



**LAW REFORM**  
COMMISSION/COIMISIÚN UM  
ATHCHÓIRIÚ AN DLÍ

REPORT

# PERSONAL DEBT MANAGEMENT AND DEBT ENFORCEMENT

(LRC 100-2010)





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Law Reform Commission

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## LAW REFORM COMMISSION'S ROLE

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The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law. Since it was established, the Commission has published over 160 documents (Consultation Papers and Reports) containing proposals for law reform and these are all available at [www.lawreform.ie](http://www.lawreform.ie). Most of these proposals have led to reforming legislation.

The Commission's role is carried out primarily under a Programme of Law Reform. Its *Third Programme of Law Reform 2008-2014* was prepared by the Commission following broad consultation and discussion. In accordance with the 1975 Act, it was approved by the Government in December 2007 and placed before both Houses of the Oireachtas. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act. Since 2006, the Commission's role includes two other areas of activity, Statute Law Restatement and the Legislation Directory.

Statute Law Restatement involves the administrative consolidation of all amendments to an Act into a single text, making legislation more accessible. Under the *Statute Law (Restatement) Act 2002*, where this text is certified by the Attorney General it can be relied on as evidence of the law in question. The Legislation Directory - previously called the Chronological Tables of the Statutes - is a searchable annotated guide to legislative changes, available at [www.irishstatutebook.ie](http://www.irishstatutebook.ie). After the Commission took over responsibility for this important resource, it decided to change the name to Legislation Directory to indicate its function more clearly.

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Full responsibility for this publication lies, however, with the Commission.

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Bankruptcy Abuse Prevention and Consumer Protection Act 2005	Pub. L. No. 109-8	USA
Bankruptcy Act 1966	No. 33/1966	Aus (Cth.)
Bankruptcy Act 1988	No. 27/1988	Irl
Bankruptcy and Diligence etc. (Scotland) Act 2007	2007 asp 3	Scot
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Bankruptcy and Insolvency Act	R.S., 1985, c. B-3	Can
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Bankruptcy Regulations 1996	SR 1996 No. 263	Aus
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Civil Law (Miscellaneous Provisions) Bill 2010	Bill No. 44/2010	Irl
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Comhairle Act 2000	No. 1/2000	Irl
Common Law Procedure Amendment (Ireland) Act 1856	1856 c. 102	Irl
Community Reinvestment Act 1977	Pub.L. 95-128	USA
Companies (Amendment) Act 1990	No. 27/1990	Irl
Companies Act 1963	No. 33/1963	Irl
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Debt Arrangement and Attachment (Scotland) Act 2002	2002 asp 17	Scot
Debt Arrangement and Attachment (Scotland) Act 2002	2002 asp 17	Scot
Debt Arrangement and Attachment (Scotland) Act 2002	2002 asp 17	Scot
Debt Relief Bill (Northern Ireland) 2010	NIA Bill 9/09	N Irl
Debtors (Scotland) Act 1987	1987 c. 18	Scot
Employment Rights Act 1996	1996 c. 18	UK
Enforcement of Court Orders (Amendment) Act 2009	No. 21/2009	Irl
Enforcement of Court Orders (Amendment) Act 2009	No. 21/2009	Irl
Enforcement of Court Orders Act 1940	No. 23/1940	Irl
Enforcement of Court Orders Act 1940	No. 23/1940	Irl
Enterprise Act 2002	2002 c. 40	UK
European Communities (Consumer Credit Agreements) Regulations 2010	SI No. 281/2010	Irl
Fair Debt Collection Practices Act	Pub. L. 109-351, 15 USC 1692	USA
Fair Trading Act Collection and Debt Repayment Practices Regulation	194/1999	Alberta
Family Law (Divorce) Act 1996	N. 33/1996	Irl
Family Law (Maintenance of Spouses and Children) Act 1976	No. 11/1976	Irl

Family Law Act 1995	No. 26/1995	Irl
Federal Trade Commission Act	15 U.S.C. §§ 41-58	USA
Fines Act 2010	No. 8/2010	Irl
Fines Act 2010	No. 8/2010	Irl
Fines Act 2010	No. 8/2010	Irl
Fines Act 2010	No. 8/2010	Irl
Guidelines Relating to the Registration and Cancellation of a Registered Debt Agreement Administrator and Ineligibility of an Unregistered Debt Agreement Administrator	F2007LO1006	Aus
Insolvency (Northern Ireland) Order 1989	SI 1989 No. 2405 (NI 19)	N Irl
Insolvency (Tax Priorities) Legislation Amendment Act 1993	No. 32/1993	Aus (Cth)
Insolvency Act 1986	186 c. 45	UK
Insolvency Act 2006	2006 No. 55	NZ
Insolvency Act 2006	2006 No. 55	NZ
Insolvency Practitioners Regulations 2005	No. 524/2005	UK
Insolvency Proceedings (Monetary Limits) (Amendment) Order 2009	SI 2009 No. 465	Eng
Insolvency Rules 1986	SI 1986 No. 1925	UK
Judgments Enforcement (Northern Ireland) Order 1981	1981 No. 226 (N.I. 6)	NI
Maternity Protection Act 1994	No. 34/1994	Irl
National Minimum Wage Act 2000	No. 5/2000	Irl
National Minimum Wage Act 2000	No. 5/2000	Irl
National Training Fund Act 2000	No. 41/2000	Irl
National Training Fund Act 2000	No. 41/2000	Irl
National Training Fund Act 2000	No. 41/2000	Irl
Sale of Goods Act 1893	1893, c.71	Irl
Social Welfare (Miscellaneous Provisions) Act 2008	No. 22/2008	Irl
Social Welfare Consolidation Act 2005	No. 26/2005	Irl
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Solicitors Acts 1954 to 2002	No. 236/1954 to No. 19/2002	Irl
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Supreme Court of Judicature Act 1877	1877 c. 9	Irl
Taxes Consolidation Act 1997	No. 39/1997	Irl
Tribunals, Courts and Enforcement Act 2007	2007 c. 15	Eng
Tribunals, Courts and Enforcement Act 2007	2007 c. 15	Eng
Trustee Licensing Directive	OSB Directive No. 13R2	Can
Unfair Dismissals Act 1977	No. 10/1977	Irl
Unfair Terms in Consumer Contracts Regulations 1999	SI 1999 No. 2083	UK

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Apostol v Georgia	Application No. 40765/02	ECHR
Bales v Arundale	(1813) 1 M & S 77.	Eng
British Eagle International Airlines Limited v Compagnie Nationale Air France	[1975] 1 WLR 758	UK
Deighan v Hearne	[1986] IR 603	Irl
Farrar v Beswick	(1836) 1 M&W 682	Eng
Grace v Ireland and the Attorney General	[2007] IEHC 90	Irl
Jones v Woodhouse	[1922] 2 KB 117.	Eng
K v Sweden	Application No. 13800/88 E Com HR	ECHR
Martin v Nadel	[1906] 2 KB 26	Eng
O'Connell v An Bord Pleanála	[2007] IEHC 79	Irl
Re Coombe Importers Ltd	[1999] 1 IR 492	Irl
Rondeau Le Grand & Co. v Marks	[1918] 1 KB 75	Eng
Schroyer v Frankel	197 F.3d 1170 (6th Cir. 1999)	USA
Webb v Ireland	[1988] IR 353	Irl
Wymes v Tehan	[1988] IR 7171	Irl



## INTRODUCTION

### A Background to the Report

1. This Report forms part of the Commission's *Third Programme of Law Reform 2008-2014*<sup>1</sup> and follows the publication, in September 2009, of the Commission's *Consultation Paper on Personal Debt Management and Debt Enforcement*<sup>2</sup> and the publication, in May 2010, of its *Interim Report on Personal Debt Management and Debt Enforcement*.<sup>3</sup> The 2009 Consultation Paper examined the law on personal indebtedness and insolvency in Ireland in its wider policy setting, with the Commission placing particular emphasis on reform of the law concerning personal insolvency, debt enforcement and the pre-judgment and enforcement procedures for the recovery of debt. As discussed below, the Commission's Annual Conference 2009 also explored the issue of debt management and debt enforcement, including options for reform from a comparative perspective. The Commission is extremely grateful to the speakers and delegates who provided valuable insights to the Commission in preparing this Report.

2. Indeed, many of the conference delegates followed up with detailed submissions to the Commission on the provisional recommendations made in the Consultation Paper. In addition, the Commission received a large number of other submissions on the many aspects of this area of the law, and their detailed content provided valuable material on which the Commission reflected in preparing this Report, and indeed confirmed the need for wide-ranging and fundamental reform. The Commission also held further consultative meetings with interested parties during 2010, including with representative bodies who had assisted in the preparation of the Commission's *Interim Report on Personal Debt Management and Debt Enforcement*. Again, the Commission expresses sincere thanks to all those who took the time to make submissions on this project and to participate in the consultative meetings. The submissions received and the material generated through the consultative meetings have been considered by the Commission in the preparation of this Report, which contains the Commission's final recommendations on this project. The Appendix contains the Commission's draft *Personal Insolvency Bill* intended to implement the key recommendations in the Report.

### B General framework of the analysis of indebtedness and relevance of "can't pay v won't pay"

3. In approaching this project, the Commission built on valuable research work in Ireland, notably by the Free Legal Advice Centres (Flac), and also on international studies in the area. The Commission recognised that the focus on personal insolvency and debt enforcement involving individuals raised a wider context of personal indebtedness generally. Therefore the Commission, adopting as a reference point the framework proposed in a 2008 study funded by the European Commission,<sup>4</sup> approached the subject on the basis of six "building blocks" of:

- Responsible borrowing
- Responsible lending
- Responsible arrears management
- Debt counselling
- Personal insolvency law, and
- Holistic court procedures.

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<sup>1</sup> Law Reform Commission Report on Third Programme of Law Reform 2007-2014 (LRC 86-2007), Project 2. In accordance with the Law Reform Commission Act 1975 the contents of the Third Programme of Law Reform were approved by the Government in December 2007 and placed before both Houses of the Oireachtas.

<sup>2</sup> LRC CP 56-2009. This is referred to as the Consultation Paper in the remainder of this Report.

<sup>3</sup> LRC 96-2010.

<sup>4</sup> *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008).

4. The Commission fully appreciated, however, that not all of the six “building blocks” contained appropriate subject-matter for review by the Commission, due to the wide and complex questions of economic and social policy involved. Therefore while the Commission drafted the 2009 Consultation Paper on the basis that it should provide, to the greatest extent possible, a wide-ranging examination of the current law on personal indebtedness, it attempted also to identify those issues which could be addressed by other bodies as well as those which could suitably be dealt with by the Commission. In particular, the Commission’s primary focus was placed on the fifth and sixth of the “building blocks”, personal insolvency law and legal debt enforcement proceedings, and the Commission limited its provisional recommendations for law reform to these areas.

5. A fundamental aspect of the Commission’s approach, which is reflected in the literature surveyed in the Consultation Paper, is the need to ensure that reform proposals draw a clear distinction between those who are unable to repay debts and those who are unwilling to repay debts, the “can’t pay, won’t pay” distinction.<sup>5</sup> While this distinction does not translate into a crude matter of forgiveness for those who are unable to pay and unending proceedings “to the ends of the earth” for those who refuse to pay, it provides a useful basis for reform proposals. In any event, as the Commission noted in the Consultation Paper, the distinction between “can’t pay” and “won’t pay” does not signify two categories of persons, but rather indicates two ends of a spectrum (with individuals such as “those who could pay” in between). A reformed law on personal debt should, therefore, take an individualised debtor-specific approach.

## **C The Current Economic and Social Context**

6. The Commission’s proposals for reform of this area of law take place against the backdrop of a global and national recession and an unprecedented liquidity and solvency crisis in the banking system in the State. The convergence of these two enormous fiscal shocks has led to a sudden increase in unemployment, the need for massive capital investments in the banking system and enormous budgetary cutbacks. In terms of this project and Report, the global and national recession had also been preceded by huge increases in the levels of personal debt in Ireland in recent years. As the Commission noted in the Consultation Paper, these events have magnified the need to ensure that the law must keep pace with the changing needs of Irish society and recognise the role of consumer credit in the modern economy.<sup>6</sup> The Commission noted that one study estimated that the ratio of household debt to disposable income had risen from a level of 48% in 1995 to 176% in 2009.<sup>7</sup> The Commission acknowledged that while the majority of consumer borrowers remain in a position to repay their debts, straitened economic conditions have led to rising levels of over-indebtedness and serious debt difficulties for many households.<sup>8</sup> Data compiled as part of the Central Statistics Office *Survey on Income and Living Conditions 2008* (2008 SILC) found that 20.3% of Irish households were in arrears on at least one of the following five forms of credit: an overdrawn bank account; an outstanding credit card balance; mortgage, rent or utility arrears; arrears on other bills; and arrears on other loans.<sup>9</sup> This indicates that almost 80% of Irish households surveyed in 2008 were free from arrears, notwithstanding the very high average levels of debt being carried by Irish households.

7. The Consultation Paper also noted that the literature in this area indicates that the primary cause of over-indebtedness is a change in a household’s income, with some research suggesting that such an “income shock” can make a household over four times more likely to fall into arrears when compared with

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<sup>5</sup> (LRC CP 56-2009) at paragraphs 1.61 to 1.74.

<sup>6</sup> (LRC CP 56-2009) at paragraph 1.16.

<sup>7</sup> *Ibid*, citing *The Debt of the Nation: How we Fell in and out of Love with Debt* (Amárach Research 2009), 4-5, available at: <http://www.amarach.com/assets/files/The%20Debt%20of%20the%20Nation.pdf> (accessed 6 May 2010).

<sup>8</sup> (LRC CP 56-2009) at paragraph 1.17. For a discussion of the concepts of indebtedness and over-indebtedness, see (LRC CP 56-2009) at paragraphs 1.03 to 1.10.

<sup>9</sup> *Survey on Income and Living Conditions (SILC) 2008* (Central Statistics Office 2009) at 21 to 34. Available at: [http://www.cso.ie/releasespublications/documents/silc/2008/silc\\_2008.pdf](http://www.cso.ie/releasespublications/documents/silc/2008/silc_2008.pdf) (Accessed 1 May 2010).



a household which has experienced an improvement in income.<sup>10</sup> Rises in unemployment and falls in average income in Ireland in recent years have therefore led to the development of economic conditions that have contributed to rising levels of over-indebtedness.<sup>11</sup> The Commission thus recognises that the recent deterioration of macro-economic conditions in Ireland, which reflects international developments, has led to increased personal over-indebtedness and repayment difficulties since the CSO's 2008 SILC, as indicated by the data compiled by organisations such as the Central Bank of Ireland Commission, the Courts Service, and the Money Advice and Budgeting Service (MABS).<sup>12</sup> Nonetheless the position remains that Irish law should cater for a position in which most borrowers are in a position to repay their obligations, while a minority of over-indebted individuals are unable to do so. This reinforces the Commission's analysis that debt management systems, most of which should operate outside the court system, should be efficient and fair for both debtors and creditors.

#### **D The Commission's Annual Conference 2009**

8. In early 2009, bearing in mind the importance of reform in this area, the Commission had already decided that its Annual Stakeholder Conference, held in November 2009, should focus on the issues addressed in the Consultation Paper. The Conference discussed the provisional recommendations in the Consultation Paper and the need for long-term reform; speakers also noted that, during 2009, a number of initiatives had already been put in place or were in train to deal in the short term with the growing problem of personal indebtedness.

9. Conference speakers drew attention to the impact of the massive global, and local, economic crisis, and that this had already focused on the need for significant reform of the financial services regulatory regime. In turn, this had prompted an almost equal amount of attention on the need to address the increasing problem of personal indebtedness, and on the deficiencies in the existing legislative arrangements and legal processes concerning debt management and debt enforcement. The Conference speakers acknowledged that this had already been reflected in the inclusion of a commitment in the October 2009 *Renewed Programme for Government* to take steps to reform the law in this area in the light of the Commission's provisional recommendations in the Consultation Paper. The Commission notes that this commitment to urgent reform has received widespread support politically and in the media. By the time of the Conference, therefore, there was growing consensus on the need for urgent action on this aspect of the law.

#### **E The Commission's Working Group and *Interim Report***

10. With this in mind, in December 2009 the Commission decided to establish a Working Group on Personal Debt Management and Debt Enforcement which would review, within a strictly defined time frame, what additional actions could be put in place in the short-term, pending the long-term solutions that would realistically take some time to implement. The Commission drew up a proposed list of members of the Working Group, drawing on the parties with whom consultations had been held prior to the publication of the Consultation Paper, and focused on those – Government Departments, statutory bodies and representative bodies – who were in a position to agree and implement specific solutions. The deliberations of the Working Group led to the publication, in May 2010, of the Commission's *Interim Report on Personal Debt Management and Debt Enforcement*.<sup>13</sup>

11. In the *Interim Report*, the Commission departed from its usual approach of setting out a series of recommendations for reform. Instead, the *Interim Report* contained a 14 Point Action Plan setting out specific actions on debt management and enforcement that had already been put in place, or were in

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<sup>10</sup> (LRC CP 56-2009) at paragraphs 1.32 to 1.36, citing Duygan-Bump and Grant *Household Debt Repayment Behaviour: What Role do Institutions Play?* Federal Reserve Bank of Boston Working Paper No. QAU08-3, available at: <http://www.bos.frb.org/bankinfo/qau/wp/2008/qau0803.htm>, at 15 (accessed 1 May 2010).

<sup>11</sup> See *Interim Report on Personal Debt Management and Debt Enforcement* (LRC 96-2010), at paragraph 2.17.

<sup>12</sup> *Ibid*, at paragraphs 2.22 to 2.30.

<sup>13</sup> LRC 96-2010.

train, arising from discussions involving members of the Commission's Working Group. The Commission's focus, with the benefit of the assistance of the Working Group, was to make progress as quickly as possible in 2010 - on as many issues as possible - in the context of the overall problem of personal indebtedness. In respect of each matter, several relevant members of the Working Group participated in the discussion of the action involved, while at the same time it was clear which member had ultimate authority to take action to progress the matter. The agreement, or comments, of all representatives was not sought in relation to all issues considered by the Group.

12. The items in the 14 Point Action Plan in the *Interim Report* were linked to specific members of the Working Group who had either already progressed that item to a conclusion or were to progress it to a conclusion during 2010. Some of these actions, such as the reduction of the discharge period in the *Bankruptcy Act 1988* from 12 years to 6 years, were presented as interim solutions pending a complete and long-term framework to deal with personal indebtedness. Others, such as the need for a Standard Financial Statement and Model Rules of Court on a Pre-Action Protocol in consumer debt proceedings, were seen as key elements of the long-term framework. In that respect, some of the actions noted in the *Interim Report* were likely to be part of the complete, holistic, approach to debt management on which the Commission makes its final recommendations in this *Report*.

13. Among the topics discussed in the *Interim Report* were:

- general reform of financial services regulation;
- regulation of money advice undertakings;
- credit reporting;
- application of statutory codes in court proceedings;
- development of arrears management and debt settlement principles in cases of non-mortgage arrears (through the extension of the IBF-MABS Operational Protocol);
- development of a Standard Financial Statement;
- development of a Pre-Action Protocol/pre-litigation notice in consumer debt proceedings;
- modernisation of Irish bankruptcy law; and
- distribution of information to borrowers in difficulty.

14. Having dealt with these issues in the Commission's *Interim Report*, this Report has, therefore, focused on reform of personal insolvency law and debt enforcement procedures. The Commission's deliberations leading up to the *Interim Report* had also identified two further issues, the regulation of debt collection undertakings and the provision of legal advice and legal aid to persons involved in debt proceedings, which are also considered in this Report.

## **F Reports of the Mortgage Arrears and Personal Debt Review Group**

15. In preparing this Report, the Commission is also conscious of the work of the Mortgage Arrears and Personal Debt Review Group, which the Government established in February 2010. The Review Group published an *Interim Report* in July 2010 and its *Final Report* in November 2010.<sup>14</sup> As the Review Group's title clearly indicated, its terms of reference extended to both mortgage and non-mortgage personal debt. It was also mandated to consider proposals made by the Commission. To a large extent, for the reasons given in the 2009 Consultation Paper, the Commission has focused on non-mortgage personal debt. Nonetheless, the deliberations leading to, and the contents of, the Commission's *Interim Report*, required that, in light of the holistic approach to personal debt - as advocated in the Commission's Consultation Paper - both mortgage and non-mortgage personal debt must be considered in order to provide satisfactory solutions to the problem of personal indebtedness.

16. The Commission emphasises that this project and Report have not considered to any significant extent the issue of mortgage debt. This is because the November 2010 *Final Report of the Mortgage*

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<sup>14</sup> Both Reports are available on the website of the Department of Finance, [www.finance.gov.ie](http://www.finance.gov.ie).

*Arrears and Personal Debt Review Group* made specific recommendations on the issue of mortgage debt, notably by recommending that all lenders must develop a Mortgage Arrears Resolution Process (MARP), which must include further forbearance measures to assist mortgage holders, including where they agree to pay at least 60% of the interest payments on their mortgage.<sup>15</sup> Indeed, there is general agreement that two aspects of mortgage debt mark it out as different from other personal debt: first, from a personal and social point of view, its connection with people's sense of safety and security in their family home; and, second, from a legal point of view, the fact that, until the mortgage debt has crystallised, it is a secured debt. As the Commission notes in this Report, such secured debts are almost invariably excluded from the scope of non-judicial personal debt settlement systems found in other states.

17. Of course, once the mortgage debt has crystallised, for example, through enforcement proceedings for mortgage default (bearing in mind the current moratorium on enforcement proceedings and other mortgage forbearance arrangements), any outstanding unpaid debt becomes an unsecured debt. Given that recommendations on mortgage debt have already been made in the *Final Report of the Mortgage Arrears and Personal Debt Review Group*, the Commission does not attempt in this Report to present or suggest solutions to the mortgage debt situation as such. Nonetheless, the Commission is conscious that where a mortgage debt has crystallised and leaves some outstanding unpaid debt owing to the mortgage lender, this (now unsecured) personal debt becomes part of the overall indebtedness that must be considered under the Commission's proposed legislative framework on personal insolvency. The Commission's proposals do not, therefore, apply to mortgage debt while the mortgage remains in place, but may apply where the mortgage debt changes to other "ordinary" personal after crystallisation.

## **G Main elements of the Commission's recommendations in this Report**

18. The Commission now turns to provide a general overview of the key elements in its proposals for reform of the law on personal insolvency and debt enforcement in this Report.

### **(1) Non-judicial personal insolvency and debt settlement institutional reform: Debt Enforcement Office**

19. The first key element of the Commission's proposals is the enactment of a non-judicial debt settlement regime to provide an efficient and cost-effective solution to personal insolvency that takes account of the rights of both creditors and debtors. This proposed institutional arrangement includes the establishment of a small Debt Enforcement Office which would oversee throughout the State the proposed new non-judicial debt settlement arrangements for creditors and debtors in the most efficient and cost-effective manner possible. In this respect, the Commission recommends that the Debt Enforcement Office could build on existing successful arrangements such as the small unit currently in place within the Revenue Commissioners for Revenue Sheriffs.

20. The Commission notes here that the Report does not contain a specific recommendation on a monetary ceiling for the proposed non-judicial debt settlement arrangement. Indeed, as the comparative analysis in this Report indicates, comparable schemes in other states almost invariably place no monetary ceiling on their scope. It might be thought that the scheme could, therefore, potentially deal with especially wealthy (or formerly wealthy) individuals, but the Commission considers that this is most unlikely. The Commission's requirement that 60% of creditors must agree to the proposed non-judicial debt settlement is likely to result in the use of the judicial bankruptcy process in such high value (or perceived high value) cases. In practice, therefore, it is likely that the non-judicial process will be of particular benefit to those who have incurred average type of debt levels of recent years.<sup>16</sup>

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<sup>15</sup> The thrust of these recommendations, including the obligation to develop a MARP, has been implemented in the Central Bank of Ireland's revised *Code of Conduct on Mortgage Arrears* (6 December 2010), which comes into effect 1 January 2010. Available at, [www.financialregulator.ie](http://www.financialregulator.ie).

<sup>16</sup> The Commission's proposed non-judicial scheme also covers personal debt connected with the debtor's employment or business, where relevant. In that respect, it may also be of use to persons who were or are involved in the small and medium-sized enterprise (SME) sector. The inclusion of business-related debts reflects the jurisdiction of the Financial Services Ombudsman, who may hear complaints from any individual

**(2) *Licensing and oversight arrangements for non-judicial personal insolvency and debt settlement processes: Debt Settlement Arrangement and Debt Relief Order***

21. The second element of the Commission's reform proposals concerns arrangements to oversee the proposed non-judicial personal insolvency processes. The Commission recommends in this respect that the Debt Enforcement Office would include a small independent unit, the Debt Settlement Office, which would oversee and license Personal Insolvency Trustees. A Personal Insolvency Trustee would, as a specialised type of mediator or intermediary between specific creditors and a specific debtor, manage the most significant innovative personal insolvency process proposed by the Commission, the Debt Settlement Arrangement.

22. In the proposed Debt Settlement Arrangement, creditors and a debtor would (overseen by the licensed Personal Insolvency Trustee) enter into a binding commitment in which the debtor would repay an agreed amount of personal debt over a period of up to 5 years. At the end of this Arrangement period the debt, even if not repaid in full, would be deemed to be discharged. The Debt Settlement Arrangement process would be available to a person who, acting in good faith and making full disclosure of all their assets, is in a position to make significant repayments to creditors over an extended period. At the end of that period of up to 5 years, he or she would be able to make a "fresh start" as an economically active member of society without incurring long-term damage to his or her personal credit rating. To some extent, the Debt Settlement Arrangement process can be compared to a company examinership, allowing a debtor who acts in good faith to avoid the judicial bankruptcy regime, which is, broadly, the equivalent of corporate liquidation.

23. For individuals whose personal indebtedness is so extreme that there is virtually no prospect of being able to pay back any debt (the "no assets, no income" situation), the Commission proposes that the Debt Enforcement Office, with the assistance of the Money Advice and Budgeting Service (MABS), may make a Debt Relief Order. This would be a once-off Order, which would recognise the reality of an indebtedness which simply cannot be repaid within a foreseeable time period.

**(3) *Proportionate and holistic debt enforcement mechanisms***

24. The third, related, aspect of the Commission's reform proposals is that any individual personal insolvency process or debt enforcement mechanism must be based on a complete picture of an individual's personal indebtedness. This is referred to as the holistic approach to debt, and it ensures that an appropriate balance is in place between the creditors and the debtor in a specific case. This approach is also intended to ensure that creditors and debtors do not become involved in the expensive, and often fruitless, personal insolvency and debt enforcement processes that are currently in place, and which were developed long before the advent of the consumer society. The Commission proposes, therefore, that the Debt Enforcement Office would have at its disposal a wide variety of suitable personal insolvency processes and enforcement mechanisms. Many of the Commission's proposals would simply bring the State into line with comparable processes that have been in place in other states for a long time, but which would be introduced for the first time in this State.

25. The Commission reiterates that a court order confirming that a debt is actually due to a creditor is required before any enforcement mechanisms can be activated by the Debt Enforcement Office. The Commission also recommends that, in making any enforcement order, the Debt Enforcement Office must ensure that the mechanism is, firstly, a proportionate measure (the least restrictive and most effective available in the circumstances) and, secondly, that any payments which the debtor is required must ensure that there is still a minimum standard of living for the debtor and his or her dependants, if any.

26. As to the mechanisms, the Commission recommends the use of two in particular. First, the Debt Enforcement Office may make a third party creditor order, in which a debtor's repayments are deducted from a bank account (this is currently referred to as a garnishee order). Secondly, the Commission recommends that the Debt Enforcement Office may make an attachment of earnings order, which is currently confined to limited circumstances, such as in the context of family law maintenance arrangements.

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but also from any company with a turnover of €3 million or less (which, in effect, is intended to cover the SME sector as the equivalent of a consumer).

27. The Commission also recommends the modernisation of the processes for carrying out (executing) debt enforcement orders, which are currently carried out by a variety of persons, notably Sheriffs (who are often also Circuit Court County Registrars) and Revenue Sheriffs (engaged on a contract/commission basis by the Revenue Commissioners). These proposals for reform complement those made by the Commission as part of its wider project on the consolidation and reform of the Courts Acts, which culminated in its 2010 *Report on the Consolidation and Reform of the Courts Acts*.<sup>17</sup> The Commission's Report contains a draft *Courts (Consolidation and Reform) Bill* which sets out in modern language the detailed provisions concerning the execution and enforcement of court decisions concerning money debts, some of which date back to the 13<sup>th</sup> Century, such as the *Sheriffs Act 1215*.<sup>18</sup> These consolidated and modernised existing provisions will need to be considered in the context of their relationship to the proposals for reform in this Report.<sup>19</sup>

28. The Commission also reiterates in the Report that imprisonment simply cannot be seen as an acceptable enforcement mechanism for those who are unable to pay their personal debts, and the Commission has also concluded that it should end completely, even for those who "can pay." The Commission sets out in the Report the many arguments against the use of imprisonment in debt cases, which largely echo the valuable and long-standing work of the Free Legal Advice Centres (Flac) in this respect. Imprisonment for non-payment of debt, relatively common up to 2009, effectively ended after the decision of the High Court in *McCann v The Judge of Monaghan District Court*<sup>20</sup> (a case supported by Flac), which found unconstitutional the pre-2009 system by which even "can't pay" debtors with no means were imprisoned under the *Enforcement of Court Orders Acts 1926 and 1940*. The enactment by the Oireachtas of the *Enforcement of Court Orders (Amendment) Act 2009* has meant that the circumstances under which a debtor may be imprisoned are greatly restricted.<sup>21</sup> The Commission's proposals for reform will underpin this important development, and the Commission has concluded that, while those who "can pay" and wilfully refuse to obey a court order should be subject to a criminal sanction, the appropriate sanction is a community service order.

#### **(4) Judicial personal insolvency law: reform of the Bankruptcy Act 1988**

29. A fourth element of the Commission's analysis in this Report is (as noted in the 2009 Consultation Paper) that any review of this area of the law must be seen in the context of existing, admittedly limited, legislative provisions concerning personal indebtedness. In this respect, the Commission proposes a number of significant reforms in the current judicial, that is, court-based, bankruptcy regime. In the May 2010 *Interim Report on Personal Debt Management and Debt Enforcement* the Commission recommended, as an interim reform measure, the reduction of the discharge period in the *Bankruptcy Act 1988* from 12 years to 6 years; the *Civil Law (Miscellaneous Provisions) Bill 2010*, which is currently before the Oireachtas, proposes to implement this recommendation. This Report contains the Commission's final recommendations for more wide-ranging reform of the bankruptcy law, currently contained in the *Bankruptcy Act 1988*. The Commission emphasises that the judicial bankruptcy process remains a suitable mechanism to deal with some forms of personal insolvency, including large and complex cases or those which have not been resolved using the Commission's proposed non-judicial process (for example, because a debtor did not act in good faith).

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<sup>17</sup> LRC 97-2010.

<sup>18</sup> See Part 2, Chapter 10 (sections 112 to 122) and Schedule 8 of the draft *Courts (Consolidation and Reform) Bill* in Appendix A of the *Report on the Consolidation and Reform of the Courts Acts* (LRC 97-2010).

<sup>19</sup> This was anticipated in the Commission's *Report on the Consolidation and Reform of the Courts Acts* (LRC 97-2010), Introduction, paragraph 19, fn13.

<sup>20</sup> [2009] IEHC 276, [2010] 1 ILRM 17.

<sup>21</sup> Thus a court may order the arrest and imprisonment of the debtor only if a creditor proves beyond reasonable doubt that a debtor's failure to pay an instalment order was due to the debtor's wilful refusal or culpable neglect: see section 6(8) of the *Enforcement of Court Orders Act 1940*, as inserted by section 2(1) of the *Enforcement of Court Orders (Amendment) Act 2009*.

**(5) Regulation of debt collection undertakings**

30. The fifth element of the Commission's proposals for reform involves the need to regulate debt collection undertakings. It is clear that most existing debt collection undertakings operating in Ireland act responsibly and professionally in carrying out their functions. Indeed, representative bodies in the sector have called for suitable statutory regulation in order to ensure that the voluntary codes of practice to which their members conform are put on a firm legislative footing. This would have the added effect of preventing the emergence of unprofessional debt collection undertakings and, more worryingly, debt collectors who engage in actions that amount to offences under the existing criminal law, such as harassment under the *Non-Fatal Offences against the Person Act 1997*. The Commission acknowledges that a prosecution for harassment under the 1997 Act would deal with such extreme behaviour but the Commission's proposals involve the introduction of a standard-setting legislative regime aimed at supporting existing, responsible, debt collection undertakings.

31. The Commission also notes that the regulation of debt collection undertakings should be seen in the wider context of the proposed regulation of money advice undertakings, which comprises an element of the 14 Point Action Plan in the Commission's *Interim Report*. The Commission understands that, at the time of writing (December 2010), legislative proposals to regulate money advice undertakings may form part of a *Central Bank Reform Bill*, which is due to be published shortly. The Commission notes that, while money advice and debt collection involve different activities, they are closely connected with each other, which is evident from the reality that many existing undertakings engage in both activities. The Commission therefore reiterates its view here that the regulatory regime for money advice undertakings and for debt collection undertakings should be closely related, ideally with the same regulatory body being responsible for both.

**(6) Legal aid and advice and personal insolvency**

32. As already indicated, the Commission's deliberations leading up to the *Interim Report* had also identified the issue of the provision of legal advice and legal aid to defendants in debt proceedings.<sup>22</sup> In the wake of the decision of the High Court in *McCann v The Judge of Monaghan District Court*,<sup>23</sup> the *Enforcement of Court Orders (Amendment) Act 2009* provides for legal aid and advice for any person who may face imprisonment for non-payment of debt. The Commission naturally supports this important development, although it is clear that the reformed personal insolvency regime proposed in this Report should make such cases extremely rare in the future.

33. The Commission acknowledges that the issue of legal aid and advice is of great importance in the context of the serious long-term consequences for those who face personal indebtedness. Equally, the provision of legal aid and advice should not be equated with access to a solicitor or barrister in every setting where personal indebtedness is at issue. In this respect, the Legal Aid Board has indicated that the provision of legal advice (as opposed to legal aid) can be made available in the personal debt setting where the debtor meets the general means test applicable under the *Civil Legal Aid Act 1995*.<sup>24</sup> The Commission would add that the reforms involved in the non-judicial debt settlement arrangements proposed in this Report are intended to provide another level of legal protection for personal debtors, notably through the statutory standards that will be imposed on Personal Insolvency Trustees by the Debt Settlement Office. To that extent, debtors and creditors alike would be provided with a statutory regime that will make clear how their respective rights and entitlement are respected outside the court setting (where legal advice would be required).

34. The Commission nonetheless accepts that legal advice remains a matter that requires a suitable response. This is especially so in those settings that fall between the two extremes of, on the one hand, a debtor facing possible imprisonment (for which the 2009 Act already makes provision) and, on the other, a debtor engaged in the Commission's proposed non-judicial debt settlement arrangements (whose

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<sup>22</sup> See *Interim Report on Personal Debt Management and Debt Enforcement* (LRC 96-2010), at paragraphs 2.76-2.77.

<sup>23</sup> [2009] IEHC 276, [2010] 1 ILRM 17: see paragraph 28, above.

<sup>24</sup> *Interim Report on Personal Debt Management and Debt Enforcement* (LRC 96-2010), at paragraph 2.76.

interests are, to a great extent protected by the standards involved in the regime). The Commission accepts, however, that this is ultimately a matter which must be considered in the context of the resources that may be involved, in particular by the Legal Aid Board under the *Civil Legal Aid Act 1995* or by other relevant non-statutory bodies such as Flac. The Commission considers that it is highly desirable that these statutory and non-statutory bodies could, with relatively modest additional financial support, develop co-ordinated and innovative advisory resources (including online resources) that would complement the direct advisory resources available through the Legal Aid Board under the 1995 Act and through the voluntary services provided by Flac. Such co-ordinated activities would complement and enhance the proposed non-judicial statutory regime proposed in this Report.

35. The Commission now turns to provide a brief overview of the Chapters in the Report.

## **H Overview of the Report**

36. The Commission now turns to provide a brief overview of the Chapters in the Report.

37. In Chapters 1 to 3, the Commission presents recommendations for the reform of personal insolvency law. These recommendations provide for three procedures designed to address the situations of three different categories of insolvent debtors. In Chapter 1, the Commission proposes the introduction of a Debt Settlement Arrangement procedure, which the Commission views as a structured non-judicial debt settlement mechanism, designed for cases of debtors who, while insolvent, possess the means to make part repayments of their debts over a period of years. The Commission proposes that debtors who successfully complete a repayment plan under a Debt Settlement Arrangement should obtain a discharge of their remaining obligations, and this would serve as an alternative to a bankruptcy procedure.

38. In Chapter 2, the Commission recommends the establishment of a Debt Relief Order procedure. This mechanism is designed to provide a debt discharge in cases of debtors who lack the means to make even part repayments of their obligations. Under this procedure, the Commission proposes that a debtor who meets the strict entry requirements and complies with the obligations imposed should obtain a discharge of all of their obligations after a period of one year.

39. In Chapter 3, the Commission presents the third element of its recommendations for the reform of personal insolvency law, by proposing reform of key aspects of the *Bankruptcy Act 1988* in order to form part of a modern and effective personal insolvency system in Ireland. While the Commission does not make detailed proposals for the comprehensive reform of the 1988 Act, it highlights certain elements of the 1988 Act which are most urgently in need of reform.

40. In Chapters 4 and 5, the Commission considers the reform of the law on the enforcement of judgment debts. While Chapters 1, 2 and 3 consider the law of personal insolvency, and how the law should address the situations of multiply-indebted individuals who are unable to pay their debts, Chapters 4 and 5 focus primarily on how the law should provide for the enforcement of judgment debts in cases of individuals who have some means to pay. It must be noted that an important element of the law on the enforcement of judgments is the process of ascertaining the category into which the judgment debtor in a given case falls, and so there is some overlap between the “can’t pay” and “won’t pay” categories.

41. The Commission divides the law on the enforcement of judgments into two discrete areas. In Chapter 4 the Commission sets out its recommendations for the reform of the enforcement system as a whole, consisting of proposals for the establishment of new institutions and structures, while building upon the existing framework.

42. In Chapter 5 the Commission recommends reforms of individual enforcement mechanisms. These include instalment orders, third party creditor orders (currently called garnishee orders) and attachment of earnings orders. Chapter 5 also deals with the need to modernise the legislative provisions for enforcement of judgments, currently enforced by Sheriffs and Revenue Sheriffs.

43. In Chapter 6, the Commission discusses its recommendations for the regulation of debt collection undertakings.

44. Chapter 7 is a full list of the recommendations made by the Commission in this Report.

45. Appendix A is a comparative overview in tabular form of debt settlement and repayment plan procedures found in a number of States. The Commission has included this in order to assist in seeing the current position in Ireland in an international comparative setting.

46. Appendix B contains the Commission's draft *Personal Insolvency Bill* intended to implement the recommendations in the Report concerning the introduction of a non-judicial personal insolvency process and reform of the existing debt enforcement system.

47. Appendix C contains an *Outline Scheme of Amendments to Judicial Bankruptcy Legislation*, which reflects the Commission's recommendations in Chapter 3 concerning reform of the *Bankruptcy Act 1988*. The Commission has not included these provisions in the draft *Personal Insolvency Bill* in Appendix B as it understands that a new legislative framework to reform the *Bankruptcy Act 1988* is currently (December 2010) under consideration.



**A            Introduction**

**(1)           Outline of the Commission’s proposals for the reform of personal insolvency law**

1.01        In the following three Chapters, the Commission presents recommendations for the reform of personal insolvency law. These recommendations provide for three procedures designed to address the situations of three different categories of insolvent debtors.<sup>1</sup> In this Chapter, the Commission proposes the introduction of a Debt Settlement Arrangement procedure, which the Commission views as a structured non-judicial debt settlement mechanism, designed for cases of debtors who, while insolvent, possess the means to make part repayments of their debts over a period of years. The Commission proposes that debtors who successfully complete a repayment plan under a Debt Settlement Arrangement should obtain a discharge of their remaining obligations, and this would serve as an alternative to a bankruptcy procedure.

1.02        In CHAPTER 2, the Commission advances its recommendations for the establishment of a Debt Relief Order procedure. This mechanism is designed to provide a debt discharge in cases of debtors who lack the means to make even part repayments of their obligations. Under this procedure, the Commission proposes that a debtor who meets the strict entry requirements and complies with the obligations imposed should obtain a discharge of all of their obligations after one year.

1.03        In CHAPTER 3, the Commission presents the third and final stage of its recommendations for the reform of personal insolvency law, by proposing key aspects of the *Bankruptcy Act 1988* that should be modified in order to form part of a modern and effective personal insolvency system in Ireland. While the Commission does not make detailed proposals for the comprehensive reform of the 1988 Act, it highlights certain elements of the 1988 Act which are most urgently in need of reform.

**(2)           Consultation Paper and Interim Report**

1.04        The Commission’s *Consultation Paper on Personal Debt Management and Debt Enforcement* provisionally recommended wide-ranging reforms of personal insolvency laws in Ireland.<sup>2</sup> On examining existing personal insolvency law under the *Bankruptcy Act 1988*,<sup>3</sup> the Commission concluded that Irish law has failed to keep pace with the development of the consumer credit society.<sup>4</sup> The Commission noted that the law provides no means of relieving the debt difficulties of over-indebted individuals, who may suffer the consequences of over-indebtedness indefinitely. Irish law was also presented as falling behind international best practices, and particularly the principles contained in the 2007 Council of Europe recommendation on legal solutions to debt problems.<sup>5</sup>

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<sup>1</sup> See the Commission’s discussion of the distinction between “can’t pay” and “won’t pay” debtors at (LRC CP 56-2009), paragraphs 1.61 to 1.74.

<sup>2</sup> (LRC 56-2009) at paragraphs 5.01 to 5.179.

<sup>3</sup> *Bankruptcy Act 1988*, No. 27/1988.

<sup>4</sup> (LRC 56-2009) at paragraphs 3.174 to 3.177.

<sup>5</sup> *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* (Council of Europe CM/Rec(2007)8, 2007).

**(a) Rationales for Reform**

1.05 The Commission therefore provisionally recommended comprehensive reforms of personal insolvency law. The rationales advanced for such reforms included the following:<sup>6</sup>

- The functional economic theory that debtors should be provided with relief from their debts in order to restore them to a position whereby they can participate and contribute to the economy.
- The promotion of entrepreneurship requires a “safety net” of debt relief procedures to exist so that individuals are encouraged to take the risks necessary to start and grow businesses.
- From the point of view of economic theory, the financial and social risks of over-indebtedness should be placed on the party better able to bear the risk. In most cases the creditor will be best placed to bear the risk due to advanced credit rating techniques and risk-based pricing, and so should bear the losses of default.
- Many of the costs of over-indebtedness are borne not by either creditors or debtors, but by the State, through social welfare provision. Therefore debt discharge facilities should be available to individuals so as to reduce their reliance on social welfare support.
- Rehabilitative and humanitarian justifications also support the introduction of consumer debt relief procedures into Irish law, as society can be said to owe a duty to relieve the suffering its over-indebted members.
- Finally, debt discharge is also justified from the point of view of consumer protection. Empirical studies and behavioural economics theory have illustrated that consumers demonstrate a “bounded rationality” and systematically underestimate the risk of debt difficulties when borrowing. Viewed in this manner, over-indebtedness is an inevitable occurrence in a modern consumer credit society, and so the victims of over-indebtedness must be provided with relief.

**(b) Reform of the Bankruptcy Act 1988**

1.06 Based on these considerations, the Commission concluded that “any advanced legal system which operates within an economy driven by consumer credit must provide adequate and effective personal insolvency laws.”<sup>7</sup> The Commission provisionally recommended that a new personal insolvency system should be urgently introduced.<sup>8</sup> The Commission took the view that this should involve two steps. The first should be the comprehensive reform of bankruptcy procedures as contained in the *Bankruptcy Act 1988* in order to replace the existing system with an entirely new effective bankruptcy system. The Commission however took the view that the making of detailed recommendations for a new bankruptcy law fell outside the scope of its project, and so merely recommended that a thorough review of the 1988 Act should be undertaken.

1.07 In May 2010, the Commission’s published its *Interim Report on Personal Debt Management and Debt Enforcement*.<sup>9</sup> This Interim Report set out a range of proposals for immediate reform that could be achieved without delay in order to respond to the pressing need for a legal response to the situation of personal over-indebtedness and repayment difficulties in Ireland. This Interim Report also included a digest of other relevant actions taken or planned by relevant bodies in Ireland in order to address the problem of personal over-indebtedness. The Interim Report further contained a summary of the long-term reform issues identified for consideration in this final Report. These issues included the reform of personal insolvency law.<sup>10</sup> The Commission acknowledged that the provisional recommendations contained in the Consultation Paper concerned issues of medium and long-term reform of a substantial aspect of Irish law. The implementation of such recommendations requires detailed and complex legislation. Therefore the Commission decided that the reform of this area of law was not an appropriate

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<sup>6</sup> (LRC CP 56-2009) at paragraphs 5.04 to 5.15.

<sup>7</sup> (LRC 56-2009) at paragraph 5.67.

<sup>8</sup> *Ibid* at paragraph 5.69.

<sup>9</sup> (LRC 56-2010).

<sup>10</sup> (LRC 56-2010) at paragraph 3.07 to 3.12.

subject to be considered in the Interim Report, which primarily sought to discuss reforms which could be implemented without delay.

1.08 The Interim Report did propose one reform measure in the area of personal insolvency law however. Noting the criticisms of the *Bankruptcy Act 1988* and the rationales for reform contained in the Consultation Paper, the Commission indicated that while the reform of the 1988 Act requires detailed consideration and complex legislation, a relatively modest adjustment could be made to the Act in the more immediate future. Therefore the Commission proposed that section 85(4) of the 1988 Act should be amended to reduce the 12 year waiting period before a bankrupt may apply for a discharge to a period of six years or less.<sup>11</sup> The Commission acknowledged that this proposed reform would have limited effect however. This is because under section 85(4) even after 12 years have passed since the beginning of the bankruptcy, further obstacles exist to the debtor's discharge in that the debtor must pay in full all expenses, fees and costs of the bankruptcy, as well as all preferential payments before a discharge may be obtained. As the Commission noted in its Interim Report, in the majority of cases a debtor will be unable to meet these preferential payments and costs, and so may remain bankrupt indefinitely.<sup>12</sup> The Commission returns to this issue of the obstacle posed to discharge by the requirement to pay all preferential payments below.<sup>13</sup>

**(c) Non-Judicial Debt Settlement System**

1.09 The second aspect of the reform of personal insolvency law proposed by the Commission was the establishment of a statutory non-judicial debt settlement system.<sup>14</sup> The Commission envisaged this system as operating in addition to a judicial bankruptcy system, with the use of the non-judicial system however to be favoured and encouraged where appropriate.<sup>15</sup> The Commission invited submissions as to how this policy of favouring non-judicial debt settlement over bankruptcy court proceedings could be encouraged through incentivising the use of the non-judicial system.<sup>16</sup> The Commission provisionally recommended that the non-judicial debt system should have binding statutory force, with statutory provisions relating to the terms of settlements<sup>17</sup> and means by which dissenting creditors could be compelled to participate in a proposed settlement.<sup>18</sup>

1.10 The Commission provisionally recommended that the underlying principle of the debt settlement system should be that of "earned discharge", whereby the debtor will receive a debt discharge only after completing a repayment plan under which as much of his or her obligations as is reasonably possible must be repaid.<sup>19</sup> The Commission however recognised that certain exemptions would be necessary for debtors who have no available income from which to satisfy a repayment plan. The Commission invited submissions as to whether any other obligations in addition to a repayment plan should be imposed on debtors throughout the duration of the proceedings,<sup>20</sup> and also requested views as

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<sup>11</sup> (LRC 56-2010) at paragraphs 2.78 to 2.84. Section 85(4) of the 1988 Act provides that bankrupt whose estate has, in the opinion of the court, been fully realised, shall be entitled to a discharge when provision has been made for the payment of the expenses, fees and costs due in the bankruptcy and for the preferential payments, and all other creditors have received at least 50% of the debts owed or the bankruptcy has lasted for 12 years. The court must also be satisfied that all after-acquired property has been disclosed and that it is reasonable and proper to grant the application.

<sup>12</sup> (LRC 56-2010) at paragraph 2.82.

<sup>13</sup> See paragraphs 3.64 to 3.94 below.

<sup>14</sup> (LRC CP 56-2009) at paragraph 5.71.

<sup>15</sup> (LRC 56-2009) at paragraphs 5.73 to 5.78.

<sup>16</sup> *Ibid* at paragraphs 5.84 to 5.91.

<sup>17</sup> (LRC 56-2009) at paragraph 5.97.

<sup>18</sup> (LRC 56-2009) at paragraph 5.91.

<sup>19</sup> (LRC 56-2009) at paragraphs 5.109 to 5.113.

<sup>20</sup> (LRC 56-2009) at paragraph 5.116.

to whether certain debts should be excluded from discharge, such as family maintenance obligations, fines and tort liabilities.<sup>21</sup>

1.11 The Consultation Paper stated that access to the debt settlement system should be open, with all genuinely over-indebted individuals permitted to avail of the procedures without unnecessary restrictions on access.<sup>22</sup> The Commission provisionally recommended that a debtor must demonstrate an inability to meet his or her obligations over a considerable period of time, while inviting submissions as to whether any other considerations should be taken into account in formulating the “insolvency” criterion for accessing the procedure. The Commission also invited submissions as to what, if any, “good faith” conditions should be met by debtors before they may access the debt settlement system. In addition, the Commission invited submissions as to whether access to the system should be reserved for consumer debtors, or whether individuals whose debts arose from business obligations could also be permitted to access the system. Submissions were also invited in relation to the restrictions which should be placed on the use of the proposed debt settlement scheme by individuals who have already availed of debt discharge under the scheme.<sup>23</sup>

1.12 The Commission also specified certain substantive rules concerning the terms of settlements under the proposed new system. Therefore the Commission emphasised that while a basic principle of insolvency law is that the debtor’s assets are made available for sale and that the proceeds are distributed amongst his or her creditors, the rights of the debtor and his or her dependents to a basic standard of living must also be respected. Therefore the Commission provisionally recommended that legislation should provide that sufficient assets and income of the debtor must be exempt from distribution to creditors in order to ensure that the debtor maintains a reasonable standard of living.<sup>24</sup> Methods by which the debtor’s home should be protected and how mortgage loans should be incorporated under the debt settlement system were also discussed.<sup>25</sup> The Commission also provisionally recommended that legislation should provide for a repayment period of a reasonable length, after which the debtor should be automatically discharged from all non-exempt obligations. The Commission provisionally recommended that the duration of this period should be three to five years, while inviting submission as to the appropriate precise length of this repayment period.<sup>26</sup> Finally, the Commission discussed the subject of the appropriate structure of the proposed debt settlement system. The Commission ultimately invited submissions as to the structure which the system should take, and the appropriate respective roles for debt advisors and the proposed enforcement office<sup>27</sup> under the system.

### **(3) *Rationale and aims of the Debt Settlement Arrangement procedure***

1.13 In this Chapter, the Commission builds on its Consultation Paper and presents its final recommendations for a non-judicial Debt Settlement Arrangement procedure. This procedure is designed for intermediate cases which do not justify the close supervision (of the court and Official Assignee) and complex procedural safeguards of bankruptcy proceedings; and which nonetheless do not qualify for the Debt Relief Order procedure as described in CHAPTER 2. Primarily, the procedure is designed for debtors who are insolvent but are nonetheless in receipt of an income and may also have some other assets, and so are in a position to make partial repayments to their creditors. The Commission intends that this procedure should be the primary or “standard” personal insolvency mechanism, as it would facilitate debtors in financial difficulty to repay their obligations as far as is possible, and so promote the

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<sup>21</sup> (LRC 56-2009) at paragraph 5.119.

<sup>22</sup> (LRC 56-2009) at paragraphs 5.120 to 5.135.

<sup>23</sup> (LRC 56-2009) at paragraph 5.145.

<sup>24</sup> (LRC 56-2009) at paragraphs 5.151 to 5.158.

<sup>25</sup> (LRC 56-2009) at paragraphs 5.159 to 5.164.

<sup>26</sup> (LRC 56-2009) at paragraphs 5.171 to 5.177.

<sup>27</sup> See (LRC 56-2009) at paragraphs 6.33 to 6.70 for a discussion of the Commission’s provisional recommendations for the introduction of a debt enforcement office.

“earned” “fresh start” principle which lies behind the Commission’s proposed system.<sup>28</sup> In this manner the Debt Settlement Arrangement procedure should provide a balance between relieving individuals from over-indebtedness while also providing a return to creditors on what is owed to them.

1.14 Several rationales exist for creating a new personal insolvency mechanism as an alternative to bankruptcy. A number of features of bankruptcy law make it inappropriate for less complicated cases, particularly those of consumer debt. Such features which may be unnecessary in simple cases of personal insolvency include the automatic vesting of all of the debtor’s property in the Official Assignee, the complicated and expensive court proceedings, and the comprehensive investigation of all of the debtor’s financial affairs.<sup>29</sup> Other reasons why an alternative procedure to bankruptcy may be appropriate include the capability of an alternative system to promote the rehabilitation of the debtor more effectively and the potential of such a system to provide greater returns to creditors than bankruptcy.<sup>30</sup> The chances of greater returns to creditors become particularly relevant where the alternative system involves the completion of a repayment plan by the debtor and where the costs of the procedure are lower than those in bankruptcy proceedings. Therefore there are convincing reasons for establishing an alternative personal insolvency mechanism, a fact that has been recognised in many legal systems similar to that of Ireland.

1.15 The Commission’s Consultation Paper identifies further reasons why a non-judicial debt settlement system may be more appropriate than bankruptcy in many cases, particularly those of consumer debt. First, as the problem of over-indebtedness involves non-legal difficulties and factors as well as legal issues, a non-judicial system may be a more appropriate forum in which to address these issues rather than in court proceedings.<sup>31</sup> Secondly, most debt claims coming before the courts do not raise justiciable issues for decision.<sup>32</sup> This is especially the case in cases where the debtor is admittedly insolvent, as the majority of bankruptcy petitions in countries with well-developed bankruptcy systems are brought by debtors who do not contest their obligations but rather simply lack the resources to meet them.<sup>33</sup> For this reason a trend towards the administrative processing of personal insolvency cases outside of the judicial system can be observed in several European and other developed countries in recent decades.<sup>34</sup> A third important reason in favour of a non-judicial alternative to bankruptcy is that the costs in a non-judicial system could be lower than those in judicial bankruptcy proceedings, which has the advantage of increasing access to the procedure for debtors and increasing the returns to creditors.<sup>35</sup> A non-judicial system could also save costs for the State, through a reduction in the time spent by courts and public service staff on processing uncontroversial debt cases. The practice of several creditors bringing multiple individual claims against a single debtor, which causes significant waste of court resources, should be reduced by the introduction of a functioning personal insolvency system. Finally, a non-judicial alternative procedure to bankruptcy should be less stigmatising than judicial bankruptcy

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<sup>28</sup> See *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 5.109 to 5.112.

<sup>29</sup> See e.g. Duns and Mason “Debt Agreements Down Under” in Niemi, Ramsay, Whitford (eds.) *Consumer Credit, Debt and Bankruptcy: Comparative and International Perspectives* (Hart Publishing 2009) 355 at 357.

<sup>30</sup> See e.g. Duns and Mason “Debt Agreements Down Under” in Niemi, Ramsay, Whitford (eds.) *Consumer Credit, Debt and Bankruptcy: Comparative and International Perspectives* (Hart Publishing 2009) 355 at 357.

<sup>31</sup> (LRC CP 56-2009) at paragraph 5.74.

<sup>32</sup> (LRC CP 56-2009) at paragraph 5.75.

<sup>33</sup> See paragraph 3.33 below for an illustration of the manner in which the majority of bankruptcies in a range of legal systems are initiated by debtors.

<sup>34</sup> See paragraphs 3.123 to 3.127 below. See also the discussion of the Swedish debt settlement system, as operated administratively outside of the courts by the Swedish Enforcement Agency: (LRC CP 56-2009) at paragraphs 5.41 to 5.49.

<sup>35</sup> (LRC CP 56-2009) at paragraph 5.76.

proceedings.<sup>36</sup> The reduced stigma should have the effect of encouraging more insolvent debtors to participate actively in seeking debt relief.

1.16 Therefore strong reasons exist for the introduction of a non-judicial debt settlement system. The submissions received by the Commission supported unanimously the Consultation Paper's provisional recommendations for the introduction of such a system, albeit with some contributors highlighting the need for safeguards to be introduced limiting the effect of the system. Others emphasised that the justifications and rationales behind the introduction of the system should be clearly enunciated and promoted so that a change of this magnitude in the legal approach to personal indebtedness can gain public support. There was also unanimous agreement in the submissions received as to the need to reform comprehensively the *Bankruptcy Act 1988*, with submissions all accepting that the current bankruptcy procedures are entirely ineffective. Various proposals were submitted as to how the 1988 Act could be reformed, with most involving the simplification and liberalisation of the bankruptcy regime.

1.17 Submissions were more varied on the issue of the promotion and encouragement of non-judicial debt settlement over judicial bankruptcy proceedings. Some objections were expressed to the provisional recommendations of the Commission that non-judicial debt settlement should be favoured over court-based personal insolvency proceedings, while the Commission's invitation for submissions as to how participation in the non-judicial settlement system could be encouraged or possibly compelled was the subject of similar opposition. Other submissions however were supportive of the Commission's proposals that non-judicial debt settlement should be promoted over judicial bankruptcy. Some suggested that attempts to reach an arrangement through the non-judicial system should be an obligatory pre-condition for both creditor and debtor to access judicial bankruptcy procedures, while others argued instead that incentives should be provided to creditors to participate in non-judicial debt settlement rather than instituting bankruptcy proceedings. Such incentives could involve ensuring that the costs of the non-judicial system are low, so that higher returns would be available to creditors under this system when compared with the returns in a judicial bankruptcy.

1.18 The Consultation Paper presented an outline for a non-judicial debt settlement system, while also highlighting several key decisions to be made in designing the system in detail. This chapter therefore builds on the Commission's provisional recommendations and the responses received in order to produce detailed recommendations for the introduction of a Debt Settlement Arrangement procedure.

1.19 *The Commission recommends that a non-judicial debt settlement mechanism known as the Debt Settlement Arrangement procedure should be established under Irish law.*

## **B Structural and Institutional Framework: Personal Insolvency Trustees**

1.20 In its Consultation Paper, the Commission discussed the subject of the appropriate structure of the proposed debt settlement system. The Commission ultimately invited submissions as to the structure which the system should take, and the appropriate respective roles for debt advisors and the proposed enforcement office<sup>37</sup> under the system.<sup>38</sup>

1.21 The Commission's Consultation Paper identified three primary roles to be filled in the proposed debt settlement system.<sup>39</sup> The first role identified was that of "mediator". This role was stated to involve the following functions:

- Preparing an assessment of a debtor's means.
- Preparing a realistic, affordable and sustainable repayment plan.

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<sup>36</sup> (LRC CP 56-2009) at paragraph 5.77.

<sup>37</sup> See (LRC 56-2009) at paragraphs 6.33 to 6.70 for a discussion of the Commission's provisional recommendations for the introduction of a debt enforcement office.

<sup>38</sup> (LRC 56-2009) at paragraph 5.108.

<sup>39</sup> See *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraph 5.98 to 5.108.

- Negotiating debt settlements with creditors.
- Advising debtors and providing them with money management skills.

1.22 These functions were thought to overlap with those of money advisors, and so the Commission provisionally recommended that the role of mediator should be carried out by a (suitably licensed and regulated) money advisor.<sup>40</sup> This section of the Consultation Paper also envisaged that money advice would be a compulsory element of the debt settlement scheme.

1.23 The second role envisaged under the debt settlement system was that of “administrator”. This role was described as involving the following functions:

- Receiving payments from the debtor under a repayment plan and distributing these payments among creditors.
- Receiving and selling any non-exempt assets of the debtor and distributing the proceeds among creditors.
- Supervising the debtor’s compliance with a repayment plan.

1.24 The Commission noted that while money advisors could also potentially act as administrators of debt settlements and perform these functions, certain disadvantages exist in giving this role to advisors. The Commission therefore indicated that alternative solutions could provide for a trustee to administer settlements, or for these administration functions to be attributed to the proposed debt enforcement office. The Commission therefore invited submissions as to the role which money advisors should hold under the system, and as to the appropriate actor to fill the role of administrator.

1.25 In addition, the Consultation Paper identified a third supervisory role which should be performed by an administrative body. The Paper suggested that this role should be assigned to the proposed debt enforcement office, and that it would consist of the following functions:

- Exercising the power to impose a settlement in cases where creditors unreasonably refuse to accept a debtor’s proposal of settlement.
- Exercising the power to stay enforcement proceedings when an application for debt settlement is made and throughout the duration of the debt settlement plan.
- Registering and maintaining records of all debt settlements and enforcement proceedings.

1.26 The Paper indicated that a right to challenge any decisions made by the office in the courts should be available to debtors or creditors, but that the grounds on which a challenge could be made should be limited so that debt difficulties can be resolved through non-judicial settlement in as many cases as possible. Various examples were then provided of how this function of the enforcement office could link debt settlement and enforcement procedures.

1.27 This Part focuses on the subject of structural and institutional issues relating to the Commission’s proposed debt settlement system. It discusses options for the form that the system should take, and the actors to be involved. Certain key roles in the debt settlement system are identified, and the Chapter discusses the actors who should fill these roles. The structure of the system cannot be discussed in complete isolation from substantive issues relating to the terms of debt settlement arrangements however, and an issue arises as to whether different structural arrangements will be necessary under the system so as to accommodate different categories of debtors. The question as to whether debtors should be placed into different categories and different procedures based on their ability and/or inability to participate in a repayment plan is therefore also discussed.

1.28 As noted above, the Commission received several submissions in relation to the appropriate actors involved in the debt settlement process. In addition, the Commission has held discussions with various stakeholders in the as part of its consultation process, during which this subject has also been discussed. These submissions have been most helpful and have informed the Commission’s recommendations.

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<sup>40</sup> (LRC CP 56-2009) at paragraph 5.100.

**(1) Role of Personal Insolvency Trustee as “Mediator” and “Administrator”: Terminology**

1.29 An important issue arising in several submissions is that of the role described as that of “mediator” in the Consultation Paper.<sup>41</sup> The Consultation Paper noted that debt counselling plays a key role in consumer bankruptcy and debt settlement systems in other countries, and took the view that debt counselling and money advice should play a central role in the proposed debt settlement system. The Consultation Paper therefore provisionally recommended that the role of “mediator” in the proposed statutory debt settlement scheme should be carried out by a money advisor.<sup>42</sup> In this Report, the Commission refers to the Personal Insolvency Trustee as performing this role.

1.30 Several submissions raised issues for consideration in this Report regarding the role of “mediator” in the debt settlement system. First of all, submissions sought further clarification of the exact scope of the role and the functions to be performed by this actor in the process. Secondly, the view was expressed that money advisors traditionally operate as advocates and advisors for debtors and so may not be sufficiently independent to operate as a “mediator” in the traditional meaning of the term as an impartial and independent third party who assists parties to a dispute to come to their own resolution. This objection was acknowledged to depend on the definition given to the term in the Commission’s final Report, however. If the role of a “mediator” is to be one of an independent third party in this sense, it may be more appropriate to provide for both a money advisor to assist the debtor throughout the debt settlement process and an independent mediator to negotiate a settlement between the debtor and his or her creditors.

1.31 Therefore the Commission first addresses the exact role to be filled by the “mediator” under the debt settlement system. As noted above, the Commission views this role as encompassing the following functions:

- Preparing an assessment of a debtor’s means.
- Preparing a realistic, affordable and sustainable repayment plan.
- Negotiating debt settlements with creditors.
- Advising debtors and providing them with money management skills.<sup>43</sup>

1.32 The Commission acknowledges that for the purposes of increasing certainty, the term “mediator” may not be most appropriate for this role. The Commission’s *Report on Alternative Dispute Resolution: Mediation and Conciliation*<sup>44</sup> describes the process of mediation as a facilitative, consensual and confidential process, in which parties to the dispute select a neutral and independent third party to assist them in reaching a mutually acceptable negotiated agreement. The participation of the parties in the process is voluntary and the mediator plays no advisory or evaluative role in the outcome of the process, but may advise on or determine the process.

1.33 Mediation is categorised in the Commission’s *Report on Alternative Dispute Resolution: Mediation and Conciliation* as a form of facilitative alternative dispute resolution process, which involve neutral and independent third parties providing assistance in the management of the process of dispute resolution. Under facilitative forms of alternative dispute resolution, the third party has no advisory or determinative role in the resolution of the dispute, but rather assists the parties in reaching a mutually acceptable agreement by encouraging parties to define the issues in dispute, with the aim of finding common ground on which agreement or compromise can be formed. This “neutral and independent third party” in the mediation process is referred to as the mediator. The *Report on Alternative Dispute Resolution: Mediation and Conciliation* describes how the process of mediation usually consists of:

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<sup>41</sup> See (LRC CP 56-2009) at paragraphs 5.98 to 5.103.

<sup>42</sup> In this Report, as in the Commission’s Interim Report, the Commission uses the term “money advisor” in a broad sense to refer to all services traditionally provided by money advisors such as employees of the Money Advice and Budgeting Service (MABS), and the individuals or organisations providing those services: see *Interim Report on Personal Debt Management and Debt Enforcement* (LRC 96-2010) at paragraph 2.12.

<sup>43</sup> See paragraphs 1.21 and 1.22 above.

<sup>44</sup> LRC 98-2010.



- an explanatory joint session attended by both parties to the dispute, at which the mediator explains the process and assesses whether the case is suitable for mediation;
- confidential private meetings held individually between the mediator and each of the parties to the dispute, at which each party communicates their respective positions to the third party;
- a stage during which the mediator tries to establish areas of common ground between the parties and explores proposals for a mutually acceptable agreement with both parties;
- the closing joint session, at which an agreement drafted by the mediator is signed by both parties to the dispute.

1.34 The Commission acknowledges that the role of the proposed third party in the reaching of a Debt Settlement Arrangement does not correspond fully with the process of mediation and the traditional role of a mediator. Such a third party would perform an important role in advising the debtor of his or her options and in assisting the debtor in formulating an offer for a repayment plan to be presented to creditors.<sup>45</sup> Such an advisory role may not be consistent with the role of a mediator as traditionally understood. This view has been reflected in the submissions received by the Commission in relation to the idea of a money advisor acting as a “mediator” under the scheme. Submissions have indicated that as money advisors effectively act as an advocate for debtors, and provide advisory and counselling services, such actors would not be sufficiently independent to be considered as acting as mediators. It should be noted however that money advisors, such as those of the MABS, are nonetheless independent and impartial in exercising some of their functions, such as when preparing a comprehensive and accurate statement of the debtor’s financial affairs (through the MABS Standard Financial Statement) for presentation to the debtor’s creditors.<sup>46</sup>

1.35 For the avoidance of confusion the Commission therefore takes the view that the term “mediator” should not be used to describe the role of the third party intermediary in the proposed Debt Settlement Arrangement procedure who performs the functions of preparing a statement of the debtor’s means; proposing a repayment plan; and conducting negotiations with creditors.<sup>47</sup> As is seen below, the Commission recommends that the Personal Insolvency Trustee playing this “mediator” role should also hold the role described as “administrator” in the Consultation Paper.<sup>48</sup> The Personal Insolvency Trustee should be responsible for administering and supervising agreed Debt Settlement Arrangements, and in particular for performing the following functions:

- Receiving payments from the debtor under a repayment plan and distributing these payments among creditors;
- Receiving and selling any non-exempt assets of the debtor and distributing the proceeds among creditors
- Supervising the debtor’s compliance with a repayment plan.

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<sup>45</sup> For example, under the Individual Voluntary Arrangement (IVA) process in the UK (see (LRC CP 56-2009) at paragraphs 5.26 to 5.29), an insolvency practitioner owes a duty to advise a debtor of his or her options before formally entering the IVA process. During the formal process however, the insolvency practitioner must act independently and impartially in fulfilling his or her duties to the court and to creditors: see Morgan *Causes of Early Failure in Individual Voluntary Arrangements* (Kingston Business School Occasional Paper No. 63, 2009), available at: <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/research/personaldocs/IVA%20Research%20-%20Occasional%20Paper.pdf>.

<sup>46</sup> For a discussion of the Standard Financial Statement, see *Interim Report on Personal Debt Management and Debt Enforcement* (LRC 96-2010) at paragraphs 2.45 to 2.47.

<sup>47</sup> A full discussion of the functions to be performed by the Personal Insolvency Trustee is provided below: see paragraphs 1.59 to 1.65.

<sup>48</sup> See *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 5.104 to 5.105.

A more detailed discussion of these two different sets of functions is provided below.<sup>49</sup> In subsequent paragraphs, the Commission recommends that these two types of functions should however be exercised by a Personal Insolvency Trustee.

## **(2) The Role of Money Advisors**

1.36 The next issue to be discussed is the Consultation Paper's provisional recommendation that the intermediary and administrator roles under Debt Settlement Arrangements should be filled by a money advisor/debt counsellor. The Consultation Paper provisionally recommended that only licensed agencies and money advisors should be permitted to fulfil this role,<sup>50</sup> with reference to the Commission's provisional recommendation that a licensing regime should be introduced for money advice undertakings.<sup>51</sup> It should be noted in this regard that the Department of Finance has indicated that it is examining the possibility of introducing a regulatory framework for the money advice industry.<sup>52</sup>

1.37 Submissions and consultation have raised several points suggesting that this role should not necessarily be filled by a money advisor, such as an employee of the Money Advice and Budgeting Service (MABS). First, a risk exists that the core functions of money advisors could be diluted if too much time is spent to processing Debt Settlement Arrangements.<sup>53</sup> Money advisors carry out important educational functions concerning money management skills, and this function is important for the rehabilitation of debtors.<sup>54</sup> The process of administering Debt Settlement Arrangements is resource-intensive, with considerable administrative work to be conducted in managing and distributing a debtor's regular repayments to creditors. For example, MABS provides such a service under its Special Account scheme, but limits its provision to only those of its clients in most need of the service.<sup>55</sup> While this limiting of the use of the Special Account Service is partly due to the MABS policy of promoting the self-empowerment of debtors and the management of a client's own financial affairs, it is also at least partly influenced by the strain on resources posed by the use of this service.

1.38 Secondly, the client base of money advisors such as MABS may be different from the types of debtors expected to use the Debt Settlement Arrangement procedure. In 2009, 69% of MABS clients' primary income came from social welfare payments.<sup>56</sup> A significant portion of these debtors may be more suited to the Debt Relief Order procedure rather than the Debt Settlement Arrangement procedure, as they may have very limited disposable income and so may not be in a position to contribute towards a repayment plan. If the resources of money advisors such as MABS were to be directed towards

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<sup>49</sup> See paragraphs 5.104 to 5.105 below.

<sup>50</sup> See *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 5.100 to 5.103.

<sup>51</sup> See (LRC CP 56-2009) at paragraphs 4.236 to 4.254; *Interim Report on Personal Debt Management and Debt Enforcement* (LRC 96-2010) at paragraphs 2.12 to 2.20.

<sup>52</sup> See (LRC 96-2010) at paragraph 2.16.

<sup>53</sup> On this point, see also Reifner, Kiesilainen, Huls, Springeneer *Consumer Overindebtedness and Consumer Law in the European Union* (Report to Commission of the European Communities, Health and Consumer Protection Directorate-General Contract Reference No. B5-1000/02/00353) at 63; Huls "Overindebtedness and Overlegalization: Consumer Bankruptcy as a Field for Alternative Dispute Resolution" *Journal of Consumer Policy* 20: 143, 1997 at 254.

<sup>54</sup> Section 7 of the *Comhairle Act 2000*, as amended by section 27 of the *Social Welfare (Miscellaneous Provisions) Act 2008* states that the functions of the Money Advice and Budgeting Service are "to provide advice to individuals for the purpose of the management, avoidance, reduction and discharge of personal debt and in relation to money management." This emphasises the preventive educative role of MABS, as well as its role in assisting those already experiencing debt difficulties.

<sup>55</sup> For example, in 2009 only 2,618 of the 22,962 cases handled by the MABS required the use of the Special Account: See *Statistics for Q1, Q2, Q3, Q4 2009* (Money Advice and Budgeting Service 2010), available at: <http://www.mabs.ie/publications/STATS/MABS%20stats%20Q4%202009.pdf>.

<sup>56</sup> *Ibid.*

processing and administering Debt Settlement Arrangements for debtors in receipt of higher incomes with considerable disposable income to go towards repayments, this may mean that less resources would be available to serve the core clientele of MABS, and the population for whom the service was originally established. As MABS is a free-of-charge money advice service, funded by the Department of Social Protection, it is also questionable whether a State-funded service should be provided without charge to individuals who are in receipt of sufficient income to make contributions towards the cost of providing the service. In contrast, as noted below,<sup>57</sup> the Commission recommends that the Debt Relief Order procedure should be accessible only through MABS advisors, as the debtors qualifying for this procedure fall within the core clientele of MABS and are also not in a position to pay for the services of a fee-charging Personal Insolvency Trustee of a Debt Settlement Arrangement repayment plan.

1.39 Thirdly, a related point is that the Debt Settlement Arrangement procedure is designed to cater for a wide range of debtors, with varying levels of indebtedness and assets. Particularly due to current economic conditions, the Commission understands that there are significant numbers of individuals in financial difficulty with indebtedness standing at very high levels and who are in possession of considerable assets. Several consumer debtors have amassed debts due to investment purchases in recent years. Similarly, the Commission takes the view that the procedure should be available to individuals whose debts have arisen from business transactions as well as consumer debtors. These debtors would again not meet the characteristics of the core clientele of money advisors such as the MABS, and their situations may also fall outside of the areas of expertise of money advisors. Complicated issues of property ownership, revenue law and employment law may arise in such cases, and these issues may not fall within the core skills of money advisors. Therefore it may be appropriate in such cases for an individual other than a money advisor, such as a solicitor or accountant, to take responsibility for preparing and administering a Debt Settlement Arrangement.

1.40 For these reasons, the Commission takes the view that the role of Personal Insolvency Trustee should not be confined exclusively to money advisors. The Commission recommends that the role of Personal Insolvency Trustee should be open to a wider category of operators, subject to the requirement that all applicants should be licensed to act in these roles by the Debt Settlement Office, as is discussed below.<sup>58</sup> Such operators could include insolvency practitioners from the accountancy and legal professions, as well as others deemed to meet the requisite standards of fitness for obtaining a licence. The Commission proposes in addition that private trustees in judicial bankruptcy proceedings should be subject to the same regulatory regime, and that a single Personal Insolvency Trustee licence should be introduced which must be held by any person seeking to act as a trustee in either the Debt Settlement Arrangement procedure or judicial bankruptcy proceedings.

1.41 *The Commission recommends that the role of Personal Insolvency Trustee should not be confined to money advisors/money advice undertakings. The Commission recommends that a licensing system for Personal Insolvency Trustees should be introduced under the supervision of the Debt Settlement Office, and that any persons meeting the requisite standards for such a licence should be eligible to act as a Personal Insolvency Trustee.*

1.42 This is not to say that money advisors should not act as Personal Insolvency Trustees under the proposed Debt Settlement Arrangement procedure, but that these roles should not be restricted to money advisors. Money advice organisations such as MABS may wish to provide these services. In so far as the provision of these services would be resource-intensive and would involve providing assistance to debtors falling outside of the core MABS clientele, the organisation may wish to explore the possibility of deducting a portion of the repayments administered in order to fund the costs of providing such services. This is of course an operational business decision to be made by MABS, and the Commission does not express any further view on the matter.

1.43 Money advisors would continue to play an important role in advising over-indebted individuals of their options, statutory and non-statutory, even if they do not act as Personal Insolvency Trustees. The importance of the initial advice given to debtors in advance of their entering into a formal statutory

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<sup>57</sup> See Chapter 2 below.

<sup>58</sup> See paragraphs 1.131 to 1.168 below.

repayment programme has been emphasised by evaluations of such programmes in other countries.<sup>59</sup> While under the Individual Voluntary Arrangement procedure in England and Wales the intention of the legislation is that a debtor prepares a proposal for an IVA and presents this to an Insolvency Practitioner to present it to his or her creditors, in reality debtors seek out the advice of an Insolvency Practitioner or other advisor in advance of preparing a proposal.<sup>60</sup> Also, the Pre-Action Protocol in Consumer Debt Claims proposed in the Commission's *Interim Report* provides for the recommendation by creditors that the debtor seeks money advice in advance of the commencement of legal proceedings.<sup>61</sup> For a significant number of debtors it may be the prospect of court proceedings that may force them to take action regarding their indebtedness, and so the money advice received as part of the pre-action process may be the means by which such debtors gain information concerning the Debt Settlement Arrangement procedure. Therefore money advisors will continue to play an important role in advising debtors at this stage.

1.44 In this regard the Commission's proposals are similar to those made by the Australian Law Reform Commission (ALRC) when proposing a repayment plan-based alternative to bankruptcy.<sup>62</sup> The recommendations of the ALRC provided that money advisors (known in Australia as "financial counsellors") should be eligible to be appointed to administer debt repayment plans.<sup>63</sup> The ALRC cautioned however that its intention was not that these counsellors should lose their independence or that their present role of counselling and advising debtors should be affected. The ALRC instead recommended that those counsellors who wished to assume responsibility for administering repayment arrangements under the proposed new scheme could apply for accreditation to act in such a role, while the activities of those counsellors who do not wish to perform these additional duties would remain unaffected.

### **(3) Assigning the role of Personal Insolvency Trustee (Intermediaries/ Administrators) to the Same Actor**

1.45 A further issue on which the Commission invited submissions in its Consultation Paper was whether the roles of Intermediary and Administrator should be capable of being held by the same person, or alternatively whether these roles should be divided amongst different persons or bodies.<sup>64</sup> One possibility discussed in the Consultation Paper was to assign the role of administering Debt Settlement Arrangements to a public sector administrative body, while the role of Intermediary could be assigned to another individual. The Commission received several submissions in relation to this point. The submissions were evenly split between those arguing that the roles should be held by different actors, and those recommending that they should be held by the same actor.

1.46 The Commission notes that this is an issue that has raised controversy and consideration in other countries. For example, under the Individual Voluntary Arrangement (IVA) procedure in England and Wales,<sup>65</sup> an individual Insolvency Practitioner (IP) holds both the role of nominee – who presents a proposal for an arrangement to creditors on behalf of the debtor – and of supervisor – who is responsible for administering the arrangement.<sup>66</sup> Under the IVA procedure, a debtor in financial difficulty will generally approach an IP for advice and with a view to ascertaining whether the IP will consent to act for the debtor

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<sup>59</sup> See Morgan *Causes of Early Failure in Individual Voluntary Arrangements* (Kingston Business School Occasional Paper No. 63, 2009) at 29 to 33, 40 to 41.

<sup>60</sup> *Ibid* at 12; Fletcher *The Law of Insolvency* (4<sup>th</sup> ed. Sweet and Maxwell 2009) at 54.

<sup>61</sup> See (LRC 96-2010) at paragraphs 2.59 to 2.65; Appendix C.

<sup>62</sup> See The Law Reform Commission of Australia *General Insolvency Inquiry Volume 1* (Report No. 45, 1988) at 186ff.

<sup>63</sup> *Ibid* at 189.

<sup>64</sup> See (LRC CP 56-2009) at paragraphs 5.104 to 5.105.

<sup>65</sup> See (LRC CP 56-2009) at paragraphs 5.26 to 5.29.

<sup>66</sup> See e.g. Morgan *Causes of Early Failure in Individual Voluntary Arrangements* (Kingston Business School Occasional Paper No. 63, 2009) at 12.

in relation to the presentation of a proposal to the debtor's creditors. The debtor must make full disclosure of his or her financial affairs to the IP at this stage, who will require such information before consenting to act as a nominee in respect of the proposal.<sup>67</sup> At this preliminary stage the IP owes a duty to the debtor to ensure that he or she receives appropriate advice and that if the debtor proceeds with an IVA, that this is the best solution in the debtor's circumstances.<sup>68</sup> Once the debtor has agreed to the content of the proposal and the IP has prepared a report for submission to the court, the IP formally becomes the nominee. At this stage the IP's duties shift, as the nominee owes a duty to the court to report on the efficacy of the proposed arrangement and to balance fairly the interests of the debtor and creditors. The IP no longer has a duty to the debtor and must act impartially and independently from all parties, including creditors. If the proposal is approved and becomes an IVA, a resolution is proposed for the appointment of a supervisor to the IVA. As the supervisor is usually the same person as the nominee, this shift in duties of the IP has been described as "an ethical minefield".<sup>69</sup> Therefore concerns of potential conflicts of interest have been raised in relation to this situation where the IP owes different duties to different parties at various stages throughout the process.

1.47 As can be seen from the table below, a similar situation exists under the repayment plan-based personal insolvency schemes of many countries in Europe and the Commonwealth. Thus in Australia, under both the Part IX (Consumer) Debt Agreement<sup>70</sup> and the Part X Personal Insolvency Agreement<sup>71</sup> procedures, the same person in assisting the debtor in presenting a repayment proposal, and in administering an agreed repayment arrangement.<sup>72</sup> This person is known as the administrator in the case of the Part IX procedure, and the trustee in the case of the Part X procedure. Administrators and trustees are registered and supervised by the Inspector-General in Bankruptcy, as discussed further below.

1.48 In Canada, these roles are also performed by the same person, with an administrator (the Bankruptcy Trustee) responsible for assisting the debtor to prepare, and also supervising, an arrangement under the Division II Consumer Proposal procedure;<sup>73</sup> while a trustee (usually a private sector insolvency practitioner) assists in the preparation and administers arrangements under the Business Proposal procedure.<sup>74</sup>

1.49 Similarly under the Proposal procedure in New Zealand, a trustee assists the debtor in presenting a proposal to creditors and also administers the agreed arrangement.<sup>75</sup> Under the Summary Instalment Order procedure, however, these functions are performed by different actors.<sup>76</sup> This is because no proposal is prepared for approval by creditors under this procedure, but rather the Official Assignee makes an order imposing a repayment arrangement on the parties. The instalment repayment arrangement is then supervised by a Summary Instalment Order Supervisor, who must be approved by the Official Assignee to act in this capacity.

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<sup>67</sup> See Fletcher *The Law of Insolvency* (4<sup>th</sup> ed. Sweet and Maxwell 2009) at 54 to 55.

<sup>68</sup> Morgan *Causes of Early Failure in Individual Voluntary Arrangements* (Kingston Business School Occasional Paper No. 63, 2009) at 12.

<sup>69</sup> *Ibid.*

<sup>70</sup> See Part IX of the *Bankruptcy Act 1966* (Cth) (Aus).

<sup>71</sup> See Part X of the 1966 Act.

<sup>72</sup> The role of the Official Receiver in accepting a debtor's application and presenting the debtor's proposal to the creditors' meeting must however be noted. This means that some of the functions corresponding to those proposed by the Commission for the Personal Insolvency Trustee are performed by the Official Receiver: see paragraph 1.186 below.

<sup>73</sup> See Part III, Division II of the *Bankruptcy and Insolvency Act* (Can).

<sup>74</sup> See Part III, Division I of the *Bankruptcy and Insolvency Act* (Can).

<sup>75</sup> See Part 5, Subpart 4 of the *Insolvency Act 2006* (NZ).

<sup>76</sup> See Part 5, Subpart 5 of the *Insolvency Act 2006* (NZ).

1.50 The Summary Instalment Order procedure involves the imposition of terms on the parties rather than the presentation of a proposal by the debtor to be approved by creditors. For this reason it is perhaps not appropriate to compare the operation of this procedure with the Debt Settlement Arrangement procedure proposed by the Commission. Similarly, the systems in France, Germany, Netherlands and Sweden involve the imposition of a repayment plan by a public body (a court in France, Germany and Netherlands; the State enforcement agency in Sweden). Therefore these systems provide little guidance as to the question of whether the proposed roles of Intermediary and Administrator should be held by the same person or body.

1.51 Of the systems discussed that provide for the presentation of a proposed arrangement to creditors, in each a single actor is responsible for assisting the debtor in the preparation and presentation of the proposal, and for supervising the arrangement. A primary advantage of such an approach is that it helps to reduce the costs of the arrangement procedure, as only one third party actor is required. This of course means that only one set of costs and fees must be paid. This argument in favour of giving the two roles to the same actor is convincing, particularly when the goal of keeping the costs of the procedure, for both the parties involved and for the State, as low as possible is considered.<sup>77</sup> Particularly if responsibility for administering a debtor's repayments was given to the proposed Debt Settlement Office, the resource-intensive work of administering agreements would be assigned to a public body, which may lead to considerable public expenditure. Issues of duplication of work may also arise if these functions were spread between two different actors, and there may be an advantage in allowing an administrator who is already familiar with the debtors' case to be responsible for administering the arrangement he or she has helped prepare. A further major advantage which the Commission finds convincing is that if the same actor is responsible for both proposing and negotiating an arrangement, and for supervising the arrangement to completion, this actor has a strong interest in ensuring that a viable arrangement is reached which is sustainable over its entire duration. Submissions received included the suggestion that in furtherance of this goal of seeking to ensure viable plans are agreed, the proposed Debt Settlement Office could monitor the failure and success rates of arrangements prepared and administered by individual intermediaries/administrators, with negative assessments perhaps impacting on the fitness of the actors in question to hold the requisite licence.

1.52 For these reasons, the Commission recommends that the functions of intermediary and administrator of Debt Settlement Arrangements should be incorporated into a single position of Personal Insolvency Trustee. The Commission acknowledges the points made in submissions regarding the need to avoid conflicts of interest of the type described above,<sup>78</sup> and the benefits of separating the two functions for this reason and from the point of view of ensuring transparency. The Commission however takes the view that such goals can be ensured through appropriate regulation of the activities of Personal Insolvency Trustees. The Commission's proposals for the regulation of such actors are discussed below.<sup>79</sup>

1.53 *The Commission recommends that the role of Personal Insolvency Trustee should incorporate what are sometimes described as the intermediary role (the role before a Debt Settlement Arrangement is agreed) and also the administrator role (the role after a Debt Settlement Arrangement is agreed and is being implemented).*

#### **(4) Public Sector v Private Sector**

1.54 A further important issue raised in the Commission's consultation process is that of the respective roles of the public and private sectors in the proposed debt settlement system. In particular, the question arises as to whether the role of Personal Insolvency Trustee (Intermediary and Administrator) should be filled by public officials (of the Debt Settlement Office, for example) or private sector actors, operating on a commercial basis. As the analysis above suggests, the Commission takes the view that the role of Personal Insolvency Trustee (Intermediary and Administrator) should be filled by private sector actors. The fees to be charged in such cases would be subject to the general statutory

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<sup>77</sup> See (LRC CP 56-2009) at paragraphs 5.134.

<sup>78</sup> See paragraph 1.46 above.

<sup>79</sup> See paragraphs 1.131 to 1.168 below.

framework proposed by the Commission<sup>80</sup> and would be paid by creditors, as they would come from deductions from the regular repayments being made by the Personal Insolvency Trustee to creditors on behalf of the debtor. There are several reasons for the Commission's conclusion on this issue.

1.55 First, the Commission recognises that personal insolvency law reform and the introduction of the proposed Debt Settlement Arrangement procedure is urgently necessary. The establishment of a public framework for the negotiation and administration of Debt Settlement Arrangements would be a considerable undertaking, involving the creation of administrative structures and the hiring and training of a considerable number of staff. In contrast, private sector operators, if subject to suitable standards and supervision, would be in a position to provide the required services more readily without the initial outlays on infrastructure that would be required if the services were to be provided by a public body. Secondly, issues of both principle and practicality in relation to the costs of funding the proposed system suggest that private sector operators should be used to fulfil the key role of Personal Insolvency Trustee (Intermediary and Administrator), and that these should be remunerated by deductions from the payments to creditors. The problem of over-indebtedness is one arising in the private sector and is generated from the relationship between debtor and creditor. A strong argument therefore exists for the costs of remedying the problem of over-indebtedness to be borne by the credit industry, rather than by the State. This view is consistent with one of the key principles lying behind the concept of debt discharge, that the risk of financial distress caused by insolvency and over-indebtedness should be placed on the party better able to bear the risk.<sup>81</sup> Creditors, due to their expertise in assessing the risk of repayment and through advanced tools such as credit reporting systems, are in a position to prevent the risk of default and over-indebtedness, and so should be made to bear their share of the costs of remedying situations of over-indebtedness. Furthermore, a Debt Settlement Arrangement would involve the collection and distribution of a debtor's excess income to creditors, meaning that creditors receive the benefit of repayment without incurring collection costs, often where otherwise no such repayment would be forthcoming. If a State-funded public body was responsible for negotiating and administering arrangements, creditors would be receiving these services from the State free of charge, a position which is difficult to justify. In this regard the Commission rejects the view that it is inappropriate for fees to be charged by commercial operators at the expense of the payments to creditors. The reality of a situation of insolvency is that costs are incurred in assessing an individual's available income and assets and distributing these among all of a debtor's creditors. These costs must be borne by someone and it more fitting that they are borne by the creditors who can limit the costs (through their ability to limit the risk of default),<sup>82</sup> rather than by the State, who is in no position to limit costs. This is especially the case when it is considered that often the State will already be incurring expenditure by treating the problem of over-indebtedness, through the funding of the Money Advice and Budgeting Service and through the provision of social welfare payments to those in financial difficulty.<sup>83</sup> From a practical point of view, the cost to the State of establishing a framework of Personal Insolvency Trustees (Intermediaries and Administrators) would be a considerable burden. Even if a public office was to fund its operating costs through contributions from industry or through deductions from the amounts distributed under arrangements, the initial outlay for the establishment of such a public system would be substantial, and would be an obstacle to the creation of the proposed procedure.

1.56 Thirdly, the option of attributing the functions of Personal Insolvency Trustees (Intermediaries and Administrators) to MABS money advisors must be rejected for the reasons identified above.<sup>84</sup> The

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<sup>80</sup> See paragraphs 1.66 to 1.68 below.

<sup>81</sup> See (LRC CP 56-2009) at paragraph 5.08.

<sup>82</sup> In this regard see the Commission's discussion of the role of responsible lending practices in preventing default: (LRC CP 56-2009) at paragraphs 3.53 to 3.102; 4.26 to 4.173.

<sup>83</sup> Such assistance is provided both through general social assistance and social insurance schemes as well as through targeted schemes such as the Mortgage Interest Supplement Scheme: See e.g. Department of Social Protection *Review of the Mortgage Interest Supplement Scheme* (July 2010), available at: [http://www.welfare.ie/EN/Policy/CorporatePublications/Finance/exp\\_rev/Documents/misreviewjuly2010.pdf](http://www.welfare.ie/EN/Policy/CorporatePublications/Finance/exp_rev/Documents/misreviewjuly2010.pdf) (accessed 7 August 2010).

<sup>84</sup> See paragraphs 1.37 to 1.40 above.

philosophy and core functions of the MABS could be threatened by imposing such a role, as is discussed in more detail above. Finally, the Commission acknowledges that private sector operators may already possess the skills and expertise required to carry out the functions of Personal Insolvency Trustees (Intermediaries and Administrators), and that it would be wasteful for such knowledge to be under-used and/or duplicated by a public system. Private sector operators may also be well placed to provide the services in an efficient manner, as they would be subject to commercial and competitive pressures.

1.57 For these reasons, the Commission recommends that the role of Personal Insolvency Trustee should be capable of being held by a private sector commercial operator, subject to such operators meeting the requisite fitness standards and being subject to regulatory supervision.<sup>85</sup> As noted above, this would not exclude MABS money advisors from acting in this capacity, but such MABS advisors would be required to apply for a licence to operate in this role in a manner similar to private sector commercial operators. The following paragraphs discuss the regulatory regime to be applicable to those actors operating as Personal Insolvency Trustees, and the role of the State in the system, as represented by the Debt Settlement Office.

1.58 *The Commission recommends that the role of Personal Insolvency Trustee in the context of Debt Settlement Arrangements should be capable of being held by (suitably licensed and regulated) private sector commercial operators.*

**(5) Functions, Powers and Duties of Personal Insolvency Trustee in Debt Settlement Arrangement**

1.59 The Commission now turns to specify more precisely the content of the role of Personal Insolvency Trustee in the context of a Debt Settlement Arrangement. The various functions required to be carried out for a successful system of repayment plans/schemes of arrangement can be partly identified from the procedures in place in other countries.

1.60 Under the IVA process in England and Wales, a “nominee” is responsible for a number of functions in the preparation of an arrangement before it comes into effect. A debtor seeking to present to his or her creditors a proposal for an IVA may apply to court for an interim order, the effect of which is to allow a court to stay any enforcement proceedings against the debtor.<sup>86</sup> The proposal must specify some person, known as “the nominee”, to act in relation to the arrangement either as trustee or otherwise for the purpose of supervising its implementation.<sup>87</sup> The court will not make an interim order unless it is satisfied that the nominee under the proposal is willing to act in relation to the proposal.<sup>88</sup> Before the debtor prepares a proposal, he or she will usually obtain advice from a prospective nominee.<sup>89</sup> The nominee at this stage usually receives full disclosure of the debtor’s financial affairs, and advises the debtor as to his or her options. The nominee usually also assists in the preparation of a statement of affairs at this time, with detailed standards regarding the preparation of such a statement to be found in the relevant Statement of Insolvency Practice.<sup>90</sup> The person who is to act as nominee will also in practice draw up the terms of the proposal to be presented to creditors, again in accordance with the relevant Statement of Insolvency Practice.<sup>91</sup> The nominee is also under a duty to consider the proposal before it is presented to a creditors’ meeting, in order to consider whether it is viable, fair to the debtor and creditors, an acceptable alternative to bankruptcy, and fit to be considered by creditors.<sup>92</sup> Therefore it can be seen that even before the proposal for an IVA has been forwarded to the debtor’s creditors, the nominee

<sup>85</sup> See paragraphs 1.131 to 1.168.

<sup>86</sup> Sections 253 to 254 of the *Insolvency Act 1986* (UK).

<sup>87</sup> Section 253(2) of the 1986 Act.

<sup>88</sup> Section 255(1)(d) of the 1986 Act.

<sup>89</sup> See Fletcher *The Law of Insolvency* (4<sup>th</sup> ed. Sweet and Maxwell 2009) at 54.

<sup>90</sup> *Statement of Insolvency Practice 3: Voluntary Arrangements (England and Wales)* (Version 4 Joint Insolvency Committee 2007) at paragraphs 4.1 to 4.3.

<sup>91</sup> Appendix to *Statement of Insolvency Practice 3: Voluntary Arrangements (England and Wales)*, *Ibid.*

<sup>92</sup> *Ibid* at paragraphs 5.1 to 5.4.



performs initial functions of advising the debtor of his or her options, explaining the nature and consequences of an IVA and the roles of the nominee in the process, and taking all necessary steps to ascertain the debtor's financial circumstances.<sup>93</sup>

1.61 Following these initial stages of the process, the *Insolvency Act 1986* provides that the nominee is to perform the following functions:

- The nominee must submit a report to the court stating:
  - Whether the voluntary arrangement which the debtor is proposing has a reasonable prospect of being approved and implemented
  - Whether in his opinion a meeting of debtor's creditors should be summoned to consider debtor's proposal
  - where and when the meeting is proposed to be held.<sup>94</sup>
- The nominee may apply to court for the discharge of an interim order if the debtor has failed to submit terms of the IVA document and/or statement of affairs.<sup>95</sup>
- The nominee must summon a creditors' meeting for the time, date and place proposed in the report given to court.<sup>96</sup>
- The nominee may challenge the decision of the creditors' meeting.<sup>97</sup>
- The nominee must report any criminal conduct engaged in by the debtor to the relevant authority, and is obliged to assist the relevant investigating authority in a criminal investigation.<sup>98</sup>

Where the proposal has been accepted by the creditors' meeting and takes effect as an IVA, the person who has been carrying out the functions of the nominee shall be known as the "supervisor" of the IVA.<sup>99</sup> The powers and functions of the supervisor then include the following:

- The primary duty of the supervisor is to ensure that the IVA proceeds in accordance with the terms of the agreed proposal.<sup>100</sup> This involves the following:
  - Maintaining regular contact with the debtor, obtaining reports as may be appropriate to the case.
  - Monitoring any problems that may arise and where it appears that the terms of the IVA may not be achieved, discuss them with the debtor.
  - If events (such as a change in the debtor's circumstances) suggest that the terms of the IVA may not be followed, the supervisor should take appropriate action, such as explaining the circumstances to creditors at the next available opportunity.
  - If it becomes clear that the fee payable to the supervisor will exceed the estimate given to creditors in the proposal, he/she must notify creditors of this fact, explain why the estimate has been exceeded, and provide a revised estimate.

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<sup>93</sup> See *Statement of Insolvency Practice 3: Voluntary Arrangements (England and Wales)* (Version 4 Joint Insolvency Committee 2007) at paragraphs 3.1 to 4.3.

<sup>94</sup> Section 256(1) of the *Insolvency Act 1986*. See also *Statement of Insolvency Practice 3: Voluntary Arrangements (England and Wales)* (Version 4 Joint Insolvency Committee 2007) at paragraphs 6.1 to 6.7.

<sup>95</sup> Section 256(6) of the 1986 Act.

<sup>96</sup> Section 257(1) of the 1986 Act. See also *Statement of Insolvency Practice 3: Voluntary Arrangements (England and Wales)* (Version 4 Joint Insolvency Committee 2007) at paragraphs 7.1 to 7.15.

<sup>97</sup> Section 256(2)(c) of the 1986 Act.

<sup>98</sup> Sections 256(2), (3) and (4) of the 1986 Act.

<sup>99</sup> Section 263(1) and (2) of the 1986 Act.

<sup>100</sup> *Statement of Insolvency Practice 3: Voluntary Arrangements (England and Wales)* (Version 4 Joint Insolvency Committee 2007) at paragraphs 8.1 to 8.2.

- Where the arrangement has been fully implemented the supervisor must conclude his administration as expeditiously as possible.<sup>101</sup>
- In circumstances of likely failure or default the supervisor must consider how matters should proceed.<sup>102</sup>
  - Where failure has occurred the supervisor should notify the creditors accordingly and advise them what action has taken or proposes to take.
  - The supervisor must ascertain who is entitled to the remaining assets or monies in the event of the failure of an IVA.
- The supervisor may apply to court for directions.<sup>103</sup>
- The supervisor may present to the court a petition for a bankruptcy order to be made against the debtor in the event of a default under the IVA.<sup>104</sup>

1.62 Similarly, in Australia Guidelines issued by the Inspector-General in Bankruptcy outline the powers, functions and duties of a Debt Agreement Administrator as follows. The administrator must:

- Certify that he/she has consented to deal with the identified property in the manner specified in the proposal.
- Certify that the debtor has received specified information about alternative means of dealing with financial difficulty.
- Certify that having regard to the circumstances in existence at the time when the debtor's statement of affairs was signed by the debtor, the administrator has reasonable grounds to believe that the debtor is likely to be able to discharge the obligations created by the agreement as and when they fall due.
- Certify that he/she has reasonable grounds to believe that all information required to be set out in the debtor's statement of affairs and proposal explanatory statement, has been set out and that the administrator has a reasonable basis for believing that the debtor has properly disclosed their affairs to creditors.
- Ensure that the certification provided to the Official Receiver with the debt agreement proposal is correct.
- Deal with the debtor's property in the manner specified in the debt agreement.
- Respond in a timely manner to reasonable requests from creditors about the progress of individual agreements.
- Respond in a timely manner to reasonable requests from debtors for information.
- Ensure that creditors and the Official Receiver are informed where the debtor defaults in certain circumstances.
- Inform the Official Receiver within 5 working days after the end of the agreement.
- Handle and properly account for money including paying all money received from debtors under agreements to the credit of a single interest-bearing bank account and keeping such accounts, books and records as are necessary to give a full and correct account of the administration of the debt agreement.
- Answer any inquiries about the debt agreement and cooperate with any inquiry or investigation made by the Inspector-General.

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<sup>101</sup> *Ibid* at paragraph 9.1.

<sup>102</sup> *Statement of Insolvency Practice 3 op cit* at paragraphs 9.2 to 9.4.

<sup>103</sup> Section 263(4) of the 1986 Act.

<sup>104</sup> Sections 264(1)(c) and section 276(1) of the *Insolvency Act 1986*.

- Take his/her remuneration in accordance with the Act including maintaining a separate record of money received, payments made and the balance of money held in relation to each debt agreement and at least once every 45 days, reconcile the balance held in the bank account with these records.

1.63 The Commission takes the view that these two accounts of the roles of intermediaries in personal insolvency repayment plan arrangement systems are useful for illustrating the roles that the Commission proposes should be held by the Personal Insolvency Trustee under the Debt Settlement Arrangement procedure. The Commission therefore recommends that the role of Personal Insolvency Trustee should include the following functions, powers and duties. The Personal Insolvency Trustee should:

- Consent to act in the role of Personal Insolvency Trustee for the purposes of the Debt Settlement Arrangement.
- Hold a meeting with the debtor and provide information to the debtor about his or her options for addressing his or her situation of financial difficulty, and certify that such information has been provided.
- Receive a full disclosure of the debtor's financial affairs, and, if such a step has not already been taken, assist the debtor in completing a Standard Financial Statement.<sup>105</sup> The Trustee should also make a statement to the effect that the Trustee has reasonable grounds to believe that the information contained in the debtor's statement of affairs is complete and accurate.<sup>106</sup>
- Prepare a proposal to be considered and voted upon at a creditors' meeting.
- Consider the likely viability of the proposal, its fairness to all parties involved, whether it is an acceptable alternative to bankruptcy or a Debt Relief Order, and whether it is otherwise fit to be considered by creditors.
- Submit a report to the Debt Settlement Office stating whether the proposed Debt Settlement Arrangement has a reasonable prospect of being accepted by creditors and completed sustainably by the debtor; and whether a creditors' meeting should be summoned to consider the proposal.
- Summon a creditors' meeting.
- Report any alleged criminal conduct engaged in by the debtor and assist in any investigation.

The Personal Insolvency Trustee should be given the power to challenge the decision of the creditors' meeting under certain limited grounds.

In turn, the Commission recommends that the role of Personal Insolvency Trustee should involve the following functions, powers and duties. The Personal Insolvency Trustee should:

- Ensure that the Debt Settlement Arrangement proceeds in accordance with its accepted terms.
- Maintain regular contact with the debtor, obtaining reports and conducting reviews as may be required.
- Monitor any problems that may arise and where a default appears likely to take place, discuss the issue with the debtor.
- If a variation in the terms of the arrangement is required (e.g. due to changes in the debtor's circumstances), take appropriate action to achieve an alteration of the original terms.
- Take his/her remuneration in accordance with the legislative and regulatory rules including maintaining a separate record of money received, payments made and the balance of money

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<sup>105</sup> See *Interim Report on Personal Debt Management and Debt Enforcement* (LRC 96-2010) at paragraphs 2,45 to 2.47.

<sup>106</sup> See paragraph 1.212 below.

held in relation to each Debt Settlement Arrangement. Notify creditors of any fee increase occurring during the course of the administration of the arrangement.

- Deal with the debtor's property in the manner specified in the debt agreement.
- Respond in a timely manner to reasonable requests from creditors about the progress of individual agreements.
- Respond in a timely manner to reasonable requests from debtors for information.
- Ensure that creditors and the Debt Settlement Office are informed where the debtor defaults in certain circumstances.
- Handle and properly account for money including paying all money received from debtors under agreements to the credit of a single interest-bearing bank account and keeping such accounts, books and records as are necessary to give a full and correct account of the administration of the debt agreement.
- Answer any inquiries about the debt agreement and cooperate with any inquiry or investigation made by the Debt Settlement Office or court.
- Notify the Debt Settlement Office where he or she has reason to believe that the debtor may have committed a criminal offence.<sup>107</sup>
- Cooperate in any criminal investigation being conducted against the debtor by the relevant authorities.
- Make an application to court for the termination of the Debt Settlement Arrangement and/or the adjudication of bankruptcy of the debtor.<sup>108</sup>
- Make an application to the Debt Settlement Office for the formal recognition of the end of the Debt Settlement Arrangement in cases where a six month arrears default has occurred.<sup>109</sup>

1.64 *The Commission recommends that the role of Personal Insolvency Trustee should involve two sets of functions in a Debt Settlement Arrangement. The first set of functions should apply before the Debt Settlement Arrangement is agreed and require that the Trustee should: (a) confirm in writing that he or she has consented to act in the role of Personal Insolvency Trustee for the purposes of the Debt Settlement Arrangement, and has entered into an agreement with the debtor to make the payments to creditors ("individual debt settlement agreements") comprising the Debt Settlement Arrangement; (b) hold a meeting with the debtor and provide information to the debtor about his or her options for addressing his or her situation of financial difficulty, and certify that such information has been provided; (c) receive a full disclosure of the debtor's financial affairs, and, if such a step has not already been taken, assist the debtor in completing a Standard Financial Statement; (d) make a statutory declaration to the effect that the Trustee has reasonable grounds to believe that the information contained in the debtor's statement of affairs is complete and accurate; (e) prepare a proposal to be considered and voted upon at a creditors' meeting; (f) consider the likely viability of the proposal, its fairness to all parties involved, whether it is an acceptable alternative to bankruptcy or a Debt Relief Order, and whether it is otherwise fit to be considered by creditors; (g) submit a report to the Debt Settlement Office stating whether the proposed Debt Settlement Arrangement has a reasonable prospect of being accepted by creditors and completed sustainably by the debtor; and whether a creditors' meeting should be summoned to consider the proposal; and (h) summon a creditors' meeting.*

1.65 *In turn, the Commission recommends that the second set of functions given to the Personal Insolvency Trustee should apply after the Debt Settlement Arrangement is agreed and require that the Trustee should: (a) ensure that the Debt Settlement Arrangement proceeds in accordance with its accepted terms; (b) maintain regular contact with the debtor, obtaining reports and conducting reviews as may be required; (c) monitor any problems that may arise and, where a default appears likely to take*

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<sup>107</sup> See paragraph 1.157 below.

<sup>108</sup> See paragraph 4.155 below.

<sup>109</sup> See paragraphs 1.200 and 1.201 below.

place, discuss the issue with the debtor; (d) if a variation in the terms of the a Debt Settlement Arrangement is required, take appropriate action to achieve a variation; (e) comply with any requirements under the proposed legislation or Regulations made under the legislation concerning his or her remuneration, including maintaining a separate record of money received, payments made and the balance of money held in relation to any Debt Settlement Arrangement; (f) notify creditors of any increase in his or her remuneration occurring during the course of the administration of the Debt Settlement Arrangement; (g) deal with the debtor's property in the manner specified in the Debt Settlement Arrangement; (h) respond in a timely manner to reasonable requests from creditors about the progress of individual debt settlement agreements; (i) respond in a timely manner to reasonable requests from a debtor for information; (j) ensure that creditors and the Debt Settlement Office are informed where the debtor defaults in prescribed circumstances; (k) handle and properly account for money including paying all money received from debtors under individual debt settlement agreements to the credit of a single interest-bearing bank account and keeping such accounts, books and records as are necessary to give a full and correct account of the administration of the individual debt settlement agreements; and (l) answer any inquiries about the individual debt settlement agreements and cooperate with any inquiry or investigation made by the Debt Settlement Office or court.

#### **(6) Tender/Panel System**

1.66 As noted above, the Commission recommends that private practitioners should fill the role of Personal Insolvency Trustee under the proposed Debt Settlement Arrangement procedure. As is discussed further below, any practitioner wishing to operate in this role should be required to obtain a licence and should be subject to the supervision of the Debt Settlement Office.<sup>110</sup>

1.67 The Commission takes the view that it may be appropriate for eligibility for the positions of Personal Insolvency Trustee to be limited to members of a panel of practitioners drawn up for this purpose. Practitioners satisfying the licensing conditions could apply to become members of this panel according to a tendering system, and the panel should have a specified time frame of 3 years, and that the panel would then be reviewed in the same publicly tendered manner. The Debt Settlement Office would also specify the range of fees to be charged by the panel members to debtors. This approach of creating a panel of limited number would ensure that there are sufficient numbers of practitioners to act in the role of Personal Insolvency Trustee in the system, and also to limit the detrimental effects of aggressive competitive practices among insolvency practitioners in other countries such as Canada<sup>111</sup> and England and Wales.<sup>112</sup> The performance of Trustees (Intermediaries/Administrators) on the panel would also be monitored by the Debt Settlement Office as the relevant regulatory body, and such performance standards would be considered when the membership of the panel is being renewed. In this manner an approach based upon a panel of practitioners could also provide further supervisory oversight of the system, and further eliminate problems arising in similar processes in other countries.

1.68 *The Commission recommends that the Debt Settlement Office establish a panel of persons by public tender to act as Personal Insolvency Trustees for a 3 year period in the Debt Settlement Arrangement, and that the Debt Settlement Office would set out indicative fees to be charged by Trustees as part of the licensing regime.*

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<sup>110</sup> See paragraphs 1.137 to 1.168 below.

<sup>111</sup> See e.g. Ramsay "Market Imperatives, Professional Discretion and the Role of Intermediaries in Consumer Bankruptcy: A Comparative Study of the Canadian Trustee in Bankruptcy" 74 *American Bankruptcy Law Journal* (2000) 399 at 423 to 426.

<sup>112</sup> Morgan *Causes of Early Failure in Individual Voluntary Arrangements* (Kingston Business School Occasional Paper No. 63, 2009) at 4. Available at: <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/research/personaldocs/IVA%20Research%20-%20Occasional%20Paper.pdf>.

## **C Regulation of Personal Insolvency Trustees**

1.69 The Commission takes the view that the effective operation of the Debt Settlement Arrangement procedure depends on ensuring high standards among the individuals filling the role of Personal Insolvency Trustee. Essential to this goal is the establishment of a rigorous regulatory system for these actors. The following paragraphs contain a discussion of approaches to the regulation of insolvency practitioners and administrators of comparable personal insolvency arrangements in other countries. Subsequent paragraphs discuss similar comparative regimes for the regulation of private sector trustees acting in formal judicial bankruptcy proceedings. The Commission then presents its recommendations for the establishment of a regulatory system for all Personal Insolvency Trustees, which also encompass their role as private trustees in bankruptcy proceedings.

### **(1) Regulation of trustees in bankruptcy proceedings: Models for Consideration**

#### **(a) Irish Corporate Insolvency Law: General Scheme of a Companies Consolidation and Reform Bill**

1.70 A proposal for the introduction of a regulatory system for corporate liquidators has recently been made in Ireland, and this should be considered when deciding how private trustees in bankruptcy should be regulated. The Company Law Review Group (CLRG) has published a General Scheme of a *Companies Consolidation and Reform Bill*,<sup>113</sup> in respect of which heads have been agreed and which has been included in the September 2010 Government Legislation Programme.<sup>114</sup> In Part A11 of the CLRG Scheme, concerned with the Winding-Up of corporate bodies, Head 68 specifies provisions relating to qualifications for appointment as a liquidator of a company in winding-up proceedings. This provision seeks to introduce into Irish law for the first time restrictions on those who may act in this capacity of liquidator. The authorisation regime contained in the Scheme limits access to the position of liquidator to those who are members of certain professional bodies or who have obtained authorisation from “the Supervisory Authority”,<sup>115</sup> this authority being a public company designated by the Minister for Enterprise, Trade and Innovation to perform the functions and exercise the functions attributed to it by the proposed legislation. The provision for the establishment of this body is equivalent to section 5(1) of the *Companies (Auditing and Accounting) Act 2003*, and the public company established by the Minister to carry out these functions under the 2003 Act is the Irish Auditing and Accounting Supervisory Authority (IAASA). Therefore the appropriate Supervisory Authority for company liquidators under the CLRG Scheme is also the IAASA.

1.71 Head 68 of the CLRG Scheme therefore provides that:

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<sup>113</sup> Available at: <http://www.clrg.org>.

<sup>114</sup> See [http://www.taoiseach.gov.ie/eng/Taoiseach\\_and\\_Government/Government\\_Legislation\\_Programme/SECTION\\_B1.html](http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/SECTION_B1.html).

<sup>115</sup> Section 5(1) of the *Companies (Auditing and Accounting) Act 2003* provides:

5.—(1) The Minister may designate a public company to perform the functions and exercise the powers of the Supervisory Authority under this Act, if the following requirements are satisfied:

- (a) the company is formed and registered under the Companies Acts after the commencement of this section;
- (b) the company is a company limited by guarantee;
- (c) the name of the company is the Irish Auditing and Accounting Supervisory Authority or in the Irish language Údarás Maoirseachta Iniúchta agus Cuntasaíochta na hÉireann;
- (d) the memorandum of association and articles of association of the company are consistent with this Act.

(2) Section 6(1)(b) of the Act of 1963 does not apply to a company where the Minister informs the registrar of companies in writing that the Minister proposes to designate the company under subsection (1).

a person shall not be qualified for appointment as a liquidator of a company, whether provisionally or otherwise, whether in a court ordered winding-up or in a voluntary winding-up, unless he—

- (a) is a member of a [prescribed/regulated] accountancy body within the meaning of Part A14 Head 10 [equivalent of Section 4 of the Companies (Auditing and Accounting) Act, 2003] who holds a [current practicing certificate] unless prohibited by that body from acting as a liquidator;
- (b) is a member of the Law Society of Ireland who holds a current practicing certificate from such body unless prohibited by that body from acting as a liquidator; or
- (c) is a member of such other professional body as the Supervisory Authority may from time to time recognise for the purposes of this head, with authority from such body to practice, unless prohibited by that body from acting as a liquidator; or
- (d) having made application to the Supervisory Authority within two years from the operative date in the prescribed form and paid the prescribed fee in such manner as may be prescribed, has been authorised by the Supervisory Authority to be so appointed, on the grounds that—
  - (i) he has prior to the coming into operation of this Bill obtained adequate relevant experience and knowledge of the law applicable to winding-up of companies by virtue of having been employed in relevant work by a person who was a member of a body referred to in paragraphs (a), (b) or (c) or by virtue of having practised in a Member State as a liquidator, and
  - (ii) he is, in the opinion of the Supervisory Authority following consultation with the Director of Corporate Enforcement a fit and proper person to act as a liquidator, and
  - (iii) he is not a member of a body referred to in paragraphs (1)(a) to (c).

1.72 It can be seen that regulatory controls applicable to the professions of accountants and solicitors are seen to be sufficient to allow members of recognised accountancy bodies and of the Law Society of Ireland qualify to act as a liquidator without satisfying any further conditions. The IAASA may also recognise other professional bodies, such that membership of such bodies will entitle a person to act as a liquidator. For persons falling outside of these professional bodies an alternative qualification process applies, which requires an application to be made to the IAASA. Under the “grandfathering” provision, a person may become authorised to act as a liquidator on the grounds that before the coming into operation of the legislation he or she has obtained adequate relevant experience and knowledge of the law applicable to the winding-up of companies.<sup>116</sup> This experience is to have been obtained by virtue of having been employed in relevant work by a person who was a member of a body listed above, or by virtue of having practised in an EU Member State as a liquidator. In addition to having this experience, the person must, in the opinion of the IAASA following consultation with the Director of Corporate Enforcement, be a fit and proper person to act as a liquidator.<sup>117</sup>

1.73 Under subhead 68(3), a person shall not be qualified for appointment as a liquidator of a company unless he or she holds insurance indemnity cover relating to him and any servant or agent in his or her employment or engagement. Details regarding to the amount and terms of this indemnity insurance shall be specified by the IAASA from time to time.

1.74 The Scheme provides that a person who acts as liquidator of a company while not being qualified shall be guilty of a category two offence.<sup>118</sup>

1.75 It should be noted that Head 69 of the General Scheme provides that certain persons are ineligible for appointment as a liquidator. Under subhead 69(1), a body corporate shall not be qualified for appointment as a liquidator and a body corporate which acts as a liquidator shall be guilty of a

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<sup>116</sup> Head 68(d)(i) of the General Scheme of the *Companies Consolidation and Reform Bill*.

<sup>117</sup> Head 68(d)(ii).

<sup>118</sup> Head 68(8).

category three offence. In addition, 69(2) provides that none of the following persons shall be qualified to act as a liquidator:

- a person who is, or who has within 12 months of the commencement of the winding-up been, an officer or servant of the company;
- except with the leave of the court, a parent, spouse, brother, sister or child of an officer of the company;
- a person who is a partner or in the employment of an officer or servant of the company;
- a person who is not qualified by virtue of this subhead for appointment as liquidator of any other body corporate which is that company's subsidiary or holding company or a subsidiary of that company's holding company, or would be so disqualified if the body corporate were a company.

1.76 It is to be a category two offence for any of these persons to act as a liquidator. If a liquidator is adjudicated bankrupt, his or her office shall be vacated and he shall be deemed to be removed as of the date of adjudication.<sup>119</sup>

1.77 Therefore, the proposed new regime for the regulation of company liquidators could be considered as a possible model for the regulation of private trustees under a new bankruptcy system. Similarly, the system for the regulation of Insolvency Practitioners is now presented as a model for consideration as part of the proposed review of the *Bankruptcy Act 1988*.

**(b) England and Wales: the Office of Insolvency Practitioner**

1.78 Under English law, on the making of a bankruptcy order against a debtor, the Official Receiver automatically becomes receiver and manager of the bankrupt's estate until such time as it vests in a trustee.<sup>120</sup> At this point a duty is placed on the Official Receiver to decide whether to summon a meeting of the bankrupt's creditors for the purpose of appointing a trustee in bankruptcy.<sup>121</sup> The rationale behind imposing a duty on the Official Receiver to decide whether or not to convene a creditor's meeting is to limit the costs of bankruptcy proceedings as far as is possible. Therefore as a private trustee is to be remunerated from the debtor's assets in priority to all other debts, the expense of a meeting will be avoided where the debtor's assets are so limited as to mean that if a trustee was appointed and paid there would be no assets left to distribute amongst unsecured creditors.<sup>122</sup> Therefore where the debtor's assets are this few, the bankruptcy must be administered by the Official Receiver at the expense of the public, with the Official Receiver then remaining in the position of trustee.

1.79 If a meeting is called however, a private trustee will be appointed where a resolution for his or her appointment is passed by a majority in value of those creditors present and voting.<sup>123</sup> The creditors also have the power to appoint a "creditors' committee" to perform a number of functions, including maintaining communications between the trustee and creditors, and authorising the trustee to carry out certain functions for which creditor assent is required.<sup>124</sup> Therefore this position is similar to that under Part V of the Irish *Bankruptcy Act 1988*. The key difference under English law is that the trustee appointed by creditors must be a qualified Insolvency Practitioner, as is now described.<sup>125</sup>

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<sup>119</sup> Head 69(6) of the General Scheme of the *Companies Consolidation and Reform Bill*.

<sup>120</sup> See section 287 of the *Insolvency Act 1986* and Fletcher *The Law of Insolvency* (4<sup>th</sup> ed. Sweet & Maxwell 2009) at 174.

<sup>121</sup> See section 293 of the *Insolvency Act 1986* and Fletcher *op cit.* at 192.

<sup>122</sup> See Fletcher *The Law of Insolvency* (4<sup>th</sup> ed. Sweet & Maxwell 2009) at 192. It should be noted that where the Official Receiver decides not to call a meeting, one quarter of the debtor's creditors may request that a meeting nonetheless be held: section 294 of the 1986 Act.

<sup>123</sup> See Fletcher *op cit.* at 194 and Rule 6.88(1) of the *Insolvency Rules 1986*.

<sup>124</sup> See sections 301, 314(1)(a) and (b), 314(2) and Schedule 5, Part I of the 1986 Act.

<sup>125</sup> See section 292 of the *Insolvency Act 1986*.



1.80 Under the *Insolvency Act 1986*, eligibility to act as an office holder in any type of insolvency proceedings, both corporate and personal, is restricted to persons who are qualified to act as an Insolvency Practitioner within the meaning of the Act.<sup>126</sup> Therefore a person must meet certain criteria in order to hold the position of liquidator, provisional liquidator, administrator or administrative receiver of an insolvent company, or the trustee in bankruptcy or interim receiver of an insolvent individual.<sup>127</sup> Only similarly qualified Insolvency Practitioners may hold the position of supervisor or nominee of either a company voluntary arrangement (CVA) or an individual voluntary arrangement (IVA) also.

1.81 The requisite qualifications required to act as an insolvency practitioner are specified in section 390 of the 1986 Act. First, only an individual (and not a legal person) may act as an insolvency practitioner. Secondly, to be qualified to act, a person must be authorised to do so either by virtue of membership of a recognised professional body or by holding an authorisation granted by a competent authority.

1.82 Under the first method of obtaining authorisation, the insolvency practitioner must be a member of, and must be permitted to act as an insolvency practitioner by, a professional body recognised for this purpose by the Secretary of State of the Department of Business, Innovation and Skills. A body may be recognised if it regulates the practice of the profession and enforces rules for ensuring that those of its members permitted to act as insolvency practitioners are fit and proper persons so to act, and meet acceptable requirements as to education and practical training and experience.<sup>128</sup> If a body no longer satisfies these criteria, its recognition can be withdrawn by the Secretary of State. Thus far seven Recognised Professional Bodies, regulating the professions of solicitors and accountants, have been recognised under the Act.<sup>129</sup> These seven bodies are:

- The Chartered Association of Certified Accountants;
- The Insolvency Practitioners Association;
- The Institute of Chartered Accountants in England and Wales;
- The Institute of Chartered Accountants in Ireland;
- The Institute of Chartered Accountants in Scotland;
- The Law Society of England and Wales;
- The Law Society of Scotland.

1.83 The alternative method of obtaining authorisation to act as an Insolvency Practitioner for those who are not members of these professional bodies is through application to a “competent authority”, which is in effect the Secretary of State of the Department of Business, Innovation and Skills.<sup>130</sup> The Secretary will then make a decision using such information as the applicant is required to furnish and based on the two grounds of whether the applicant is a fit and proper person to act as an insolvency practitioner and whether the applicant meets the prescribed requirements with respect to education and practical training and experience.

1.84 The matters to be taken into account in deciding whether the applicant is a fit and proper person are specified in the *Insolvency Practitioners Regulations 2005*.<sup>131</sup> They include whether the applicant has been convicted of any offence involving fraud, dishonesty or violence; and whether the applicant has contravened any provision of insolvency legislation. Consideration will also be given to

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<sup>126</sup> See section 230 of the *Insolvency Act 1986* (UK). See also Fletcher *The Law of Insolvency* (4<sup>th</sup> ed. Sweet & Maxwell 2009) at 33ff.

<sup>127</sup> Section 388 of the 1986 Act, providing a definition of “acting as an insolvency practitioner”.

<sup>128</sup> Section 391(2) of the *Insolvency Act 1986* (UK).

<sup>129</sup> See *Insolvency Practitioners (Recognised Professional Bodies) Order 1986*; Fletcher *The Law of Insolvency* (4<sup>th</sup> ed. Sweet & Maxwell 2009) at 36.

<sup>130</sup> Sections 392-393 of the 1986 Act.

<sup>131</sup> See in particular Regulation 6 of these Regulations.

whether the applicant has engaged in any practices appearing to be deceitful, oppressive or otherwise unfair or improper, which cast doubt upon his probity or competence for discharging the duties of an insolvency practitioner. The Secretary will also have regard to the prior conduct of the applicant in carrying out any insolvency practice. In particular consideration will be given to whether such practice was carried on with appropriate independence, integrity and skill in accordance with generally accepted professional standards; whether adequate systems of control, including accounting records, have been maintained on an adequate basis; and whether the applicant has failed to disclose fully an existing or apparent conflict of interest in any case where he or she has acted as an insolvency practitioner.

1.85 The 2005 Regulations also specify detailed requirements as to education and training, with different standards to be satisfied by applicants who have never previously been authorised to act as insolvency practitioners and by those who have previously been so authorised.<sup>132</sup> These requirements include an obligation to pass the Joint Insolvency Examination set by the Joint Insolvency Examination Board, and also demand that applicants have acquired certain levels of work experience.

1.86 An authorisation granted by the Secretary of State may be withdrawn if its holder is no longer a fit or proper person to act as an insolvency practitioner, or if the holder has failed to comply with any relevant provisions of the Act or any regulations made under these provisions.<sup>133</sup>

1.87 The system for the regulation of Insolvency Practitioners (IPs) has therefore been described as a regulatory model of “practitioner-led self-regulation within a statutory framework overseen by the state.”<sup>134</sup> Despite the variety of Recognised Professional Bodies responsible for regulating IPs, the Insolvency Service seeks to co-ordinate and harmonise the approach of these regulators, as well as to establish common professional standards through the following instruments:<sup>135</sup>

- A Memorandum of Understanding between the Recognised Professional Bodies and the Insolvency Service, compliance with which is a condition of the continuing recognition of the body. This aims to harmonise approaches of the professional bodies to issues such as authorisation, ethics, complaints-handling, monitoring and bonding.
- The Joint Insolvency Committee is a body established to promote common professional and ethical standards and to ensure that IPs are dealt with uniformly by the regulatory bodies. It issues two forms of instrument to achieve this aim: mandatory Statements of Insolvency Practice,<sup>136</sup> and voluntary Insolvency Guidance Papers.
- Common principles for monitoring IPs are agreed between the Secretary of State for Business, Innovation and Skills and the Recognised Professional Bodies.
- The Joint Insolvency Committee issues common ethical standards applicable to all IPs.
- Common qualifications exist in the form of the Joint Insolvency Examination.

1.88 It should be noted also that some control is exercised over Insolvency Practitioners by the courts.<sup>137</sup> For example, a liquidator can be removed from office by a court order or creditors’ meeting convened for that purpose, while similar provisions apply to trustees in bankruptcy and administrators. Also, the level of these office-holders’ remuneration is fixed by the liquidation committee or the creditors’

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<sup>132</sup> See Regulations 7 and 8 of the *Insolvency Practitioners Regulations 2005* (UK).

<sup>133</sup> Section 393(4) of the *Insolvency Act 1986* (UK).

<sup>134</sup> See Walters and Seneviratne *Complaints Handling in the Insolvency Practitioner Profession* (A Report Prepared for the Insolvency Practices Council 2008) at 4. Available at: <http://ssrn.com/abstract=1094757>.

<sup>135</sup> See Walters and Seneviratne *Complaints Handling in the Insolvency Practitioner Profession* (A Report Prepared for the Insolvency Practices Council 2008) at 5. Available at: <http://ssrn.com/abstract=1094757>.

<sup>136</sup> Statements of Insolvency Practice set out basic principles and essential procedures with which IPs are required to comply, and a failure to comply may lead to possible disciplinary or regulatory action: *Ibid.*

<sup>137</sup> Walters and Seneviratne *op cit.* at 6-7.

meeting, but can be challenged in court. In addition to these court-based mechanisms, office-holders are also subject to general private law obligations in the form of fiduciary duties and duties of care and skill.<sup>138</sup>

1.89 Each of the Recognised Professional Bodies has procedures in place for handling complaints against IP members.<sup>139</sup> These procedures have been described as being aimed at maintaining standards in the respective professions rather than acting as redress mechanisms for aggrieved individuals. The procedures are not concerned with dispute resolution, but the monitoring of standards. The procedures tend to be extremely formal, with clear written rules. Avenues of appeal exist for members also. The procedure is dominated by the profession, albeit with some lay involvement. The complainant usually plays little part in the complaint-handling procedure. There is a strong link between complaints and disciplinary processes in the Recognised Professional Bodies. Complaints against IPs are in this way assessed to see if they go to the core of whether the IP is fit and proper to practice. If a complaint does not raise such issues, and merely concerns a breach of a Statement of Insolvency Practice or ethical code, complaints may be treated as relatively minor, and would only result in serious action being taken if non-compliance was repetitive or systematic.<sup>140</sup> Generally in the professional bodies, the complaints-handling procedures are linked to the authorisation and monitoring process, so that new complaints are reported to the committee within the professional body that grants and renews licences to practice as an IP. In this regard the professional bodies have been described as following a “joined-up” process, with complaints feeding into discipline and monitoring; monitoring processes raising complaints and disciplinary matters; and information sharing between the various processes.<sup>141</sup>

1.90 In its role as regulator of regulators, the Insolvency Service monitors the complaints-handling procedures of the Recognised Professional Bodies. This monitoring primarily takes the form of requiring the bodies to submit their complaints statistics on an annual basis.<sup>142</sup> If any complaints arise as to how complaints are being handled, they may be raised during a monitoring visit. There is no formal appeal route to the Insolvency Service from the determination of a body in relation to a complaint or disciplinary matter and the Service has no power to intervene. The Insolvency Service is therefore limited to raise concerns informally with the body in question, or to address an issue more formally during a monitoring visit, as previously mentioned. The Service may however take up matters arising from the disciplinary measures taken by the professional bodies (as reported in the annual reports of the bodies to the Service). One issue that may be taken up is if the Service did not consider that a penalty ordered in disciplinary proceedings was adequate.<sup>143</sup>

1.91 The Insolvency Service, as regulator of regulators, monitors and supervises the complaints-handling procedures of the Recognised Professional Bodies (RPBs). Under the Memorandum of Understanding, the RPBs must give guidance to the public on how to make a complaint; must provide for the investigation of complaints by individuals with appropriate training and skill; and must ensure that complaints are progressed expeditiously and impartially.<sup>144</sup> In contrast to the relatively detailed complaints-handling and disciplinary processes in the professional bodies, the Insolvency Service has relatively informal mechanisms for dealing with the directly licensed IPs who are not members of a RPB. There is no hierarchy of disciplinary committees, and the Service has no powers to issue sanctions other than the ultimate sanction of withdrawal of authorisation. Section 393 of the *Insolvency Act 1986* limits the Insolvency Service’s powers to deciding whether or not the applicant for the office of IP is fit and proper to hold that role, and can only accept or reject authorisation on a positive or negative finding of this

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<sup>138</sup> *Ibid* at 7.

<sup>139</sup> See Walters and Seneviratne *Complaints Handling in the Insolvency Practitioner Profession* (A Report Prepared for the Insolvency Practices Council 2008) at 51FF. Available at: <http://ssrn.com/abstract=1094757>.

<sup>140</sup> *Ibid* at 55.

<sup>141</sup> *Ibid*.

<sup>142</sup> Walters and Seneviratne *op cit.* at 54.

<sup>143</sup> See Walters and Seneviratne *Complaints Handling in the Insolvency Practitioner Profession* (A Report Prepared for the Insolvency Practices Council 2008) at 56.

<sup>144</sup> *Ibid* at 57, citing paragraph 3 of the Memorandum of Understanding.

fit and proper test. Therefore the Insolvency Service's powers are lesser than those of the RPBs, who for example can impose conditions on an authorisation to act as an IP.

**(c) Australia: Registered Trustees**

1.92 Under Australian law, bankruptcies may be administered either by the Official Trustee, a public official, or by a private trustee who has been registered to act as a bankruptcy trustee. High standards are expected of bankruptcy trustees, who must "maintain the utmost professionalism, independence, impartiality, honesty and ethics in their dealings."<sup>145</sup> Bankruptcy trustees are considered officers of the Court, and so are expected to observe standards as high as those of a court or judge. Their duties are to exercise the powers in order to further the objectives of the Australian *Bankruptcy Act 1966*, including those of equality between creditors and fairness to debtors.<sup>146</sup> The system for the registration of trustees therefore seeks to establish and maintain these high standards among bankruptcy trustees.

1.93 To become a registered trustee, an applicant must apply to the Inspector-General in Bankruptcy (with the Insolvency and Trustee Service Australia (ITSA)'s independent Regulation Branch acting as a delegate of the Inspector-General for these regulatory purposes).<sup>147</sup> The Inspector-General then convenes a committee to consider the application, with the committee to be composed of the Inspector-General or delegate, an officer of the Australian Public Service, and a registered trustee (of at least five years' experience) nominated by the Insolvency Practitioners Association (IPA).<sup>148</sup> The committee considers the application and supporting documentation, as well as conducting an interview. The applicant may also be asked to sit an examination. Once the committee makes a decision whether or not to permit the registration of the applicant as a bankruptcy trustee (providing reasons for this decision), the Inspector-General must accept the decision. Any decision of the committee may be reviewed before the Administrative Appeals Tribunal.<sup>149</sup>

1.94 The committee must decide that the applicant should be registered if the committee is satisfied that the applicant:<sup>150</sup>

- has the qualifications, experience, knowledge and abilities prescribed by the regulations; and
- will take out insurance against liabilities that the applicant may incur working as a registered trustee; and
- has not been convicted, within 10 years before making the application, of an offence involving fraud or dishonesty; and
- has not been a bankrupt or a party (as debtor) to a debt agreement or Part X administration within 10 years before making the application; and
- has not had his or her registration as a trustee cancelled within 10 years before making the application on the ground that:
  - he or she contravened any conditions imposed by a committee on his or her practice as a registered trustee; or
  - he or she failed to exercise the powers of a registered trustee properly; or

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<sup>145</sup> See *Inspector-General Practice Statement 13: Trustee Registered under Bankruptcy Act Registration Application Process* (Insolvency and Trustee Service Australia 2008) at 1. Available at: [http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/about+us->itsa+practices+&+policies->igps+documents/\\$file/rt%20registration.pdf](http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/about+us->itsa+practices+&+policies->igps+documents/$file/rt%20registration.pdf)

<sup>146</sup> *Ibid.*

<sup>147</sup> *Inspector-General Practice Statement 13: Trustee Registered under Bankruptcy Act: Registration Application Process op cit.* at 1-2.

<sup>148</sup> Section 155 of the *Bankruptcy Act 1966* (Cth) (Aus).

<sup>149</sup> Section 155A(7) of the 1966 Act.

<sup>150</sup> Section 155A(2) of the 1966 Act.

- he or she failed to carry out the duties of a registered trustee properly; or
- he or she failed to properly carry out the duties of an administrator in relation to a debt agreement; and
- has not had his or her registration as a debt agreement administrator cancelled under section 186K [of the *Bankruptcy Act 1966*],<sup>151</sup> within 10 years before making the application, on the ground that he or she failed to properly carry out the duties of an administrator in relation to a debt agreement; and
- has not had his or her registration as a debt agreement administrator cancelled, within 10 years before making the application, as a result of an order under section 185ZCA [of the *Bankruptcy Act 1966*].

1.95 In relation to the first conditions that the applicant demonstrate his or her experience, knowledge and abilities, three main conditions in particular must be fulfilled.<sup>152</sup> The applicant must first have completed the academic requirements for the award of a degree, diploma or similar qualification from an Australian university or college of advanced education, or other Australian tertiary institution of an equivalent standard, being a degree, diploma or similar qualification granted to a person who has completed (i) a course of study in accountancy of not less than 3 years' duration; and (iii) a course of study in commercial law of not less than 2 years' duration. Secondly, the applicant must have been engaged in relevant employment on a full-time basis for a total of not less than 2 years in the preceding 5 years. Finally, the applicant must demonstrate an ability to perform satisfactorily the duties of a registered trustee immediately after registration. It should be noted that even if the applicant does not meet these conditions, the committee may yet decide that the applicant should be registered if the committee is of the opinion that the applicant is suitable to be registered as a trustee.<sup>153</sup> If the applicant fails to satisfy the other conditions listed above, however, the committee is obliged to refuse the application for registration.<sup>154</sup>

1.96 Therefore an application must be accompanied by a statement illustrating that the above conditions have been met, and must also include two references of a specified type.<sup>155</sup>

1.97 If the committee has decided that the applicant should be registered, the Inspector-General in Bankruptcy must register the applicant provided that the requisite fees have been paid.<sup>156</sup> The applicant's details are then entered in the National Personal Insolvency Index. Registration has effect for three years, but may be extended before the end of this period on application in writing to the Inspector-General.<sup>157</sup> The committee (and so the Inspector-General) may decide that the applicant's registration should be subject to specified conditions.<sup>158</sup> A registered trustee may however apply to the Inspector-General for any conditions imposed to be changed or removed, and the Inspector-General must once again convene a committee of similar representative composition as the original committee to assess this application.<sup>159</sup>

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<sup>151</sup> See paragraph 1.104.

<sup>152</sup> See Regulation 8.02 of the *Bankruptcy Regulations 1996*.

<sup>153</sup> Section 155A(3) of the *Bankruptcy Act 1966* (Cth) (Aus).

<sup>154</sup> Section 155A(4) of the 1966 Act.

<sup>155</sup> See *Inspector-General Practice Statement 13: Trustee Registered under Bankruptcy Act Registration Application Process* (Insolvency and Trustee Service Australia 2008) at 2-3.

<sup>156</sup> Section 155C of the 1966 Act. The fee is currently set at an application fee of AUS\$2,000 and a registration fee of AUS\$1,200 for the first three years of registration: see *ibid* at 4, 8.

<sup>157</sup> Section 155D of the 1966 Act.

<sup>158</sup> Section 155A(5) of the 1966 Act.

<sup>159</sup> Section 155E of the 1966 Act.

1.98 Once registered, the conduct of a bankruptcy trustee is supervised, and is subject to the continuous threat of involuntary termination.<sup>160</sup> The Inspector-General may ask a registered trustee to provide a written explanation of why the trustee should continue to be registered in a case where the Inspector-General believes that any of the above circumstances exist:<sup>161</sup>

- the trustee no longer has a qualification or ability that is prescribed by the regulations made for the purposes of paragraph 155A(2)(a); or
- the trustee no longer has the ability (including knowledge) to perform satisfactorily the duties of a registered trustee; or
- the trustee has been convicted of an offence involving fraud or dishonesty since registration as a trustee; or
- the trustee is not insured against liabilities that the trustee may incur, or has incurred, working as a registered trustee; or
- the trustee is no longer practising as a registered trustee; or
- the trustee has contravened any conditions imposed by the committee on the trustee's practice; or
- the trustee has failed to exercise powers of a registered trustee properly or has failed to carry out the duties of a registered trustee properly; or
- if the trustee is or was the administrator of a debt agreement—the trustee has failed to properly carry out the duties of an administrator in relation to a debt agreement; or
- the trustee has failed to comply with a standard prescribed in regulations.<sup>162</sup>

If the Inspector-General does not receive a satisfactory explanation within a reasonable time, the Inspector-General must convene a committee (of a similar representative composition as the previous committees) to consider whether the trustee should continue to be registered. The committee must then produce a report and a decision, and the Inspector-General must give effect to the decision. A registered trustee's registration may also be cancelled on the entry of the trustee into bankruptcy or a debt agreement.<sup>163</sup> In addition, a court may order the Inspector-General to cancel a trustee's registration where, on application by the Inspector-General or by a creditor who has or had a debt provable in the bankruptcy, the Court is satisfied that a trustee has been guilty of breach of duty in relation to a bankrupt's estate.<sup>164</sup>

1.99 The performance standards to be observed by trustees when carrying out their duties are specified in Schedule 4A of the *Bankruptcy Regulations 1996*, and cover duties to, among other things:

- act honestly and impartially;
- take appropriate steps to avoid a conflict of interest;
- comply with privacy and data protection laws when dealing with information relating to an administration;
- ensure that a trustee's employees comply with these standards.

In addition, more detailed standards are specified in relation to the particular functions of a trustee during the bankruptcy administration. The approach to be taken by the trustee in conducting inquiries as to the debtor's financial affairs is specified, and standards are specified relating to the realisation of assets and the ascertaining of ownership of assets. Duties are also specified in detail regarding the records and files

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<sup>160</sup> Section 155H of the 1966 Act.

<sup>161</sup> Section 155H of the *Bankruptcy Act 1966* (Cth) (Aus).

<sup>162</sup> See paragraph 1.99 below.

<sup>163</sup> Section 182 of the 1966 Act.

<sup>164</sup> Section 176 of the 1966 Act.

to be kept by the bankruptcy trustee, and in relation to his or her remuneration. Further rules are established in relation to the holding of creditors' meetings, the keeping of trustee accounts, the proving of creditors' claims, and the distribution and monitoring of dividends and contributions from debtors. As noted above, a failure to comply with any of these standards may provide grounds for the involuntary termination of a debtor's registration.

1.100 The procedure for handling complaints in relation to bankruptcy trustees are discussed below alongside the procedures applicable to complaints against controlling trustees and Debt Agreement Administrators.<sup>165</sup>

## **(2) Regulation of trustees in arrangement procedures: models for consideration**

1.101 The following paragraphs discuss systems in the countries of Australia, Canada and England and Wales for the regulation of practitioners performing the roles of intermediaries under the various insolvency procedures of those countries. The discussion places particular emphasis on the systems for the regulation of intermediaries in non-judicial repayment plan arrangement procedures.

### **(a) Australia**

1.102 The Australian procedure most resembling the Commission's proposed Debt Settlement Arrangement procedure is the Part IX (Consumer) Debt Agreement scheme.<sup>166</sup> Under this scheme, a registered administrator is responsible for preparing a proposal for creditors and for administering a finalised Debt Agreement.<sup>167</sup> In order to become a registered administrator, an applicant must apply to the Inspector-General in Bankruptcy,<sup>168</sup> and must pass three stages of conditions involving a basic eligibility test; certain mandatory qualifications specified in regulations; and an ability to perform satisfactorily the duties of an administrator. The basic eligibility test serves as a gatekeeper provision to exclude applicants on such grounds as their past misconduct and/or insolvency.<sup>169</sup> The mandatory qualifications that must be held by applicants are accountancy qualifications to a certain specified level. The final stage of the application process involves an assessment of the abilities of the applicant to perform the following duties:<sup>170</sup>

- Certify that:
  - the debtor has received specified information about alternative means of dealing with financial difficulty;
  - that the debtor is likely to be able to discharge the obligations created by the agreement as and when they fall due;
  - that reasonable grounds exist to believe that all information required to be set out in the debtor's statement of affairs and proposal statement has been included, and that the debtor has properly disclosed his or her affairs to creditors.

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<sup>165</sup> See paragraph 1.107 below.

<sup>166</sup> See Part IX of the *Bankruptcy Act 1966 (Cth)* (Aus).

<sup>167</sup> See Part IX, Division 8 of the *Bankruptcy Act 1966 (Cth)* (Aus).

<sup>168</sup> The Insolvency and Trustee Service Australia (ITSA)'s Independent Regulation Branch acts as a delegate for the Inspector-General in the exercise of these regulatory functions.

<sup>169</sup> See section 186A of the 1966 Act for a full list of the grounds which would cause an applicant to fail the basic eligibility test, including: the applicant's having been convicted of an offence involving fraud or dishonesty, having been disqualified from acting as a manager of a corporation, or having been an insolvent under administration during the last 10 years.

<sup>170</sup> See *Guidelines and Processes for Registration of Debt Agreement Administrators* (Insolvency and Trustee Service Australia 2007) at 1 to 2. Available at: [http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/News+&+Events->Law+Reform->Amendments%20documents/\\$FILE/Registration\\_Guidelines\\_280307.pdf?OpenElement](http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/News+&+Events->Law+Reform->Amendments%20documents/$FILE/Registration_Guidelines_280307.pdf?OpenElement).

- ensure the certification provided to Insolvency Trustee Service Australia (ITSA) with the debt agreement proposal is correct;
- deal with the debtor's property in the manner specified in the debt agreement;
- respond in a timely manner to reasonable requests from creditors about the progress of individual agreements;
- respond in a timely manner to reasonable requests from debtors for information;
- ensure creditors are informed about default;
- inform ITSA within 5 working days after the end of the agreement;
- pay all money received from debtors under agreements to the credit of a single interest-bearing bank account that bears the administrators name and the words "Debt Agreement Administration Trust Account". Administrators must only pay into these accounts money received from debtors under debt agreements;
- keep such accounts, books and records as are necessary to give a full and correct account of the administration of the debt agreement; and if required to do so by the Inspector-General, make those accounts and records available for inspection by the Inspector-General;
- when required, answer any inquiries about the debt agreement and cooperate with any inquiry or investigation made by the Inspector-General; and
- maintain a separate record of money received as remuneration, payments made and the balance of money held in relation to each debt agreement and at least once every 45 days, reconcile the balance held in the bank account with these records.
- inform ITSA's Debt Agreement Service under certain circumstances detailed in the Act and listed later in these guidelines, and
- take fees in a particular way as required by law.

The assessment involved focuses on whether the applicant has the required knowledge and abilities, together with the appropriate business systems and controls, in order to carry out these duties immediately upon registration.<sup>171</sup> This assessment commences with an interview which examines the knowledge and abilities of the applicant. Prior experience is taken into account at this stage. If the interview is successful, an on-site inspection by ITSA Bankruptcy Regulation Branch, primarily aimed at assessing the business systems, controls and practices. The knowledge that the applicant will be required to demonstrate through the examination and interview process includes the following:<sup>172</sup>

- A basic knowledge of the Bankruptcy Act. In particular applicants will need to know the options available along with the impact of these on a debtor;
- A detailed knowledge of debt agreement legislation including the duties of an administrator;
- Other financial and banking options available including refinancing, mortgages, informal arrangements and banking industry hardship provisions;
- Knowledge of common business structures such as companies, partnerships, trusts and sole traders, the liability implications arising from these structures, commercial and financial transactions and documents, including: leases, hire purchase, guarantees, caveats, mortgages and other security, and basic contract law;
- An understanding of what enquiries can be easily made both from the debtor and other resources to assist the applicant in making a determination that the debtor has made full and true disclosure. For example the applicant will be expected to explain what evidence he/she will

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<sup>171</sup> See *Guidelines and Processes for Registration of Debt Agreement Administrators* (Insolvency and Trustee Service Australia 2007) at 6.

<sup>172</sup> *Ibid* at 9-10.



require from a debtor concerning income, expenses, liabilities and assets; what simple checks can be undertaken and what evidence the applicant might retain;

- An understanding of how the applicant can confidently form a belief and therefore be able to certify with assurance to ITSA's Debt Agreement Service that the applicant has a reasonable basis for believing that the debtor has properly disclosed their affairs. This will include what questions the applicant plans to ask the debtor, what simple enquiries the applicant can make, what evidence can be produced and retained that will assist the applicant regarding income and debt levels;
- The applicant's ability to discern between financial choices, understand money and debt, budget and plan, recognise and competently inform debtors on life events that affect everyday financial decisions, including events in the general economy;
- What budgeting and processes the applicant believes are necessary; and
- How the applicant plans to assist the debtor determine what he/she can afford to pay.

1.103 After considering an application, the Inspector-General in Bankruptcy must make a decision to approve or reject the application within 60 days of its receipt, although ITSA aims to make this decision within 30 days.<sup>173</sup> If an application is successful, the applicant's registration remains valid for a period of three years.<sup>174</sup> A registration can be renewed before or at the end of this three year period, and because the administrator is subject to annual inspections which should reveal any problems and confirm good practice, the re-registration authorisation process is likely to be less stringent than the initial application assessment.<sup>175</sup> An application for registration may be granted subject to specified conditions, which must be notified in writing to the applicant, along with the reasons for the decision.<sup>176</sup> For example a registration may be granted conditional on the applicant's completion of requisite studies which he or she has commenced but not finished.<sup>177</sup> Other conditions might include the installation of further systems, controls and practices within a set timeframe or limiting the number of arrangements which the applicant could operate due to the limits of current business systems and controls. A decision to grant a conditional registration may be reviewed by the applicant before the Administrative Review Tribunal; and an administrator may subsequently apply to change or remove any registration conditions.<sup>178</sup>

1.104 Once registered, a Debt Agreement Administrator is subject to the continuous threat of the cancellation of registration. The Inspector-General in Bankruptcy is obliged to cancel registration if he or she is satisfied that the administrator no longer passes the basic eligibility test.<sup>179</sup> In addition, if the Inspector-General has reasonable grounds to believe that the individual no longer has the ability, qualifications or experience to perform satisfactorily the duties of an administrator; or has failed to carry out properly the duties of an administrator in relation to a debt agreement; the Inspector-General may ask the individual to provide a written explanation as to why he or she should continue to be registered as an administrator.<sup>180</sup> If the Inspector-General does not receive a satisfactory explanation within 28 days, he or she may cancel the individual's registration. The Inspector-General's decision to cancel the registration may be reviewed by the Administrative Appeals Tribunal.<sup>181</sup> The Inspector-General may take such action following the establishment of breaches and deficiencies in practices either during ITSA Bankruptcy

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<sup>173</sup> Section 168B of the *Bankruptcy Act 1966* (Cth) (Aus); *Ibid* at 12-13.

<sup>174</sup> Section 186E(b) of the *Bankruptcy Act 1966* (Cth) (Aus).

<sup>175</sup> See *Guidelines and Processes for Registration of Debt Agreement Administrators op cit.* at 14.

<sup>176</sup> Section 186C(9)-(12) of the 1966 Act.

<sup>177</sup> See *Guidelines and Processes for Registration of Debt Agreement Administrators op cit.* at 13.

<sup>178</sup> Section 186H of the 1966 Act.

<sup>179</sup> Section 186K(2) of the *Bankruptcy Act 1966* (Cth) (Aus).

<sup>180</sup> Section 186K(3) of the 1966 Act.

<sup>181</sup> Section 186K(8) of the 1966 Act.

Regulation's annual inspection, or through the investigation of complaints.<sup>182</sup> When considering whether a registration should be cancelled, the Inspector-General might consider factors such as:

- (i) the importance of the duty that has not been complied with or the breach of the Act; and
- (ii) the seriousness of the effect of a failure to comply, including the impact the failure to comply has; and
- (iii) an administrator's performance history including whether previous failures to comply with the Act or undertake the duties have been raised.

1.105 It should be noted that those individuals who already hold the status of registered trustee (and so are permitted to act as trustees in bankruptcy proceedings) are not required to register separately and additionally as a Debt Agreement Administrator. The regime applying to registered trustees is described above.<sup>183</sup>

1.106 Under the other arrangement procedure under the *Bankruptcy Act 1996*, the Part X Personal Insolvency Agreement procedure, a registered trustee, a solicitor or the Official Trustee takes responsibility for preparing a proposal and administering an agreed arrangement.<sup>184</sup> The person taking such responsibility is then referred to as a controlling trustee. A person other than a registered trustee or the Official Trustee (i.e. a solicitor who does not hold these offices) is ineligible to act as a controlling trustee if he or she exhibits certain conditions of ineligibility, which largely resemble the conditions for eligibility to act as a bankruptcy trustee or a Debt Agreements Administrator.<sup>185</sup> It should be noted that a condition particular to eligibility to act as a controlling trustee is that the person is either a full member of the Insolvency Practitioners Association of Australia, or has satisfactorily completed a course in insolvency approved by the Inspector-General.<sup>186</sup>

1.107 Supervision and complaints-handling in respect of registered trustees, controlling trustees and debt agreement administrators fall within the responsibility of the Regulation Branch of the Insolvency and Trustee Service Australia (ITSA), acting as a delegate of the Inspector-General in Bankruptcy. The primary method of supervision occurs through a targeted annual inspection program which involves a sample of files, examination of their systems and practices, and attendance at creditors' meetings.<sup>187</sup> A sample of administrations is targeted each year, based on a risk assessment of each practitioner, including such factors as an evaluation of systems and controls as well as the level and seriousness of prior errors found in their administrations. Risk criteria associated with particular types of administrations are also considered. Around 1400 administrations and 220 practitioners are inspected by ITSA in this way each year. The performance standards set out in the *Bankruptcy Regulations 1996* and discussed above are used by ITSA as benchmarks when undertaking annual inspections and in the investigation of complaints. These standards are however at present only applicable to bankruptcy trustees and controlling trustees under Part X Personal Insolvency Agreements. Due to the fact that the Debt Agreement procedure has only been newly introduced, no such legislative performance standards have been developed in this area.

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<sup>182</sup> See *Guidelines and Processes for Registration of Debt Agreement Administrators* (Insolvency and Trustee Service Australia 2007) at 15.

<sup>183</sup> See paragraphs 1.92ff. above.

<sup>184</sup> See section 188 of the *Bankruptcy Act 1966* (Cth) (Aus).

<sup>185</sup> These conditions are specified in Regulation 8.35 of the *Bankruptcy Regulations 1996* (Aus). See also section 188(2B) of the 1966 Act.

<sup>186</sup> Regulation 8.35(1)(f) of the 1996 Regulations.

<sup>187</sup> See *Regulation of Bankruptcy Trustees and Debt Agreement Administrators in Australia* (Insolvency and Trustee Service Australia 2007) at 3. Available at: [http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/about+us->itsa+practices+&+policies->IGPS+Documents/\\$FILE/Regulation%20of%20Trustees%20and%20Debt%20Agreement%20Administrators.pdf](http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/about+us->itsa+practices+&+policies->IGPS+Documents/$FILE/Regulation%20of%20Trustees%20and%20Debt%20Agreement%20Administrators.pdf).

1.108 In addition to annual inspections, the standards and conduct of bankruptcy trustees, controlling trustees and debt agreement administrators are controlled through the investigation of complaints by ITSA. Complaints may be made by anyone concerned about an action taken by a bankruptcy trustee, controlling trustee or debt agreement administrator, and all complaints received are examined in detail.<sup>188</sup> Many complaints may be resolved quickly and informally through discussions with the relevant trustee or administrator. If the matter cannot be resolved in this manner, further investigations are conducted by ITSA Regulation. ITSA, as a delegate of the Inspector-General in Bankruptcy, has the power to investigate the conduct of trustees, administrators and debtors. Where grounds exist, ITSA has at its disposal the sanction of termination of registration, as described above.

1.109 In addition to these powers of supervision and investigation, the Inspector-General in Bankruptcy, and ITSA Regulation Branch as its delegate, is empowered to review certain decisions of trustees.

1.110 It should be noted that many bankruptcy trustees, controlling trustees and debt agreement administrators are members of a professional body called Insolvency Practitioners Australia (IPA). This is a voluntary membership organisation, which has no responsibility for the licensing of insolvency practitioners. It also has no investigative powers, although it has relationship agreements with other professional bodies possessing such powers, such as the Institute of Chartered Accountants in Australia, the Law Societies of each Australian state, and Certified Public Accountants Australia. If investigations by these bodies find that a member of the IPA has breached the law or professional codes of conduct, the IPA will require the member to show cause as to why the IPA should not terminate or suspend membership. The IPA sets standards and codes for its members, and these professional standards are consulted by regulators, tribunals and courts when reviewing the conduct of trustees and administrators. The IPA states that these codes set standards that are often higher than those established by law or regulation. The IPA however has no power to suspend or remove registration as a bankruptcy trustee, controlling trustee or debt agreement administrator.

1.111 Therefore, unlike in England and Wales, professional bodies have no formal role in the regulation of insolvency practitioners in Australia. The Commission notes in this respect that companies may be registered in Australia, whereas in England individuals only are registered.

**(b) England and Wales**

1.112 The positions of nominee and supervisor under an Individual Voluntary Arrangement (IVA) in England and Wales are reserved to those holding the status of Insolvency Practitioner (IP). The qualification of IP is also required to hold the position of a trustee in bankruptcy proceedings, and to hold similar positions in corporate insolvencies. The office of IP and the regulation of office holders are discussed above in relation to bankruptcy proceedings in England and Wales.<sup>189</sup> The following paragraphs therefore are limited to a discussion of IPs in the context of IVAs, and in particular highlight the strengths and weaknesses of the regulatory regime, from the point of view of research conducted into this issue.

1.113 A study published in 2009 compares the systems for the regulation of Insolvency Practitioners (IPs) in England and Wales (as described above) with regulatory regimes for other professions.<sup>190</sup> The IP regulatory structures described above are compared with three professional regulatory bodies (the Bar Standards Board, the Royal Institution of Chartered Surveyors, the General Medical Council), as well as the Primary Care Trusts of the National Health Service and the Financial Ombudsman Service. The study concludes that there is a trend towards the separation of representative and regulatory functions within

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<sup>188</sup> See *Regulation of Bankruptcy Trustees and Debt Agreement Administrators in Australia* (Insolvency and Trustee Service Australia 2007) at 4; *Resolving Complaints about Trustees and Administrators* (Insolvency and Trustee Service Australia 2009).

<sup>189</sup> See paragraphs 1.78ff. above.

<sup>190</sup> Seneviratne and Walters *Complaints Handling by the Regulators of Insolvency Practitioners: A Comparative Study* (Report Prepared for the Insolvency Practices Council 2009), available at: <http://ssrn.com/abstract=1310791>.

the governance of professional bodies, a trend found to exist also in the insolvency profession. The report also notes that there is a tendency for the separation of disciplinary and complaint-handling processes in the professions examined, which extends to the Recognised Professional Bodies (RPBs) regulating IPs who are part of the legal professions. In contrast, the report finds that accountancy RPBs and the Insolvency Service focus principally on the regulation and disciplining of IPs, rather than on complaints resolution and redress for individual complainants of the type found to be present in the other regulatory systems examined. The comparative regulatory structures demonstrate an increased emphasis on alternative dispute resolution (ADR) mechanisms and financial redress for service complaints, while there is also a trend towards some form of independent, external oversight in relation to complaints. The study noted that in contrast, there is no independent, external avenue of review and redress for complainants of this kind in the IP professions (except in relation to those IPs involved in volume IVA provision, who fall within the jurisdiction of the Financial Ombudsman Service).<sup>191</sup>

1.114 The primary recommendations of this 2009 study are that there appears to be a clear case for extending the jurisdiction of the Financial Ombudsman Service to all IPs involved in the provision of debt advice or debt resolution services to personal debtors. The study also recommends that the profession and its regulators may wish to consider whether the wider case for an insolvency ombudsman should be subject to a full, independent review.

1.115 In 2010, the UK Office of Fair Trading published a study of the market for corporate Insolvency Practitioners (IPs) that is also useful to the present discussion.<sup>192</sup> This study focused on the appointment, actions and fees of corporate IPs, particularly for two of the main corporate insolvency processes in the UK, administration and creditors' voluntary liquidations (CVLs).<sup>193</sup> The study analysed whether the market and regulatory framework provides IPs with appropriate incentives to operate in the long-term interests of creditors, what harm may be caused if they do not, and what changes to the operation of the market might increase its efficiency. The study concluded that corporate IPs compete by building and maintaining strong relationships with secured creditors, such as banks. Where secured creditors do not recover the amounts owed to them in full, the market works reasonably well. Where secured creditors are paid in full however, the remaining unsecured creditors find it difficult to influence the process, and suffer harm as a result. This is primarily because while the decision to appoint an IP in an administration is made by secured creditors, the IP's fees are in effect incurred by the last creditor group to be paid, i.e. unsecured creditors. Where there are insufficient funds for secured creditors to be repaid in full, secured creditors are interested in keeping the IP fees low in order to maximise their returns. Where however the secured creditors are paid in full, the secured creditors have no incentives to keep the fees low, as it is only the unsecured creditors who will lose out if the fees are high. Therefore the secured creditors may be less careful in choosing an IP in such cases, which amount to 37 of all administrations. The OFT noted that the formal procedures whereby unsecured creditors can influence the appointment of an IP are rarely used and are impractical. Also, the information sent by IPs to unsecured creditors is often unclear, incomplete, and of little help in allowing them to understand the process. Unsecured creditors, since they cannot control the IPs' actions, must rely on the IPs to safeguard their interests, but the OFT finds that there is little incentive other than regulation and ethics for IPs to charge low fees and manage the interests of unsecured creditors. The OFT stated that its research shows that fees paid to IPs are approximately 9% higher in cases where secured creditors are paid in full, illustrating that the regulatory

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<sup>191</sup> Under section 21 of the *Consumer Credit Act 1974* (UK), a consumer credit licence is required to carry on a range of ancillary business activities, such as debt adjusting and debt counselling. As high volume IVA firms advise consumer debtors in relation to their debt difficulties, including debts covered by the 1974 Act, these firms are carrying on ancillary credit business and require a consumer credit licence. As a consequence in accordance with section 226A of the *Financial Services and Markets Act 2000*, such firms fall within the jurisdiction of the Financial Ombudsman Service: see Walters and Seneviratne *Complaints Handling in the Insolvency Practitioner Profession* (A Report Prepared for the Insolvency Practices Council 2008) at 43-46. Available at: <http://ssrn.com/abstract=1094757>.

<sup>192</sup> Office of Fair Trading *The Market for Corporate Insolvency Practitioners: A Market Study* (OFT1245 2010), available at: [http://www.offt.gov.uk/shared\\_offt/reports/Insolvency/oft1245](http://www.offt.gov.uk/shared_offt/reports/Insolvency/oft1245).

<sup>193</sup> See Fletcher *The Law of Insolvency* (4<sup>th</sup> ed. Sweet and Maxwell 2009) at 513-607; 625-650.

regime fails to correct for the lack of control of unsecured creditors over the process. Other problems identified by the OFT as being caused by the weak position of unsecured creditors include the lengthy duration of liquidation proceedings and the inappropriate use of “pre-packaged” administrations.<sup>194</sup>

1.116 The OFT concluded that the extensive system of regulation of IPs does not stop this harm, and notes that a significant number of IPs find the system to be inconsistent or ineffective. The OFT therefore proposed three principal remedies to alleviate these problems.

1.117 First, the OFT recommended that an independent complaints body should be introduced to increase the efficacy and consistency of after-the-event complaint and review, restore creditor trust in the regulatory regime, and allow a cost-effective route of fee assessment.<sup>195</sup> The OFT, much in line with the findings of Seneviratne and Walters discussed above, stated that the current complaint and redress systems do not achieve these aims. The OFT therefore recommended that an independent complaint handling or appeal body should be established, with the power to review complaints and assess fees. This body should be funded by the IP profession, and should be able to sanction IPs in a way that deters future transgression. It should also be empowered to order the repayment to creditors of any overcharged fees. The OFT conducted a survey of IPs in relation to this proposal, which found that 72% are in favour, in principle, of a single complaints handling body. Stakeholder discussions have also suggested that an independent complaints body would help restore trust in the regulatory process and encourage affected parties to make well argued complaints.

1.118 The second proposal of the OFT was that clear objectives for the regulatory regime must be established, and that the ability of the regime to deliver them must be increased.<sup>196</sup> Not only are new rules required to address specific problems in the IP sector, but it is also necessary to ensure that rules are effectively monitored and enforced. The OFT notes that the existing regulatory structure for IPs, based primarily on self-regulation of the legal and accountancy professions, originates from 1986 and was not designed to accommodate the development of insolvency as a distinct profession. As a result it reflects poorly the way in which the market currently operates. The regulatory system is composed of 10 overlapping organisations and lacks universal and consistent objectives to guide regulatory action. The OFT therefore proposed that a reformed regulatory system should be based on the following three objectives:

- Maximising long-term returns to all creditors;
- Protecting vulnerable market participants; and
- Encouraging a competitive and independent IP profession.

The OFT believed that the complexity of the current regulatory structure limits its efficacy, and made three proposals to change this situation:

- The Insolvency Service should be established as a regulator of the Recognised Professional Bodies (RPBs) with a more proportionate set of oversight powers, while its role in direct regulation of IPs should be decreased.
- The decision-making process between RPBs should be changed to increase the efficiency and agility of the self-regulatory regime, and
- The independent body of the Insolvency Practices Council should be focussed on assessing how well the objectives are being met.

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<sup>194</sup> “A ‘pre-pack’ (pre-packaged sale) refers to an arrangement under which the sale of all or part of a company’s business or assets is negotiated with a purchaser prior to the appointment of an Insolvency Practitioner as administrator.” See Insolvency Service *How to Complain About Misuse of the “Pre-Pack” Administration Process*, <http://www.insolvency.gov.uk/howtocomplain/complainprepack.htm>.

<sup>195</sup> Office of Fair Trading *The Market for Corporate Insolvency Practitioners: A Market Study* (OFT1245 2010) at 92-95.

<sup>196</sup> Office of Fair Trading *The Market for Corporate Insolvency Practitioners: A Market Study* (OFT1245 2010) at 95-100.

1.119 Finally, the OFT made a number of detailed recommendations for reform of the relevant insolvency processes, such as providing enhanced opportunities for creditors to review the appointment of an IP when an administration moves into a corporate voluntary liquidation, requiring the IP's proposals for remuneration in a corporate voluntary liquidation to be voted on by creditors separately from other proposals, and requiring the IP to provide creditors with an estimate of the duration of the process and his or her fees.<sup>197</sup>

1.120 One study into the causes of failures of IVAs identified several key problematic issues, at least some of which could be attributed to failings in the regulatory regimes overseeing the IVA system and the IPs operating it.<sup>198</sup> The first category of problems identified was in the area of the process of advising a debtor on his or her options before entering an IVA. Here the key problematic issue was found to be the lack of an initial face-to-face meeting between the IP and the debtor, and the delegation of the role of advisor by IPs to more junior staff, sometimes in telephone call centres.<sup>199</sup> Despite the existence of a requirement to hold a face-to-face meeting in a mandatory Statement of Insolvency Practice,<sup>200</sup> market practice developed whereby no such meetings were held. This study found that the requirement to hold a meeting was routinely ignored by IPs and not enforced by Recognised Professional Bodies, and of the cases surveyed, a face-to-face meeting was held in less than 70% of cases. Rather than enforce this requirement, the response of regulators was to amend the relevant Statement of Insolvency Practice in order to meet the market practice and provide that initial meetings are no longer mandatory.<sup>201</sup> The study concluded that this failure to hold a face-to-face meeting has the result that debtors do not have the opportunity to discuss all their options in the best circumstances.

1.121 A second problem found to arise in IVAs is the excessive power of creditors relative to debtors and IPs, and the tendency for creditors to use this power to the detriment of the successful resolution of a debtor's difficulties. First, creditors have been found to seek contributions at very high levels when deciding whether to accept a debtor's proposal for an IVA, which can often lead to either the failure to agree an IVA, or the agreement of an ultimately unsustainable arrangement.<sup>202</sup> When they receive a debtor's proposal, creditors may also respond with contradictory or unrealistic modifications, thus preventing an effective and sustainable IVA from being reached. A further problem is that creditors no longer tend to petition for the debtor's bankruptcy in the event of the failure of an IVA. If the debtor is unavailable to afford the costs of bringing a petition for his or her own bankruptcy, this leaves the insolvent debtor without a solution, and subject to collection efforts and accompanying stress.<sup>203</sup> The study noted however that the IVA Protocol should remedy the effects of creditor dominance through its provisions containing limitations on the modifications that can be imposed on creditors, and providing for the use of an agreed common financial statement to calculate reasonable levels of living expenses and contributions from income for debtors.<sup>204</sup> A further problem found to arise is that several failed debtor

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<sup>197</sup> Office of Fair Trading *The Market for Corporate Insolvency Practitioners: A Market Study* (OFT1245 2010) at 101-102.

<sup>198</sup> Morgan *Causes of Early Failure in Individual Voluntary Arrangements* (Kingston Business School Occasional Paper No. 63, 2009) at 40ff. Available at: <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/research/personaldocs/IVA%20Research%20-%20Occasional%20Paper.pdf>.

<sup>199</sup> *Ibid* at 40.

<sup>200</sup> See paragraph 1.87 above for an explanation of the concept of Statement of Insolvency Practice. SIP3, which became mandatory on 1 October 2003, required an initial face-to-face meeting.

<sup>201</sup> SIP3 was modified with effect with 1 April 2007.

<sup>202</sup> Morgan *Causes of Early Failure in Individual Voluntary Arrangements* (Kingston Business School Occasional Paper No. 63, 2009) at 42.

<sup>203</sup> *Ibid* at 42-43.

<sup>204</sup> See *IVA Protocol: Straightforward Consumer Individual Voluntary Arrangement* (Insolvency Service, 2008), available at: <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/policychange/foum2007/plenarymeeting.htm>.

participants in IVAs are unaware that an IVA could be varied within the first year (in order to take account of a change in the debtor's circumstances).<sup>205</sup> Several debtors surveyed were told by their IVA supervisors that it was too early to propose a variation to creditors, and were led to think that this was a statutory rule rather than merely the supervisor's opinion on the creditors' probably reaction to the proposal of a variation. It appears that this restriction on variations has been imposed by some creditor groups and providers as a standard term and a cost-saving measure. The study therefore suggested that this is an issue which should be addressed in order to ensure the efficacy of the IVA process.

**(c) Canada**

1.122 In Canada, a licensing system exists for bankruptcy trustees, with private sector Insolvency Practitioners obliged to obtain authorisation from the Office of the Superintendent of Bankruptcy (OSB) to act in this capacity.<sup>206</sup> Under the consumer and business proposal procedures, which are personal insolvency processes involving an arrangement with creditors in a manner similar to the IVA system in England and Wales and the Part IX and Part X procedures in Australia, the administrator of a proposal must be a licensed trustee or a person appointed or designated by the OSB to administer consumer proposals.<sup>207</sup>

1.123 A person who wishes to become a licensed trustee must apply to the OSB for a licence.<sup>208</sup> The Superintendent may issue the licence if, having conducted such investigations as considered necessary, the Superintendent is satisfied having regard to specified criteria, that the applicant is qualified to obtain the licence.<sup>209</sup> The conditions to be satisfied in order to obtain a licence are contained in the *Trustee Licensing Directive*, issued by the OSB under paragraph 5(4)(d) of the *Bankruptcy and Insolvency Act*. As prerequisites to the application the applicant must:<sup>210</sup>

- Not be insolvent, and must not have been in a state of insolvency within five years preceding the date of the application;
- Possess a Canadian university degree or its equivalent, or hold a relevant professional designation recognised in Canada, or have a minimum of five years relevant work experience;
- Have successfully completed the National Insolvency Qualification Program and the National Insolvency Examination;
- Have successfully completed the Insolvency Counsellor's Qualification Course, as established by the Superintendent of Bankruptcy; and
- Be in good standing with, and not subject to any current disciplinary action by, any professional organisation of which the applicant is a member.

The National Insolvency Qualification Program is a three-year course administered jointly by the OSB and the Canadian Association of Insolvency and Restructuring Professionals (CAIRP), a private sector professional association of which the majority of Canadian bankruptcy trustees are member.<sup>211</sup> The OSB possesses powers of investigation for verifying that the individual does in fact meet all of the prerequisites. Meeting these prerequisites does not in itself ensure that a licence will be granted, as the

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<sup>205</sup> Morgan *op cit.* at 43.

<sup>206</sup> Section 2 of the *Bankruptcy and Insolvency Act* simply defines a "trustee" or "licensed trustee" as a person who is licensed or appointed under this Act.

<sup>207</sup> Section 66.11 of the *Bankruptcy and Insolvency Act* defines an "administrator" of a consumer proposal as either a trustee or a person appointed or designated by the Superintendent to administer consumer proposals.

<sup>208</sup> Section 13(1) of the *Bankruptcy and Insolvency Act*.

<sup>209</sup> Section 13(2) of the *Bankruptcy and Insolvency Act*.

<sup>210</sup> Section 6 of the *Trustee Licensing Directive*.

<sup>211</sup> See Office of the Superintendent of Bankruptcy Canada *How to Become a Trustee*, <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01128.html>.

applicant must also satisfy certain Specific Qualifications and pass an Oral Board Examination before a final decision will be made.

1.124 The Specific Qualifications are primarily concerned with assessing the reputation of the applicant and his or her suitability to act as a bankruptcy trustee. With regard to reputational concerns, the applicant shall be of good character and reputation, and must satisfy the OSB that the issuance of a licence will not impair public confidence in the insolvency process.<sup>212</sup> Without prejudice to these general requirements, an applicant who has been convicted of an indictable offence must satisfy the OSB that a pardon has been granted and that the conviction was not related to an offence of a commercial or an economic nature.<sup>213</sup> Similarly an applicant who has been found guilty of professional misconduct must satisfy the Superintendent that such misconduct was not of a commercial or economic nature, and that it is not likely to impair public confidence in the applicant or the bankruptcy and insolvency system in general.<sup>214</sup> Regarding the applicant's suitability to act as a bankruptcy trustee, the skills of the applicant are considered by a Board of Examination, before which the applicant must demonstrate:<sup>215</sup>

- The ability to administer professional engagements ("professional engagements" are any bankruptcy or insolvency matter in respect of which a trustee is appointed or designated to act in that capacity pursuant to the *Bankruptcy and Insolvency Act*);
- The ability to apply related legislation and jurisprudence;
- Appropriate experience and a good understanding of business and consumer matters;
- Good judgment in the administration of professional engagements; and
- A high standard of business ethics and professionalism.

1.125 If an applicant satisfies these two sets of tests, a licence may be issued. The licence may be subject to the condition that the trustee continues to meet the requirements and qualifications of this Directive at all times; and subject to any other conditions that the Superintendent considers appropriate.<sup>216</sup> The licence may also be limited to corporate bankruptcies and corporate proposals, or to consumer bankruptcies and consumer proposals. Other limitations may also be placed on the licence as considered appropriate by the Superintendent, taking into account the Board of Examination's evaluation and the professional environment in which the applicant will operate.<sup>217</sup> Only a trustee holding an unlimited licence is authorised to administer bankruptcies that are neither consumer nor corporate in nature.<sup>218</sup>

1.126 Parallel provisions apply for applications from corporate persons for a licence to act as a trustee.<sup>219</sup> It should be noted that, except in extraordinary circumstances, a corporate trustee must operate through an individual trustee.<sup>220</sup> Therefore for each engagement, a corporate trustee must designate an individual trustee to assume responsibility for the administration of that engagement.<sup>221</sup>

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<sup>212</sup> Section 8 of the *Trustee Licensing Directive*.

<sup>213</sup> Section 9 of the *Trustee Licensing Directive*.

<sup>214</sup> Section 10 of the *Trustee Licensing Directive*.

<sup>215</sup> See sections 11 and 12 of the *Trustee Licensing Directive*.

<sup>216</sup> Section 14 of the *Trustee Licensing Directive*.

<sup>217</sup> Section 15 of the *Trustee Licensing Directive*.

<sup>218</sup> Section 17 of the *Trustee Licensing Directive*. A "consumer bankruptcy" is one in which an individual has, directly or indirectly, no business liabilities.

<sup>219</sup> Sections 18 to 26 of the *Trustee Licensing Directive*.

<sup>220</sup> Section 28 of the *Trustee Licensing Directive*.

<sup>221</sup> Section 30 of the *Trustee Licensing Directive*.



1.127 In addition to the licensing conditions, conditions to practice are also prescribed under the *Trustee Licensing Directive*. In order to perform professional engagements as defined above, the trustee must:<sup>222</sup>

- Be solvent at all times;
- Have financial resources sufficient to warrant confidence in the ability to administer properly professional engagements;
- Have adequate facilities to perform his or her professional engagements; and
- Have adequate professional liability insurance and adequate employee dishonesty insurance, a bond or other suitable financial arrangements.

In addition, the *Bankruptcy and Insolvency Act* itself provides that a trustee shall comply with the prescribed Code of Ethics.<sup>223</sup>

1.128 An individual trustee may not act as a trustee if that trustee practices one of a number of specified incompatible occupations, including a collection agent, a bailiff, a trade association representative, an employee of the OSB, or a lawyer.<sup>224</sup> In addition, a trustee may not practice any other occupation, business or profession that may be in conflict with the duties and responsibilities of a trustee. The *Bankruptcy and Insolvency Act* itself provides further rules relating to disqualification on the grounds of conflict of interest, such as where the trustee is (or was within the last two years) a director or officer of the debtor; an employer or employee of the debtor' related to the debtor or any director or officer of the debtor; the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the debtor.<sup>225</sup> Other legislative provisions provide for further prohibitions from acting in other situations where a conflict of interests might arise.<sup>226</sup>

1.129 A failure to comply with any provision of the *Trustee Licensing Directive* is an offence under the *Bankruptcy and Insolvency Act*, and may, among other sanctions, result in cancellation or suspension of a licence as well as application of a disciplinary process and conservatory measures, including a direction to the official receiver not to appoint the trustee to any new estates.<sup>227</sup>

1.130 A licence may be suspended or cancelled by the OSB if the trustee has been found guilty of an indictable offence that is of a character that would impair the trustee's capacity to perform his or her fiduciary duties; or if the trustee has failed to comply with any of the conditions or limitations to which the licence is subject.<sup>228</sup>

### **(3) Conclusions and Recommendations**

1.131 The above paragraphs seek to provide a picture of the regulatory structures for insolvency practitioners in comparable legal systems, particularly in relation to the supervision of those practitioners responsible for administering part repayment arrangements similar to the Debt Settlement Arrangement procedure being proposed by the Commission.

1.132 Having examined the position in other countries, the Commission draws certain conclusions from reviews of these regulatory systems, particularly that operating in England and Wales. First, the approach of the regulation of IPs in England and Wales, which is largely based on the self-regulation of members of Recognised Professional Bodies, has received considerable criticism. Both the structure of regulation and certain undesirable practices of IPs which the regulatory system permits have been

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<sup>222</sup> Section 27 of the *Trustee Licensing Directive*.

<sup>223</sup> Paragraph 13.5 of the *Bankruptcy and Insolvency Act*.

<sup>224</sup> Sections 33 and 34 of the *Trustee Licensing Directive*.

<sup>225</sup> Paragraph 13.3(1) of the *Bankruptcy and Insolvency Act*.

<sup>226</sup> Paragraphs 13.3(1)(B), 13.3(2), 13.4(1) of the *Bankruptcy and Insolvency Act*.

<sup>227</sup> Section 63 of the *Trustee Licensing Directive*.

<sup>228</sup> Paragraph 13.2(5) of the *Bankruptcy and Insolvency Act*.

criticised.<sup>229</sup> Reforms have been proposed to the regulatory system both by academic commentators<sup>230</sup> and by the Office of Fair Trading.<sup>231</sup> These studies showed the system to be fragmented, with inconsistencies arising in relation to such matters as complaints handling and/or disciplinary processes, disciplinary sanctions and independent review facilities. It is notable that both the Office of Fair Trading and the study conducted by Professors Walters and Seneviratne recommend (albeit with varying degrees of certainty) the establishment of an independent complaints and redress body for the insolvency profession. Therefore Walters and Seneviratne conclude that there is a strong case for extending the jurisdiction of the Financial Ombudsman Service to all IPs involved in the provision of debt advice or debt resolution to personal debtors.<sup>232</sup> These authors also recommend that the insolvency profession and its regulators should consider whether the wider case for an insolvency ombudsman should be the subject of a full, independent review. The study further notes that very influential bodies and commentators have called for the establishment of an independent insolvency ombudsman in the past, such as the Cork Committee,<sup>233</sup> which noted that:

“[p]ublic confidence in the administration of insolvency matters would be considerably enhanced if machinery existed for investigation by an independent person of complaints against trustees, liquidators, receivers and administrators.”

Despite this recommendation of the Cork Committee, no such ombudsman was established. In 1998, a report of an Insolvency Regulation Working Party rejected the case for an insolvency ombudsman, primarily for the following reasons:

- It was questionable whether there was any need for a further tier in the existing complaints systems of the RPBs and of the Insolvency Service in its capacity both as a licensing body and a supervisory body.
- The costs of establishing and running an insolvency ombudsman scheme – which costs would be borne by IPs and creditors – were thought to be prohibitive.
- The nature of many complaints would be such that the IP as office holder would be inhibited in or prevented from concluding the administration of the insolvency proceeding to the detriment of creditors in terms of costs and delay of the final outcome.
- The establishment of an ombudsman could lead to an expectation gap in terms of the scope of the ombudsman’s powers to remedy perceived injustices among those adversely affected by an insolvency.
- There was thought to be an underlying difficulty with the concept of an ombudsman in that there is no client or customer relationship between an IP and potential complainants where the IP is acting as an office holder. The point here appears to be that an IP will often be faced with competing interests some of which may object to a particular outcome even though that outcome has been arrived at legitimately (i.e. in accordance with the law and professional standards).<sup>234</sup>

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<sup>229</sup> See e.g. Morgan *Causes of Early Failure in Individual Voluntary Arrangements* (Kingston Business School Occasional Paper No. 63, 2009) at 40 to 44, available at: <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/research/personaldocs/IVA%20Research%20-%20Occasional%20Paper.pdf>.

<sup>230</sup> Seneviratne and Walters *Complaints Handling by the Regulators of Insolvency Practitioners: A Comparative Study* (Report Prepared for the Insolvency Practices Council 2009), available at: <http://ssrn.com/abstract=1310791>.

<sup>231</sup> Office of Fair Trading *The Market for Corporate Insolvency Practitioners: A Market Study* (OFT1245 2010).

<sup>232</sup> Seneviratne and Walters *op cit.* at 65.

<sup>233</sup> *Insolvency Law and Practice Report on the Review Committee (the “Cork Report”)* (Cmnd 8558, 1982, HMSO).

<sup>234</sup> See Seneviratne and Walters *Complaints Handling by the Regulators of Insolvency Practitioners: A Comparative Study* (Report Prepared for the Insolvency Practices Council 2009) at 66, citing *Insolvency Practitioner Regulation – Ten Years On* (DTI Insolvency Regulation Working Party 1998) at 32-34.

Walters and Seneviratne noted that an insolvency ombudsman should not be established without detailed consideration first being given to the issue.<sup>235</sup> Such a system could be expensive, and insolvency proceedings by their nature lead to decisions that may leave some parties feeling aggrieved, thus raising the potential for vexatious or unmeritorious complaints. The authors also noted that concerns arise in relation to the creation of a new ombudsman jurisdiction at a time when there is already a wide range of ombudsman schemes across various professions, occupations and industries. The authors nonetheless stated that due to the prevailing economic conditions and the increasing attention being focussed on insolvency matters, the introduction of an ombudsman may be worthwhile from the point of view of ensuring public confidence in the insolvency system.

1.133 Similarly, the Office of Fair Trading recommended, in the context of corporate insolvencies, the creation of an independent complaints body for IPs.<sup>236</sup> This body could operate as a first tier body, taking complaints directly from creditors who are unsatisfied with an IP. Alternatively, it could operate as an appeal body after Recognised Professional Bodies have considered the complaint themselves. Whichever of these options is chosen, the OFT argued that the structure should meet the following objectives:

- Independence. The body should be wholly independent from the industry and regulators, perhaps with input from IPs limited to a technical advisory capacity. To minimise negative financial incentives, we suggest that the body be funded by the profession for each case referred, regardless of whether the body finds in favour of the IP or not.
- Consistency. At present there is a large amount of perceived inconsistency between RPBs and within RPBs. The independent complaints body should ensure that complaints and concerns are treated consistently, promoting trust in the system, and providing IPs with clear incentives to comply with rules and regulations.
- Deterrence. In addition to consistency, the complaints body should be able to sanction IPs in a manner that provides a clear deterrent. This may include fines, but may also include removal or suspension of their licence.
- Efficiency. The complaints handling or appeal body should enable speed and efficiency in the process. This would suggest a relatively limited ability to appeal decisions of the body, and providing the body with a broad discretion.
- Oversight. Complaints information can be a rich source of insight into the operation of the market. The OFT suggests that the complaints handling or appeal body should have a modest budget for analysing the causes of complaints, or the lack of them, for determining patterns within the complaint dataset, and providing advice to the IS and the RPBs on how well the regulatory objectives are being met.

The OFT also recommended that the regulatory body should be given the power to review fees, as the current position requiring such fees to be challenged in court proceedings is too expensive to be effectively used.

1.134 In addition to these recommendations, the OFT also proposed a range of regulatory objectives upon which the regulation of IPs should be based.<sup>237</sup> These are as follows:

- Maximising long-term returns to all creditors.
- Protecting vulnerable market participants, and
- Encouraging a competitive and independent IP profession.

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<sup>235</sup> Seneviratne and Walters *op cit.* at 66.

<sup>236</sup> Office of Fair Trading *The Market for Corporate Insolvency Practitioners: A Market Study* (OFT1245 2010) at 93ff.

<sup>237</sup> Office of Fair Trading *The Market for Corporate Insolvency Practitioners: A Market Study* (OFT1245 2010) at 96-97.

1.135 It should be noted however that the OFT also recommended that an improved regulatory regime should continue to be based on self-regulation by the Recognised Professional Bodies, with no direct regulation of IPs by the Insolvency Service. Instead the Insolvency Service's functions would lie solely in the oversight of the regulatory regimes adopted by the Recognised Professional Bodies.

1.136 The Commission has considered these recommendations in relation to the reform of the regulatory system in England and Wales, as well as the systems operating in Australia and Canada.

**(a) Licence Required to act as a Personal Insolvency Trustee**

1.137 Submissions received by the Commission in response to its Consultation Paper emphasised the crucial need to ensure that Personal Insolvency Trustees in the Commission's proposed Debt Settlement Arrangement procedure are independent, impartial and appropriately qualified. Submissions argued that these aims should be ensured through the establishment of a regulatory framework for such actors. The Commission accepts these submissions, and recommends that a licence should be required in order to operate as a Personal Insolvency Trustee in a Debt Settlement Arrangement. It should be an offence for an unlicensed individual to act in this role.

1.138 *The Commission recommends that a licence should be required in order to operate as a Personal Insolvency Trustee in a Debt Settlement Arrangement. The Commission recommends that an offence should be created where a person acts as Personal Insolvency Trustee without holding such a licence.*

1.139 A question arises as to the appropriate structure of the regulatory framework for Personal Insolvency Trustees. The Commission is conscious that proposals have been made for the regulation of liquidators in corporate insolvency,<sup>238</sup> and that it may be desirable to adopt a harmonised approach to the regulation of actors in all insolvency proceedings, both personal and corporate. The reform of corporate insolvency law however lies outside the scope of this Report, and is a matter more appropriately considered by the Company Law Review Group. The Commission therefore confines its comments to the regulation of Personal Insolvency Trustees in personal insolvency procedures, while having regard to the proposals for the regulation of liquidators as contained in the *General Scheme of the Companies Consolidation Bill*. While a universal regulatory structure for all insolvency practitioners therefore lies outside of the scope of the project, the Commission however accepts that unnecessary duplication of regulation should be avoided as much as is possible, and in this regard proposes that a system for the regulation of Personal Insolvency Trustees should encompass those appointed to act in bankruptcy proceedings as well as in the Debt Settlement Arrangement process. As noted above, this may be particularly necessary if the proposed reform of the bankruptcy system results in higher numbers of bankruptcies, requiring private trustees to administer estates due to the extra strain on the Official Assignee's resources. Therefore the Commission recommends that in order to protect the integrity of the bankruptcy system and to ensure public confidence is maintained, a regulatory system should also apply to trustees in bankruptcy proceedings, and that individuals should be required to obtain a licence in order to act in the capacity of trustee in bankruptcy proceedings. The licensing regime should be the same as that applicable to Personal Insolvency Trustees in Debt Settlement Arrangements, and licence holders should therefore be entitled to act as both Personal Insolvency Trustees in Debt Settlement Arrangements and trustees in bankruptcy proceedings. The Commission therefore considers that the same title should be used in both contexts, but bearing in mind that the licensing/ qualifications requirements to be imposed by the Debt Settlement Office may differentiate between the different functions.

1.140 *The Commission recommends that a licence should be required to act as a Personal Insolvency Trustee in bankruptcy proceedings. The Commission recommends that a single Personal Insolvency Trustee licence system should be established by the Debt Settlement Office, and that, subject to relevant qualifications criteria to be published by the Debt Settlement Office, licence holders may be eligible to act as Personal Insolvency Trustee in both the Debt Settlement Arrangement process and in bankruptcy proceedings.*

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<sup>238</sup> See paragraphs 1.70ff. above.

**(b) Regulatory body**

1.141 While submissions generally did not specify in further detail how these actors should be regulated, some submissions suggested that the proposed Debt Enforcement/Debt Settlement Office should be responsible for their licensing and supervision. This is a view that has also arisen during consultations with stakeholders held by the Commission during the preparation of this Report.

1.142 The Commission accepts this submission, and recommends that as part of its overall supervisory role of the proposed Debt Settlement Arrangement procedure, the Debt Settlement Office should assume responsibility for licensing and supervising Personal Insolvency Trustees (both for Debt Settlement Arrangement and bankruptcy purposes). The Commission has considered other possible approaches, such as the self-regulation of insolvency practitioners through their respective professional bodies, but considers that, in light of the criticisms of such a system of regulation in England and Wales, it may be more beneficial to establish an independent regulator, as is the case in Australia and Canada. A residual regulator would be necessary in any case to licence and supervise those individuals who are not members of a professional body and yet wish to apply to become Personal Insolvency Trustees, and so even to adopt an approach that calls for the regulation by professional bodies would require the establishment of a regulator. This approach of an entirely independent regulator would also remove the need to consider the controversial question of whether an independent complaints body or ombudsman should be established for the insolvency profession, as the Debt Settlement Office would be an independent forum for the resolution of disputes. It is also in the interest of the insolvent debtor to have in place an independent monitoring regime. The Commission also considered the possibility of providing for a system of regulation through the professional bodies, with the addition of an independent complaints body or ombudsman, or even with the possibility of bringing insolvency practitioners under the jurisdiction of the Financial Services Ombudsman. These options have been proposed by reviews of the system in England and Wales, as discussed above. The Commission however thinks that such an approach would be more appropriate in a country where there is an established system for the regulation of insolvency practitioners through professional bodies that has existed for years. Therefore where a new system is to be introduced, the Commission believes that it is appropriate to establish a single regulatory body responsible for licensing, supervisory oversight and complaints handling.

1.143 The Commission has also considered the possibility of assigning this role to the Office of the Official Assignee in Bankruptcy, the Irish office most closely resembling the Insolvency and Trustee Service Australia or the Canadian Office of the Superintendent of Bankruptcy. The Commission however takes the view that the Irish Official Assignee is quite a different organisation from these other bodies, from the point of view of the functions it performs and its general organisational structure and resources. The Official Assignee is concerned solely with the administration of bankruptcy estates, and does not carry out regulatory or policy-making functions such as those held by the Canadian and Australian offices. Therefore the Commission takes the view that the core function of the Office of the Official Assignee should not be diluted by adding a new regulatory role. The Commission also believes that the establishment of a new personal insolvency system in Ireland should involve the creation of new institutions to ensure the effective operation of the new system and a break from the old system. Therefore the Commission recommends that the appropriate body for the regulation of Personal Insolvency Trustees in Debt Settlement Arrangements and trustees in bankruptcy proceedings is the proposed Debt Settlement Office. Details on the structure of the proposed office are discussed below.<sup>239</sup>

1.144 *The Commission recommends that the proposed Debt Settlement Office should be responsible for licensing and supervising all Personal Insolvency Trustees and that a person who performs the functions of a Personal Insolvency Trustee must be in possession of a current Personal Insolvency Trustee licence issued by the Debt Settlement Office. The Commission also recommends that summary proceedings in relation to an offence may be brought and prosecuted by the Debt Settlement Office.*

**(c) Conditions required for a licence**

1.145 The Commission takes the view that while the assessment of whether or not an individual should be awarded a licence should be a matter for the Debt Settlement Office, certain basic criteria for

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<sup>239</sup> See paragraphs 4.19 to 4.30 below.

obtaining a licence should be specified in legislation (either primary or secondary legislation). The above discussion of the regulatory regimes operating in other countries illustrates that various criteria are established in legislation for applicants seeking to obtain a Personal Insolvency Trustee licence. These primarily include requirements as to:

- General fitness and good character;<sup>240</sup>
- The honesty of the applicant: whether the applicant has been convicted of any offence of a commercial nature, or involving fraud, dishonesty or violence;<sup>241</sup>
- Compliance with insolvency legislation;<sup>242</sup>
- Not engaging in any practice considered to be deceitful, oppressive or otherwise unfair or improper, which casts doubt upon his probity or competence for discharging duties of an insolvency practitioner;<sup>243</sup>
- Prior conduct in carrying out any insolvency practice: independence, skill, integrity and compliance with generally accepted professional standards; adequate systems of control; disclosure of conflicts of interests; previous cancellation of registration or other disciplinary sanctions;<sup>244</sup>
- Education and training: examinations, qualifications, work experience.<sup>245</sup>
- The skills and relevant knowledge of the applicant (regarding the relevant legislation, procedures and debt management techniques etc.) and his/her ability to carry out the role and to comply with all of the duties and obligations required of the role;<sup>246</sup>
- Obtaining insurance against liabilities that the applicant may incur working in this role; or providing security for the proper performance of his or her functions;<sup>247</sup>
- The solvency of the applicant and previous bankruptcies or insolvencies within a certain recent period;<sup>248</sup>
- Be in good standing, and not subject to any current disciplinary action by, any professional organisation of which the applicant is a member.<sup>249</sup>

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<sup>240</sup> See e.g. section 8 of the *Trustee Licensing Directive* (Can).

<sup>241</sup> See e.g. Section 9 of the *Trustee Licensing Directive* (Can), Regulation 6(a) of the *Insolvency Practitioners Regulations 2005* (UK), section 155A(2) of the *Bankruptcy Act 1966 (Cth)* (Aus).

<sup>242</sup> See e.g. Regulation 6(b) of the *Insolvency Practitioners Regulations 2005* (UK), section 155A(2) of the *Bankruptcy Act 1966 (Cth)* (Aus).

<sup>243</sup> See e.g. Regulation 6(c) of the *Insolvency Practitioners Regulations 2005* (UK), section 8 of the *Trustee Licensing Directive* (Can).

<sup>244</sup> See e.g. section 155A(2) of the *Bankruptcy Act 1966 (Cth)* (Aus); Regulations 6(d)-6(f) of the *Insolvency Practitioners Regulations 2005* (UK); section 10 of the *Trustee Licensing Directive* (Can).

<sup>245</sup> Regulations 7 and 8 of the *Insolvency Practitioners Regulations 2005* (UK); section 6 of the *Trustee Licensing Directive* (Can); Regulation 8.02 of the *Bankruptcy Regulations 1996* (Aus).

<sup>246</sup> See e.g. section 155A(2) of the *Bankruptcy Act 1966 (Cth)* and Regulation 8.02 of the *Bankruptcy Regulations 1996* (Aus); Regulation 6(e) of the *Insolvency Practitioners Regulations 2005* (UK); sections 11, 12 and 27 of the *Trustee Licensing Directive* (Can).

<sup>247</sup> See e.g. section 155A(2) of the *Bankruptcy Act 1966 (Cth)* (Aus); section 390(3) of the *Insolvency Act 1986* (UK).

<sup>248</sup> See e.g. section 155A(2) of the *Bankruptcy Act 1966 (Cth)* (Aus); section 6 of the *Trustee Licensing Directive* (Can).

<sup>249</sup> See e.g. section 6 of the *Trustee Licensing Directive* (Can).

The Commission considers that these conditions drawn from the regulatory systems of other countries provide examples of the types of important conditions that should be considered as requirements to be fulfilled by all applicants for a licence to act as a Personal Insolvency Trustee, whether in bankruptcy or within a Debt Settlement Arrangement.

1.146 The Commission however takes the view that the detailed conditions which must be satisfied by applicants lie outside of the scope of this Report, and should instead be established by the Debt Settlement Office in consultation with industry representatives. The Commission is also aware that professional bodies such as the Law Society of Ireland and the accountancy bodies have detailed requirements as to the conditions for membership of their organisations. Therefore these conditions may be very useful in drawing up conditions for obtaining a licence to act as a Personal Insolvency Trustee, whether in bankruptcy or within a Debt Settlement Arrangement.

1.147 The Commission in particular makes no recommendations regarding the appropriate educational qualifications that should be required of applicants for licences. The Commission however considers that primary legislation should provide for the establishment of educational requirements, with secondary legislation to specify the details of these requirements.

1.148 *The Commission recommends that legislation should provide for the establishment of conditions that must be satisfied by applicants for a licence to act as a Personal Insolvency Trustee. The Commission recommends that primary legislation should specify certain basic conditions and principles to be considered as part of the licensing application assessment, with detailed conditions to be specified in secondary legislation following consultation with the Debt Settlement Office (which shall publish a related Code of Practice) and industry representatives.*

1.149 *The Commission recommends that the conditions for obtaining a licence should include requirements relating to factors such as the following:*

- *The applicant's general fitness and good character;*
- *The honesty of the applicant: whether the applicant has been convicted of any offence of a commercial nature, or involving fraud, dishonesty or violence;*
- *The applicant's record of compliance with insolvency legislation;*
- *The applicant's record of not engaging in any practice considered to be deceitful, oppressive or otherwise unfair or improper, which casts doubt upon his probity or competence for discharging duties of an insolvency practitioner;*
- *The prior conduct of the applicant in carrying out any insolvency practice: the applicant's independence, skill, integrity and compliance with generally accepted professional standards; adequate systems of control; disclosure of conflicts of interests; previous cancellation of registration or other disciplinary sanctions;*
- *The applicant's education and training: examinations, qualifications, work experience.*
- *The skills and relevant knowledge of the applicant (regarding the relevant legislation, procedures and debt management techniques etc.) and his/her ability to carry out the role and to comply with all of the duties and obligations required of the role;*
- *The applicant's duty to obtain insurance against liabilities that the applicant may incur working in this role or to provide security for the proper performance of his or her functions;*
- *The solvency of the applicant and any previous bankruptcies or insolvencies within a certain recent period;*
- *If the applicant is a member of any professional body, the applicant's standing within that organisation, and any current disciplinary action by the organisation against the applicant.*

**(d) Substantive Obligations and Duties**

1.150 In addition to these detailed conditions for obtaining a licence, substantive conduct of business obligations should also be placed on licence holders in carrying out their duties. Many of the problems identified by reviews of the IVA system in England and Wales are based on poor practices by IPs in the

conduct of their businesses rather than on any failings of a kind that should be addressed through the initial licensing process.<sup>250</sup> Such poor practices include the failure by IPs to advise debtors adequately in advance of entering into an IVA, particularly by failing to hold a face-to-face meeting with the debtor client.<sup>251</sup> This particular failing occurred despite binding guidelines obliging IPs to hold such a meeting in many cases, with the conclusion that these rules were simply being ignored by IPs. Other poor practices identified include the misleading of clients by IPs as to their ability under law to ask creditors for a variation of the terms of the IVA where the client's circumstances change. A further problem that has raised concerns in England and Wales is that of making unrealistic assessments of a debtor's ability to make repayments, leading debtors to enter unsustainable IVAs. While this problem primarily results from the abuse of a strong collective bargaining position by creditors, the intermediaries involved should engage in best practice to make accurate assessments of the debtor's financial affairs and so help reach sustainable arrangements. A final example of dubious conduct of and in other countries is the aggressive marketing tactics employed by some practitioners.<sup>252</sup>

1.151 All of these poor practices should be avoided through the establishment of ongoing conduct of business standards applicable to licence holders throughout the term of their licences, which are adequately monitored and enforced by the Debt Settlement Office. Therefore the Commission believes that a rigorous and well-enforced code of practice is an essential element to the effective operation of the proposed new Debt Settlement Arrangement procedure.

1.152 The Commission considers that the detail of the substantive obligations and standards that should be imposed on licence holders will be set out in Codes of Practice to be developed by the Debt Settlement Office. This should be done in consultation with industry and professional bodies.

1.153 The kinds of obligations imposed in the other countries studied again could serve as models. An examination of the regulatory regime in England and Wales, Australia and Canada illustrate that such substantive obligations are contained in legal instruments of varying forms.

1.154 In England and Wales, certain obligations are placed on IPs directly by the *Insolvency Act 1986* and accompanying legislation such as the *Insolvency Practitioners Regulations 2005*. More detailed standards of conduct are however contained in the binding Statements of Insolvency Practice (SIPs), as issued by the Joint Insolvency Committee.<sup>253</sup> These SIPs are adopted by each of the IP Recognised Professional Bodies as part of their regulatory rules for their members, and are also imposed by the relevant Secretary of State on those IPs he/she authorises directly. A failure to comply with a SIP may therefore result in disciplinary action being taken against an offending IP. A considerable body of such SIPs has been built, covering a very wide range of activities of IPs. SIPs issued on topics of relevance to personal insolvency law include the following:

- Reporting and providing information on the IP's functions to committees in formal insolvencies (SIP No. 15, Version 3)
- Records of meetings in formal insolvency proceedings (SIP No. 12)
- Handling of Funds in Formal Insolvency Appointments (SIP No. 11, Version 2)
- Remuneration of insolvency office holders (SIP No. 9, Version 5)
- Preparation of insolvency office holders receipts and payments accounts (SIP No. 7)

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<sup>250</sup> See Morgan *Causes of Early Failure in Individual Voluntary Arrangements* (Kingston Business School Occasional Paper No. 63, 2009) at 40, available at: <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/research/personaldocs/IVA%20Research%20-%20Occasional%20Paper.pdf>.

<sup>251</sup> *Ibid* at 40-41.

<sup>252</sup> Ramsay "Market Imperatives, Professional Discretion and the Role of Intermediaries in Consumer Bankruptcy: A Comparative Study of the Canadian Trustee in Bankruptcy" 74 *American Bankruptcy Law Journal* (2000) 399; 423-426.

<sup>253</sup> See paragraph 1.87 above.



- Disqualification of directors (SIP No. 4)
- Voluntary arrangements (i.e. best practice standards to be applied in conducting Individual Voluntary Arrangements and Company Voluntary Arrangements) (SIP No. 3, Version 4)

It can be seen that these SIPs cover a very wide range of aspects of the work of insolvency practitioners throughout various statutory insolvency procedures.

1.155 In Australia, the standards of business conduct with which bankruptcy trustees and administrators of debt agreements must comply are principally specified in both primary and secondary legislation. In particular, Schedule 4A of the *Bankruptcy Regulations 1996* contains detailed duties of bankruptcy trustees in respect of a wide range of aspects of their work. While primary legislation states that an applicant for the position of administrator of a debt agreement must possess the ability to perform satisfactorily the duties of an administrator, a detailed list of duties with which an administrator must be capable of complying is specified in a legislative instrument issued by the Inspector-General in Bankruptcy.<sup>254</sup> These guidelines provide details regarding the duties that an applicant for a licence must demonstrate he or she is able to fulfil, and so operate to establish the standards expected of such actors. In addition, the Inspector-General in Bankruptcy also issues a series of documents providing guidance to regulated practitioners on the interpretation of the relevant law, and on how the Inspector-General and the Insolvency and Trustee Service Australia will apply the law. These include Inspector-General Practice Statements, which explain when and how the Inspector-General will exercise specific powers under the *Bankruptcy Act 1966*, and describe the principles underlying the Inspector-General's approach to regulation and its expectations of practitioners. Such practice statements have been issued on topics such as:

- Regulation of trustee and debt agreement administrators (IGPS2, 2007)
- Funding for trustees (IGPS5, 2006)
- Annual estate returns (IGPS7, 2010)
- Complaint handling process for complaints against bankruptcy trustees and debt agreement administrators (IGPS11, 2008)
- Referral of offences under the *Bankruptcy Act 1966* to the Inspector-General (IGPS14, 2010)

In addition, Inspector-General Practice Directions are issued to explain how the law should be interpreted in order to provide guidance and direction on specific insolvency practice. Such directions have been issued in relation to topics such as:

- Proper performance of duties of a trustee (IGPD14, 2010)
- Collections of realisations and interest charges (IGPD2, 2007)
- Trustee remuneration practices (IGPD6.1, 2010)
- Standards for trustees and controlling trustees (IGPD9, 2004)
- Categorisation of secured creditors in a debt agreement (IGPD10, 2009)
- Guidelines relating to keeping proper accounts (IGPD 15.1, 2010).

The Insolvency and Trustee Service Australia (ITSA) also issue Debt Agreement Practice Statements (DAPS), which describe the way ITSA performs functions and exercises powers conferred on the Official Receiver under the *Bankruptcy Act 1966* and related legislation, including powers in relation to debt agreements. Such statements have been issued in relation to the following stages of the debt agreement procedure:

- When a debt agreement proposal is acceptable (DAPS2, 2008)
- Voting on initial proposals and proposals to vary and terminate (DAPS3 2009)

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<sup>254</sup> *Guidelines Relating to the Registration and Cancellation of a Registered Debt Agreement Administrator and Ineligibility of an Unregistered Debt Agreement Administrator* (Federal Register of Legislative Instruments F2007L01006).

- Proposal to vary (DAPS5 2008)
- Proposal to terminate (DAPS6 2008)
- Completion of a debt agreement (DAPS8 2008)

Therefore it can be seen that the conduct of business standards of trustees and administrators in Australia are established by a range of primary and secondary legislation, and guidance documents issued by the regulator. An array of detailed standards has been established in this manner.

1.156 In Canada, the standards required of trustees are primarily contained in directives and circulars issued by the Office of the Superintendent of Bankruptcy. Such documents have been issued in relation to subjects such as:

- Counselling in insolvency matters (Directive No. 1R3)
- Delegation of tasks (Directive No. 4R)
- Estate funds and banking (Directive No. 5R4)
- Assessment of an individual debtor (Directive No. 6R3)
- Inventory of estate assets (Directive No. 7)
- Surplus income (Directive No. 11R2 – 2010)
- Trustee licensing (Directive No. 13R2)
- Trustee consultation fees in bankruptcies and proposals (Directive No. 15)
- Information to be provided to creditors in commercial proposals (Directive No. 24)
- Advertising by trustees (Directive No. 29R2)
- Preparation of the Statement of Affairs (Directive No. 16R (pre-1992)).

These directives are quite detailed in nature, and serve to establish standards in most aspects of the work of trustees. In addition, the Office of the Superintendent of Bankruptcy Canada has issued a *Code of Ethics for Trustees in Bankruptcy*, which establishes a standard for services to be provided by licensed bankruptcy trustees. Among the matters covered by this code are:

- The information that trustees must provide to creditors;
- The treatment of funds entrusted to trustees;
- Conflicts of interest;
- The sale and purchase of the property of a business or individual who has filed for bankruptcy;
- Standards for advertising by trustees;
- Standards for maintaining the good reputation of the trustee community.

1.157 From the above discussion, it is apparent that very comprehensive and detailed standards of conduct have been established in relation to personal insolvency trustees/intermediaries/administrators in England and Wales, Australia and Canada. The Commission recommends that in order to ensure the integrity of the bankruptcy and Debt Settlement Arrangement procedures, similar standards must be introduced in Ireland in order to regulate the conduct of Personal Insolvency Trustees who are responsible for operating these procedures. A detailed drafting of such standards lies outside the scope of the Commission's Report, and is more appropriately a matter for consideration by the Debt Settlement Office in its capacity as regulator of Personal Insolvency Trustees, in consultation with industry representatives and professional bodies. The Commission therefore recommends that legislation should provide for the drafting of detailed and mandatory codes of conduct on a range of aspects of the work of Personal Insolvency Trustees. While the Commission does not think it appropriate to specify the areas which should be regulated by such codes, it considers that an examination of the regimes discussed above illustrates that issues such as the following have been identified as important and should be considered:

- Continuing professional development activities;<sup>255</sup>
- Maintenance in force of a bond/security for losses caused by the fraud or dishonesty of the Personal Insolvency Trustee;<sup>256</sup>
- General best practice standards in relation to the preparation and supervision of Debt Settlement Arrangements (including the provision of advice to debtors);<sup>257</sup>
- Duties to assess the debtor's income and the repayments that the debtor can reasonably make/is obliged to make towards his or her creditors, and to monitor the payment of contributions by the debtor to his/her creditors;<sup>258</sup>
- Making of annual returns relating to all cases worked on during a year;<sup>259</sup>
- Records to be maintained by Personal Insolvency Trustees;<sup>260</sup>
- A duty to act honestly and impartially;<sup>261</sup>
- A duty to notify creditors, a committee of inspection or the court (as appropriate) if it becomes apparent that a conflict of interests exists; and to take steps to avoid the conflict of interest;<sup>262</sup>
- A duty to respect any data protection and privacy legislation when dealing with information relating to an insolvency;<sup>263</sup>
- Details of the obligatory preliminary inquiries and actions that must be taken by the Personal Insolvency Trustee in proceedings;<sup>264</sup>
- Details of the approach to be taken by the Personal Insolvency Trustee in investigating matters affecting the proceedings;<sup>265</sup>
- Details of the approach to be taken by the Personal Insolvency Trustee in identifying, protecting, realising, or determining the ownership of, assts, and/or in obtaining advice about an interest or value, and disposing of property;<sup>266</sup>
- Standards regarding remuneration and costs;<sup>267</sup>

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<sup>255</sup> Regulation 9 of the *Insolvency Practitioners Regulations 2005* (UK);

<sup>256</sup> Section 390(3)(b) of the *Insolvency Act 1986*; Schedule 2 of the *Insolvency Practitioners Regulations 2005* (UK);

<sup>257</sup> See e.g. *Statement of Insolvency Practice 3: Voluntary arrangements (England and Wales)* (Version 4 Joint Insolvency Committee 2007) (UK); see also all Insolvency and Trustee Service Australia Debt Agreement Practice Statements.

<sup>258</sup> Sections 4.4 to 4.6 of Schedule 4A to the *Bankruptcy Regulations 1996* (Aus); *Directive No. 6R3, Assessment of An Individual Debtor* (Canadian Office of Superintendent of Bankruptcy 2010), *Directive No. 16R: Statement of Affairs* (OSB 1991) (Can); *Statement of Insolvency Practice 3: Voluntary arrangements (England and Wales)* (Version 4 Joint Insolvency Committee 2007) (UK).

<sup>259</sup> See e.g. Regulation 11 of the *Insolvency Practitioners Regulations 2005* (UK); *Inspector-General Practice Statement 7: Annual estate returns* (2010) (Aus).

<sup>260</sup> Regulations 13 to 17 and Schedule 3 of the *Insolvency Practitioners Regulations 2005* (UK);

<sup>261</sup> Section 2.2 of Schedule 4A to the *Bankruptcy Regulations 1996* (Aus);

<sup>262</sup> Section 2.3 of Schedule 4A to the *Bankruptcy Regulations 1996* (Aus);

<sup>263</sup> Section 2.4 of Schedule 4A to the *Bankruptcy Regulations 1996* (Aus);

<sup>264</sup> Section 2.6 of Schedule 4A to the *Bankruptcy Regulations 1996* (Aus);

<sup>265</sup> Section 2.7 of Schedule 4A to the *Bankruptcy Regulations 1996* (Aus);

<sup>266</sup> Sections 2.8 to 2.11, 4.1 to 4.3 of Schedule 4A to the *Bankruptcy Regulations 1996* (Aus);

- Standards and duties regarding the holding of meetings of creditors;<sup>268</sup>
- Standards and duties regarding the keeping of trustee accounts;<sup>269</sup>
- Duties to provide information to creditors;<sup>270</sup>
- Duties to report to creditors;<sup>271</sup>
- Duties regarding the distribution of dividends;<sup>272</sup>
- Advertising practices of Personal Insolvency Trustees;<sup>273</sup>
- Duties relating to the reporting of offences and/or sanctioning of debtors or directors etc;<sup>274</sup>

1.158 *The Commission recommends that the Debt Settlement Office, in its role as regulator of Personal Insolvency Trustees, must prepare and publish a Code of Practice on Standards for Personal Insolvency Trustees to provide guidance on the standards expected of a Personal Insolvency Trustee in carrying out his or her duties and functions. The Commission recommends that such codes of conduct should be drawn up in consultation with relevant industry representatives and professional bodies. The Commission recommends that the Code will cover: (a) continuing professional development activities; (b) maintenance in force of a bond or security for losses caused by the fraud or dishonesty of the Personal Insolvency Trustee; (c) general best practice standards in relation to the preparation and supervision of Debt Settlement Arrangements (including the provision of advice to debtors); (d) duties to assess the debtor's income and the repayments that the debtor can reasonably make or is obliged to make towards his or her creditors, and to monitor the payment of contributions by the debtor to his/her creditors; (e) making of annual returns relating to all cases worked on during a year; (f) records to be maintained by a Personal Insolvency Trustee; (g) a duty to act honestly and impartially; (h) a duty to notify creditors, the Debt Settlement Office or the court (as appropriate) if it becomes apparent that a conflict of interests exists, and to take steps to avoid the conflict of interest; (i) a duty to respect any data protection legislation and privacy rights when dealing with information relating to an insolvency; (j) details of the obligatory preliminary inquiries and actions that must be taken by the Personal Insolvency Trustee in any process or proceedings under this Bill; (k) details of the approach to be taken by the Personal Insolvency Trustee in investigating matters affecting any process or proceedings under this Bill; (l) details of the approach to be taken by the Personal Insolvency Trustee in identifying, protecting, realising, or determining the ownership of, assets, or in obtaining advice about an interest or value, and disposing of property; (m) standards regarding remuneration and costs; (n) standards and duties regarding the holding of meetings of creditors; (o) standards and duties regarding the keeping of Personal Insolvency Trustee*

<sup>267</sup> Sections 2.13 to 2.16 of Schedule 4A to the *Bankruptcy Regulations 1996*, *Inspector-General Practice Direction 6: Trustee remuneration practices* (2010) (Aus); *Statement of Insolvency Practice 9(v.5) (England and Wales): Remuneration of Office Holders* (Joint Insolvency Committee 2007).

<sup>268</sup> Sections 2.19 to 2.23 of Schedule 4A to the *Bankruptcy Regulations 1996* (Aus); *Statement of Insolvency Practice 12: Records of Meetings in formal insolvency proceedings* (Joint Insolvency Committee 1998).

<sup>269</sup> Sections 2.24 to 2.26 of Schedule 4A to the *Bankruptcy Regulations 1996* (Aus); *Statement of Insolvency Practice 11: Handling of funds in formal insolvency appointments* (Version 2, Joint Insolvency Committee 2007); *Statement of Insolvency Practice 7: Preparation of insolvency holders receipts and payments accounts* (Joint Insolvency Committee 1998); *Directive No. 5R4: Estate funds and banking* (Office of Superintendent of Bankruptcy 2010) (Can).

<sup>270</sup> Section 2.18 of Schedule 4A to the *Bankruptcy Regulations 1996* (Aus); *Statement of Insolvency Practice 15* (Version 3, Joint Insolvency Committee 2005).

<sup>271</sup> Section 3.2 of Schedule 4A to the *Bankruptcy Regulations 1996* (Aus);

<sup>272</sup> Sections 3.6 to 3.9 of Schedule 4A to the *Bankruptcy Regulations 1996* (Aus);

<sup>273</sup> See e.g. Directive No. 29R2, *Advertising by Trustees* (Office of Superintendent of Bankruptcy, 2010).

<sup>274</sup> See e.g. *Statement of Insolvency Practice 4: Disqualification of Directors* (Joint Insolvency Committee 1998) (UK); *Inspector General Practice Statement 14: Referral of offences against the Bankruptcy Act 1996 to the Inspector-General* (2010) (Aus)

*accounts; (p) duties to provide information to creditors; (q) duties to report to creditors; (r) duties regarding the distribution of dividends; (s) advertising practices of a Personal Insolvency Trustee; and (t) duties relating to the reporting of offences or the sanctioning of debtors or directors.*

**(e) Supervision, Enforcement and Complaints-Handling**

1.159 The Commission believes that it is important that if such a system for the regulation of Personal Insolvency Trustees is to be established, the system allows for the conduct of regulated practitioners to be effectively supervised, and for regulatory rules to be adequately enforced.

1.160 The Commission has examined the regulatory systems in the countries of Australia, Canada and England and Wales, giving particular emphasis to studies reviewing the effectiveness of these systems. The Commission notes in particular that recommendations have recently been made for the introduction of a new system for the enforcement of standards and the handling of complaints in England and Wales.<sup>275</sup> In this regard both academic commentators and the Office of Fair Trading (OFT) recommend that an independent complaints and redress body should be established for the insolvency profession. The OFT recommends that such a structure should be based on the following objectives:

- Independence
- Consistency
- Deterrence
- Efficiency (involving little delay in handling complaints, and a limited ability to appeal decisions of the body)
- Oversight (i.e. analysis of statistical data relating to complaints)

The Commission accepts these principles as useful in designing the supervision and enforcement elements of the regulatory system. The Commission notes that the objectives of independence and consistency should be achieved by assigning the regulatory functions to the independent Debt Settlement Office. The Commission accepts that the objective of deterrence requires that the office should be empowered to sanction violators of the regulatory rules in a manner that provides a clear deterrent to misconduct. The OFT suggests that such sanctions could include fines, but could also take the form of the removal or suspension of licences. In relation to the goal of efficiency, the OFT recommended that the complaints handling body should use procedures designed to allow for speed and efficiency, with a limited ability to appeal decisions of the body. The body should also be given a broad discretion in order to facilitate efficiency. Regarding the objective of oversight, the OFT noted that analysis of complaints information can provide a rich source of insight into the operation of a market. The OFT therefore suggested that the complaints handling or appeal body should have a modest budget for analysing the causes of complaints, for determining patterns of complaints, and for assessing how well the regulatory objectives are being met.

1.161 The Commission supports these objectives and thinks that they may be usefully applied in designing the supervisory and enforcement elements of the system for the regulation of Personal Insolvency Trustees. The Commission recommends that the Debt Settlement Office should be given powers to monitor the conduct of regulated actors and to investigate any complaints or suspected violations of legislation, codes of practice or other regulatory rules. The monitoring of regulated actors could take place through a combination of the filing of annual reports to the Debt Settlement Office by these actors, and on-site inspections of the working practices of such actors by the Debt Settlement Office. Legislation should specify procedures for the conduct of such inspections. Secondly, the Debt Settlement Office should be empowered to receive complaints from interested parties in relation to the conduct of a Personal Insolvency Trustee.

1.162 The Commission recommends that legislation should provide the Debt Settlement Office with powers of investigation in order to examine complaints or suspected cases of misconduct, including powers to compel a Personal Insolvency Trustee to provide books of account or records.

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<sup>275</sup> See paragraphs 1.114 to 1.119 above.

1.163 Sufficient powers of sanction should be given to the Debt Settlement Office to allow both for the deterrence of misconduct and to provide redress to those parties affected by such misconduct. A major criticism of the complaints-handling systems of the Recognised Professional Bodies and the Insolvency Service in England and Wales is that they are centred on the discipline of IPs, rather than on providing redress to parties adversely affected by the misconduct of an IP.<sup>276</sup> Therefore the sanctions available to the office should include the power to make monetary awards to injured parties, in much the same manner as the Financial Services Ombudsman, for example.<sup>277</sup> In addition, the Debt Settlement Office should be empowered to impose fines or restrictions on a licensed Personal Insolvency Trustee and ultimately should hold the power to cancel the licence of a Personal Insolvency Trustee where a serious case of misconduct has taken place. The Commission considers that it may also be worthwhile for legislation to empower the office to refer cases to professional bodies where issues arise as to a professional's fitness to continue as a member of the relevant body.

1.164 Regarding the last regulatory principle proposed by the OFT, oversight, the Commission recommends that the Debt Settlement Office should produce an annual report, part of which should include a statistical analysis of the complaints received and cases investigated during each year.

1.165 *The Commission recommends that the Debt Settlement Office should be given powers to monitor the conduct of regulated Personal Insolvency Trustees and to investigate any complaints or suspected violations of legislation, codes of practice or other regulatory rules. The Commission recommends that the powers should be to: (a) issue licences to suitably qualified persons to carry out the functions of Personal Insolvency Trustee, (b) receive and review annual reports from licensed Personal Insolvency Trustees, (c) enter and inspect any places where a Personal Insolvency Trustee conducts his or her business as licensed by the Debt Settlement Office, (d) investigate any complaints or suspected violation of this Act, Regulations made under the Act or codes of practice issued under it, and (e) develop and publish Codes of Practice in accordance with this Act to provide guidance on the requirements of the functions of Personal Insolvency Trustee.*

1.166 *The Commission recommends that legislation should provide the Debt Settlement Office with powers of investigation in order to examine complaints or suspected cases of misconduct, including powers, among others, to compel a regulated Personal Insolvency Trustee to provide books of account or records.*

1.167 *The Commission recommends that the Debt Settlement Office should be empowered with significant sanctions, including the power to: (a) impose restrictions or conditions on the licence of a Personal Insolvency Trustee; (b) in cases of serious breaches, revoke the licence of a Personal Insolvency Trustee; (c) without prejudice to paragraphs (a) and (b), refer a breach to a professional body, if any, of a Personal Insolvency Trustee where the breach raises issues as to the Personal Insolvency Trustee's continued fitness to be a member of such body; (d) impose a financial sanction by way of penalty on a Personal Insolvency Trustee, (e) order a Personal Insolvency Trustee to pay monetary compensation to any individual who has suffered financial loss arising from any such breach..*

1.168 *The Commission recommends that the Debt Settlement Office should produce an annual report, part of which should include a statistical analysis of the complaints received and cases investigated during each year.*

## **D Debt Settlement Office**

1.169 The Commission proposes that as the debt settlement system is to be administrative in nature and operate outside of the judicial process, it should largely be overseen by a non-judicial body. The

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<sup>276</sup> See paragraphs 1.113 to 1.121 above and Walters and Seneviratne *Complaints Handling in the Insolvency Practitioner Profession* (A Report Prepared for the Insolvency Practices Council 2008) at 51FF. Available at: <http://ssrn.com/abstract=1094757>.

<sup>277</sup> See section 57C1 of the *Central Bank Act 1941* and (LRC CP 56-2009) at paragraphs 4.131 to 4.134.

Commission's Consultation Paper suggested that this role could be assigned to the Commission's proposed Debt Enforcement Office,<sup>278</sup> and that it would consist of the following functions:

- Exercising the power to impose a settlement in cases where creditors unreasonably refuse to accept a debtor's proposal of settlement.
- Exercising the power to stay enforcement proceedings when an application for debt settlement is made and throughout the duration of the debt settlement plan.
- Registering and maintaining records of all debt settlements and enforcement proceedings.

1.170 Following a consideration of the submissions received in response to the Commission's provisional recommendations, and the views received through further consultation exercises held by the Commission in advance of the preparation of this Report, the Commission's final recommendations take a somewhat different approach to the design of the debt settlement system. Most notably, the Commission recommends that the functions and powers of the supervisory body should be different to those envisaged in the Consultation Paper.

1.171 The Commission recommends that the debt settlement system should be operated by a combination of public sector and private sector actors. A Debt Settlement Office should be responsible for supervising the debt settlement system, but this role should be limited and should not involve the administration of each individual Debt Settlement Arrangement. Therefore private sector trustees should be allocated responsibility for the management of individual arrangements, with the role of the Debt Settlement Office being concerned with setting standards through Codes of Practice, supervising the trustees and preparing guidelines for the operation of the system. Although the reasons advanced above suggest that the system should involve as little court involvement as possible, the Commission nonetheless believes that some court oversight may be necessary in order to ensure the integrity of the system and to vindicate the rights of the parties involved.

#### **(1) Structure**

1.172 The Commission recommends that the proposed Debt Settlement Office should take the form of a discrete unit as part of the same body as the Debt Enforcement Office. The Commission has considered the option of building the new administrative structures required for the debt settlement system by expanding existing bodies, for example the Office of the Official Assignee or offices of Sheriffs. The Commission however concludes that such an approach would not be appropriate. The functions to be performed by the proposed Debt Settlement Office are new in nature, and are quite different from those carried out by existing bodies, such as Sheriffs or the Office of the Official Assignee. The debt settlement system proposed by the Commission is a novel development for Irish law, and a significant departure from existing practices. The Commission therefore thinks it appropriate that a new body should be established to supervise and ensure the effective operation of the new system. The Commission also considers that its proposed reforms of personal insolvency laws should be viewed in conjunction with its recommendation for the introduction of a more balanced and effective system for the enforcement of judgments. These two systems, of personal insolvency law and the enforcement of judgment debts, are inter-related and should be recognised as such, and therefore the Commission considers it appropriate that the proposed Debt Settlement Office and Debt Enforcement Office should be integrated into a single body. The Commission acknowledges however that certain debt settlement and debt enforcement functions may be incompatible with one another, and so the two offices should operate independently within the same overall body.

1.173 The Commission is conscious that the establishment of a new State body may raise concerns regarding the expenditure of public funds required. The Commission however considers that the cost savings arising from removing multiple enforcement proceedings from the courts should be recognised, and that these concerns can be alleviated further through limiting the size of the office and funding the

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<sup>278</sup> See (LRC CP 56-2009) at paragraphs 6.36 to 6.70.

office through industry levies. In addition, the costs of not establishing an appropriate body to regulate the system of Debt Settlement Arrangements may also be quite significant.<sup>279</sup>

1.174 The Commission therefore recommends that the proposed Debt Settlement Office should be small in size, with its functions limited to those outlined below.<sup>280</sup> The primary functions of the office should include the regulation of Personal Insolvency Trustees,<sup>281</sup> and the administration of the Debt Relief Order procedure described below.<sup>282</sup> Further functions of the office are outlined below.

1.175 The Commission envisages in particular that savings can be made by establishing the Debt Settlement Office in terms of an inexpensive alternative to processing enforcement proceedings through the courts at present. The Consultation Paper notes that the flaws of the current enforcement system mean that futile enforcement proceedings are often brought at present, including multiple enforcement proceedings against a single debtor who may be unable to satisfy even one of his or her obligations.<sup>283</sup> The Commission therefore suggests that savings could be achieved by removing such proceedings from the courts.

1.176 Finally, the Commission suggests that the option of funding the Debt Settlement Office from private sector contributions should be considered. The Commission notes that the problem of personal over-indebtedness is one that has arisen in the private sector, and that the costs should be borne so much as possible by the private actors responsible for, and in the best position to prevent, over-indebtedness.<sup>284</sup> In addition, the debt settlement system will be providing an efficient service to creditors in a mechanism for collecting and distributing part payments. Therefore as a matter of principle as well as for practical reasons, there is a strong case for the Debt Settlement Office to be funded at least partly from the private sector. This funding could take the form of a levy on industry, although problems arise in this regard due to the fact that creditors from several different industries would be involved in the Debt Settlement Arrangement procedure. Therefore a more appropriate approach may be for deductions to be made from the repayments made under a Debt Settlement Arrangement, with the amounts collected in this manner used to fund the costs of the Debt Settlement Office. The Commission recognises that the level of this income stream would depend upon the number of Debt Settlement Arrangements and the amounts being repaid. This may thus be a means of raising at least part of the funding required to run the office. Finally, the practitioners applying for licences to act as Personal Insolvency Trustees should be required to pay fees, which again could be used to provide part funding for the office. Assuming that a system of tendering is introduced, as discussed above, this could also provide some revenues to allay the costs of running the Office.<sup>285</sup> The Commission acknowledges that the precise funding mechanism chosen is primarily a policy matter but considers that it should, in principle (in keeping with similar non-judicial systems already in operation in other states) be as inexpensive and efficient as possible, and should certainly not involve anything approaching the expense of judicial bankruptcy.

1.177 *The Commission recommends that the proposed Debt Settlement Office should take the form of an independent unit within the Debt Enforcement Office.*

1.178 *The Commission recommends that the proposed Debt Settlement Office should be at least partly funded by the private sector, with the appropriate means of funding to be specified in legislation.*

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<sup>279</sup> See for example the criticisms of problems arising under the regulatory system in England and Wales above at paragraphs 1.113 to 1.121 above.

<sup>280</sup> See paragraph 1.179. below.

<sup>281</sup> See paragraphs 1.141 to 1.144 above.

<sup>282</sup> See paragraphs 2.44 to 2.115 below.

<sup>283</sup> See (LRC CP 56-2009) at paragraphs 3.319.

<sup>284</sup> See (LRC CP 56-2009) at paragraph 5.08 and paragraph 4.41.

<sup>285</sup> See paragraphs 1.66 to 1.68 above.



## **(2) Functions of the Debt Settlement Office**

1.179 The Commission recommends that the functions of the Debt Settlement Office should be more limited than some of the options proposed in the Consultation Paper for consideration.<sup>286</sup> Several of the functions to be given to the office - namely the administration of the Debt Relief Order procedure and the supervision of Personal Insolvency Trustees – are discussed elsewhere in this Report.<sup>287</sup> These functions are now outlined alongside the other functions to be held by the proposed Debt Settlement Office.

### **(a) Debt Settlement Arrangement Procedure**

1.180 In relation to the Debt Settlement Arrangement procedure (and the regulation of bankruptcy trustees), the Commission recommends that the Debt Settlement Office should carry out the following functions:

- Licensing and supervising Personal Insolvency Trustees, including the following functions:
  - Assessment of licensing applications and award of licenses.
  - Issuing codes of conduct relating to the standards to be expected of Personal Insolvency Trustees in performing their statutory functions.
  - Monitoring and inspection of licence-holders.
  - Dispute resolution: carrying out disciplinary proceedings against licence-holders and redress procedures for complainants.
  - Issuing sanctions against licence-holders found to have breached the regulatory standards.
  - Publishing an annual report, including a statistical analysis of complaints received and cases investigated.
  - Making a protective order to facilitate the negotiation of a Debt Settlement Arrangement;
  - Receiving an application for a Debt Settlement Arrangement;
  - Sending a copy of an accepted arrangement to the court for approval;
  - Registering Debt Settlement Arrangements in the Personal Insolvency Register;
  - Formally recognising the failure of a Debt Settlement Arrangement following a designated six-month arrears default;
- Receive complaints and resolve disputes arising in relation to the Debt Settlement Arrangement procedure.<sup>288</sup>

### **(b) Debt Relief Order Procedure**

1.181 Further to the proposals for the Debt Relief Order procedure described below, the Commission recommends that the Debt Settlement Office should be responsible for carrying out the following functions:

- Assessing and adjudicating upon applications for debtors for entry into the Debt Relief Order procedure, including requesting information from the debtor where the Office has reasonable grounds to believe such information is necessary.<sup>289</sup>
- Making a Debt Relief Order where the debtor's application satisfies the requirements for entry into the procedure.<sup>290</sup>

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<sup>286</sup> See (LRC CP 56-2009) at paragraphs 5.104 to 5.108.

<sup>287</sup> See paragraphs 2.01 to 2.115 below and 1.141 to 1.144 above.

<sup>288</sup> See paragraphs 1.137 to 1.168 for the Commission's recommendations for the regulation of Personal Insolvency Trustees, and the role of the Debt Settlement Office under the proposed scheme.

<sup>289</sup> See paragraphs 2.70 to 2.80 above.

- Monitoring the operation of active Debt Relief Order cases and receiving information disclosed by debtors relating to issues such as increases in debtors' assets and/or income.<sup>291</sup>
- Exercising the power to revoke or amend a Debt Relief Order where specified disqualifying factors are found to exist or where the debtor has not complied with the duties imposed under the procedure.<sup>292</sup>
- Receiving complaints from creditors relating to the participation of a debtor in the procedure, carrying out investigations further to such complaints, and suspending the debtor's discharge pending such investigation.<sup>293</sup>
- Applying to the court for directions in respect of any matter arising in relation to a Debt Relief Order or an application for such an order.<sup>294</sup>
- Maintenance of a database of Debt Relief Orders in the Personal Insolvency Register.<sup>295</sup>

**(c) General Functions**

1.182 In addition to functions, powers and responsibilities specific to each of the Debt Relief Order and Debt Settlement Arrangement procedures, the Commission recommends that the Debt Settlement Office should perform other functions common to both procedures. Thus the Debt Settlement Office, in conjunction with the Debt Enforcement Office, should be responsible for maintaining a register of all Debt Relief Orders and Debt Settlement Arrangements. As considered in the Consultation Paper and discussed further below, the Commission recommends that a register of judgments and enforcement proceedings should be established in Ireland.<sup>296</sup> Therefore a comprehensive register could be established and maintained by the Debt Settlement/Debt Enforcement Office, encompassing all Debt Relief Orders, Debt Settlement Arrangements and civil court judgments, including bankruptcy orders. The register of Debt Relief Orders, Debt Settlement Arrangements and bankruptcy orders could be contained in a single Personal Insolvency Register, as a subset of a comprehensive register also including all court judgments.

1.183 In addition, a further role of the Debt Settlement Office could be to issue guidance and information on the operation of both the Debt Relief Order and Debt Settlement Arrangement procedures. Such guidance could include the provision of information to consumers in plain language concerning the two processes. In addition, more detailed and technical guidance could be aimed at Personal Insolvency Trustees to provide clarification of the operation of the law, and to establish best practices.

**(3) Court Supervision**

1.184 A fundamental principle of the Commission's overall recommendations, and a primary rationale for the introduction of the proposed non-judicial debt settlement system, is that debt disputes should be resolved outside of court proceedings where possible.<sup>297</sup> In the area of personal insolvency law, non-judicial procedures are to be preferred to court proceedings due to the fact that non-legal issues may be more readily addressed in a non-judicial forum; few justiciable issues arise in debt disputes; the costs (both to the parties involved and to the State) of non-judicial procedures should be lower than those arising in court proceedings; and there should be a reduced stigma for debtors in non-judicial procedures.<sup>298</sup> It has been argued that the requirement of participation in court proceedings is a

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<sup>290</sup> See paragraphs 2.81 to 2.88 above.

<sup>291</sup> See paragraphs 2.89 to 2.93 above.

<sup>292</sup> See paragraph 2.99 above.

<sup>293</sup> See paragraph 2.100 above.

<sup>294</sup> See paragraph **Error! Reference source not found.** above.

<sup>295</sup> See paragraph 2.115 above.

<sup>296</sup> See (LRC CP 56-2009) at paragraphs 6.187 to 6.193 and paragraphs 4.76 to 4.81 below.

<sup>297</sup> See (LRC CP 56-2009) at paragraphs 2.117 to 2.120.

<sup>298</sup> (LRC CP 56-2009) at paragraphs 5.73 to 5.78.

significant deterrent to debtors engaging in resolving their debt difficulties under the current law.<sup>299</sup> Therefore, for this reason the Commission recommends that the Debt Settlement Arrangement procedure should be free from court involvement to the greatest extent possible. Submissions made to the Commission have however suggested that to ensure the integrity of the process, and to safeguard the rights of all of the parties involved, there should be a certain level of court supervision over the Debt Settlement Arrangement system. The following paragraphs consider the appropriate level of court supervision of the process.

1.185 The Individual Voluntary Arrangement in England and Wales is subject to court supervision at a number of stages in the process. First, where the debtor wishes to initiate the IVA process as a matter of urgency, he or she may obtain an interim order of court staying all enforcement proceedings against the debtor.<sup>300</sup> Next, the debtor's nominee must submit a report to the court stating whether the voluntary arrangement being proposed by the debtor has a reasonable prospect of being approved and implemented, and whether (and if so, when and where) a creditors' meeting should be held.<sup>301</sup> After the creditors' meeting has been concluded, the chairman of the meeting reports the result of the meeting to the court.<sup>302</sup> An application to the court may be made by the debtor, a creditor, the nominee, or the trustee of the estate of an undischarged bankrupt, to challenge the creditors' meeting on the grounds that the approved IVA unfairly prejudices the interests of a creditor of the debtor or that there has been some material irregularity at or in relation to such a meeting.<sup>303</sup> Furthermore, the debtor, any creditor or any other person dissatisfied by any act, omission or decision of the supervisor of the IVA may apply to court.<sup>304</sup> The supervisor of the IVA may also apply to the court for directions.<sup>305</sup>

1.186 In contrast, in Australia the Part IX (Consumer) Debt Agreement procedure is administrative in nature, and involves little court involvement.<sup>306</sup> A proposal for a debt agreement is processed administratively by the Official Receiver.<sup>307</sup> Under this procedure, some of the functions corresponding to those to be performed by the Personal Insolvency Trustee under the proposed Debt Settlement Arrangement procedure is in fact performed by the Official Receiver, who presents the debtor's proposal to creditors for consideration of whether it should be accepted.<sup>308</sup> The effect of the acceptance of a proposal for processing, and of the coming into force of a finalised agreement, is to prevent creditors from bringing bankruptcy proceedings against the debtor and from enforcing a remedy against the debtor's person or property in respect of a provable debt.<sup>309</sup> Therefore it is noteworthy that under the Australian procedure a court order is not required in order to prevent enforcement proceedings from being brought against the debtor. Throughout the process of an active Debt Agreement, it is the Official Receiver, and not the court, that holds an oversight role. For example, defaults in making repayments by the debtor are to be notified to the Official Receiver.<sup>310</sup> Similarly, the Official Receiver is responsible for processing applications for variations of a Debt Agreement.<sup>311</sup> The Official Receiver also provides the debtor with a

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<sup>299</sup> (LRC CP 56-2009) at paragraphs 3.328 to 3.331.

<sup>300</sup> See sections 252 to 255 of the *Insolvency Act 1986*.

<sup>301</sup> Section 256 and 256A of the *Insolvency Act 1986*.

<sup>302</sup> Section 259 of the *Insolvency Act 1986*.

<sup>303</sup> Section 262 of the *Insolvency Act 1986*.

<sup>304</sup> Section 263(3) of the *Insolvency Act 1986*.

<sup>305</sup> Section 263(4) of the *Insolvency Act 1986*.

<sup>306</sup> See Part IX of the *Bankruptcy Act 1966 (Cth.)* (Aus).

<sup>307</sup> Section 185E of the *Bankruptcy Act 1966 (Cth.)* (Aus).

<sup>308</sup> Section 185EA of the 1966 Act.

<sup>309</sup> Sections 185F and 185K of the 1966 Act.

<sup>310</sup> Sections 185LB and 185LC of the 1966 Act.

<sup>311</sup> Sections 185M to 185MD of the 1966 Act.

certificate indicating that the Debt Agreement has ended,<sup>312</sup> and the ending of the agreement has the effect of releasing the debtor from provable debts from which the debtor would have been released if the debtor had been discharged from bankruptcy.<sup>313</sup>

1.187 There remains a certain level of court supervision of the Debt Agreement procedure however. A debtor, creditor or the Official Receiver may apply to the Court for an order terminating a debt agreement where the debtor has failed to carry out a term of the agreement and it is in the creditors' interest to terminate the agreement; where carrying out the agreement would cause injustice or undue delay to the creditors or the debtor; or if the court is satisfied for any other reason that the agreement should be terminated.<sup>314</sup> The court may also make an order for sequestration on terminating a Debt Agreement. In addition to this termination procedure, a debtor, creditor or Official Receiver may also under certain circumstances apply to the court for an order declaring a debt agreement void.<sup>315</sup> An application for such an order may be made only if there is doubt on a specific ground that all or part of the Debt Agreement was not made in accordance with the procedure laid down in the legislation (in that it does not substantially comply with the legislation);<sup>316</sup> or that the statement of affairs lodged with the Debt Agreement was deficient because it omitted a material particular or because it was incorrect in a material particular.<sup>317</sup> In addition, the debtor, creditor or Official Receiver may apply to the Court for directions, with the court empowered to make an order directing the Official Receiver how to exercise its powers under the legislation.<sup>318</sup> Further court control over the process is provided by the power given to the court to order the administrator of a Debt Agreement to make good any loss caused by a breach of duty.<sup>319</sup> The court may also order the cancellation of the administrator's registration as a Debt Agreement Administrator if it sees fit, and make any other order that the Court considers just and equitable in the circumstances. The court also may, on the application of the debtor, a creditor or the Inspector-General in Bankruptcy, inquire into the conduct of the administrator, and may remove the administrator from office, or make such other order as it thinks proper.<sup>320</sup>

1.188 In Canada, the Consumer Proposal procedure is also administrative in nature, with limited court supervision. An administrator (a private sector actor) who agrees to assist a consumer debtor must investigate the debtor's financial affairs, provide the debtor with counselling, prepare a proposal in the prescribed form and file a copy of this proposal and a statement of the debtor's affairs with the Official Receiver.<sup>321</sup> The administrator must then, within 10 days of filing a proposal with the Official Receiver, prepare a report for the Official Receiver setting out the results of the investigation of the debtor's financial affairs, the administrator's opinion as to the whether the proposal is reasonable and fair to the debtor and creditors, and whether it is viable and likely to be completed by the debtor.<sup>322</sup> It is notable that this report is presented to the Official Receiver, unlike under the procedure in England and Wales where the nominee presents a similar report to the court. The Official Receiver may then direct the administrator to call a meeting of creditors.<sup>323</sup> Some court supervision then arises, as where a consumer proposal is

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<sup>312</sup> Section 185N(3) of the 1966 Act.

<sup>313</sup> Section 185NA of the 1966 Act.

<sup>314</sup> See section 185Q of the 1966 Act.

<sup>315</sup> Section 185T of the 1966 Act.

<sup>316</sup> See section 185U(2) of the 1966 Act.

<sup>317</sup> For the agreement to be declared void on this second ground of a deficient statement of affairs, the Court must also be satisfied that it is in the creditors' interests to declare the agreement or part of the agreement void: section 185U(3) of the 1966 Act.

<sup>318</sup> Section 185W of the 1966 Act.

<sup>319</sup> Section 185ZCA of the 1966 Act.

<sup>320</sup> Section 185ZCB of the 1966 Act.

<sup>321</sup> Section 66.13 of the *Bankruptcy and Insolvency Act*.

<sup>322</sup> Section 66.14 of the *Bankruptcy and Insolvency Act*.

<sup>323</sup> Section 66.15 of the *Bankruptcy and Insolvency Act*.

accepted or deemed accepted by creditors, the administrator must, if requested by the Official Receiver or any other interested party within fifteen days after the day of acceptance or deemed acceptance, forthwith apply to the court to have the consumer proposal reviewed.<sup>324</sup> If no party has requested the administrator to make such an application within the fifteen day period, the Consumer Proposal is deemed to be approved by the court.<sup>325</sup> If such an application is however made, a court hearing takes place at which the court hears the Official Receiver, the administrator, the consumer debtor and any objecting creditor or other interested party.<sup>326</sup> The court may refuse to approve the Consumer Proposal where it finds that the terms of the proposal are not reasonable or fair; where the debtor has committed certain specified offences; or where the debtor was not eligible to make a consumer proposal when the proposal was made.<sup>327</sup> In addition, the court must refuse to approve a proposal where it fails to comply with the minimum requirements that must be included in a proposal.<sup>328</sup> Therefore it can be seen that under the Canadian Consumer Proposal procedure, arrangements are subject to the approval, deemed or actual, of the court. The court possesses further supervisory powers in its capacity to order the annulment of a Consumer Proposal.<sup>329</sup> The grounds for annulment include: default in the performance of any provision in a consumer proposal; the ineligibility of the debtor to make a consumer proposal at the time of filing; the inability of the consumer proposal to continue without injustice or undue delay; or the fact that the approval of the court was obtained via fraud. A Consumer Proposal may also be annulled by the court at the request of the administrator or of any creditor whenever the consumer debtor is afterwards convicted of any offence under the legislation.<sup>330</sup> A Consumer Proposal is also deemed to be annulled where the debtor has missed three payments under the proposal (if payments are to be made monthly or more frequently), or where three months have passed since a default in respect of any payment (if payments are to be made less frequently than monthly).<sup>331</sup>

1.189 Therefore it can be seen that the procedures in similar legal systems to Ireland’s involve varying degrees of court supervision of the arrangement procedures. The Commission reiterates its view that debt disputes should be resolved outside of the judicial process where appropriate, but that this aim must be balanced with the need to ensure that the rights of all parties involved are adequately safeguarded. The following paragraphs therefore contain the Commission’s proposals for court supervision of the Debt Settlement Arrangement process.

1.190 First, the Commission takes the view that no initial court application, as is the case under the IVA procedure in England and Wales, should be required. The Commission is conscious that a requirement to participate in court proceedings may be a great deterrent to debtors from engaging with the process, and so no court involvement should be required at this initial stage of proceedings. Following the procedural steps outlined below,<sup>332</sup> the initial application to open a Debt Settlement Arrangement procedure (including the terms of the proposed arrangement and the debtor’s Standard Financial Statement) should be made to the Debt Settlement Office, along with a report of the Personal Insolvency Trustee advising the holding of a creditors’ meeting. If the proposal is accepted at the creditors’ meeting, the Personal Insolvency Trustee should communicate this decision to the Debt Settlement Office, who should then approve the Debt Settlement Arrangement. The agreed arrangement should not need to be subject to any court hearing, unless a creditor objects to the approval of the arrangement (on one of a

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<sup>324</sup> Section 66.22(1) of the *Bankruptcy and Insolvency Act*.  
<sup>325</sup> Section 66.22(2) of the *Bankruptcy and Insolvency Act*.  
<sup>326</sup> Section 66.24(1) of the *Bankruptcy and Insolvency Act*.  
<sup>327</sup> Section 66.24(2) of the *Bankruptcy and Insolvency Act*.  
<sup>328</sup> Section 66.24(3) of the *Bankruptcy and Insolvency Act*.  
<sup>329</sup> See section 66.3 of the *Bankruptcy and Insolvency Act*.  
<sup>330</sup> Section 66.3(3) of the *Bankruptcy and Insolvency Act*.  
<sup>331</sup> Section 66.31(1) of the *Bankruptcy and Insolvency Act*.  
<sup>332</sup> See paragraphs 1.202 to 1.228 below.

number of specified limited grounds, discussed below). The Commission recommends that the debtor's local Circuit Court would be the appropriate court to deal with any such objections.

1.191 The effect of registering a Debt Settlement Arrangement (or its approval by a court where there is an objection by a creditor) should be to prevent creditors from commencing legal proceedings (including bankruptcy proceedings) for the recovery of a debt, and to prevent enforcement officers from executing any court judgments against the debtor, without the permission of the court.

1.192 The grounds on which a creditor should be empowered to challenge in court an arrangement approved by the creditors' meeting and Debt Settlement Office should be limited to the following:

- The procedural requirements specified in the legislation were not followed.
- The existence of a material inaccuracy or omission in the debtor's statement of affairs/Standard Financial Statement, which is to the detriment of the creditor.
- The debtor did not satisfy the eligibility requirements to enter the Debt Settlement Arrangement procedure at the initiation of the procedure.<sup>333</sup>
- The arrangement unfairly prejudices the interests of a creditor.
- The debtor has committed an offence under the legislation (including acting fraudulently in order to procure a Debt Settlement Arrangement).<sup>334</sup>

1.193 The Commission recommends that in addition to a power to challenge the arrangement as accepted by the creditors' meeting *before* approval, a power should exist for creditors and Personal Insolvency Trustees to apply for the termination of an arrangement declared *after* it has been approved. The grounds for an order terminating the arrangement should be limited to the grounds stated above, including the invalidity of the arrangement, and the failure of the debtor to comply with the duties imposed under the legislation, and that the continuation of the arrangement would lead to injustice or undue delay.<sup>335</sup>

1.194 Termination through the ongoing default by the debtor could be addressed without a court hearing, with the Debt Settlement Office making a formal recognition of the failure of the agreement and recording such failure in the Personal Insolvency Register. The conditions under which an arrangement is deemed to have failed should be specified. Under the Australian Debt Agreement procedure, where a designated 6-month arrears default has occurred, the Official Receiver must declare in writing that the agreement is terminated and must record the declaration on the Australian National Personal Insolvency Index.<sup>336</sup> According to the Australian legislation, a "6-month arrears default" occurs at a particular time where:

- (a) both of the following apply:
  - (i) before the particular time, one or more payments in respect of provable debts became due and payable by the debtor under the debt agreement;
  - (ii) at no time during the 6 month period ending immediately before the test time were any obligations in respect of those payments discharged; or
- (b) both of the following apply:
  - (i) at the particular time, the obligations created by the debt agreement have not been discharged;
  - (ii) the last of those obligations should have been discharged at a time 6 months before the test time.

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<sup>333</sup> See paragraphs 1.328 to 1.334 below.

<sup>334</sup> See paragraphs 1.335 to 1.339 below.

<sup>335</sup> See e.g. section 66.3(1) of the *Bankruptcy and Insolvency Act* (Can.); s185Q of the *Bankruptcy Act 1966* (Cth.) (Aus).

<sup>336</sup> Section 185QA of the *Bankruptcy Act 1966* (Cth.) (Aus).

The Australian legislation also provides for a corresponding concept of a designated “3-month arrears default”, the occurrence of which must be notified to the creditors by the administrator of the agreement.<sup>337</sup>

1.195 The Commission believes that these concepts are useful tools to regulate the failure of Debt Settlement Arrangements. The Commission therefore recommends that the concept of a designated 6-month arrears default should be used to define the failure of a debt settlement arrangement. This would mean that after 6 months without payment under the arrangement, the arrangement would be deemed to have failed, and could be formally recognised as having failed by the Debt Settlement Office, which could then record the fact of failure in the relevant Personal Insolvency Register. Enforcement activities could then be instigated against the debtor once again, as the stay of enforcement accompanying the Debt Settlement Arrangement would be lifted.

1.196 *The Commission recommends that court supervision of the Debt Settlement Arrangement procedure should be limited to hearing objections by a creditor to a Debt Settlement Arrangement that has been accepted a creditors’ meeting and approved by the Debt Settlement Office.*

1.197 *The Commission recommends that the grounds on which a creditor may challenge before a court the Debt Settlement Arrangement accepted by the creditors’ meeting and the Debt Settlement Office should be limited to situations where:*

- *The procedural requirements specified in the legislation were not followed.*
- *A material inaccuracy or omission exists in the debtor’s statement of affairs/Standard Financial Statement, which causes detriment to the creditor.*
- *The debtor did not satisfy the eligibility requirements to enter the Debt Settlement Arrangement procedure at the initiation of the procedure.*
- *The arrangement unfairly prejudices the interests of a creditor.*
- *The debtor has committed an offence under the legislation.*

1.198 *The Commission recommends that at any time during the operation of a Debt Settlement Arrangement a creditor or the Personal Insolvency Trustee should be empowered to apply to court to have a Debt Settlement Arrangement terminated on the grounds that:*

- *The procedural requirements specified in the legislation were not followed.*
- *A material inaccuracy in the debtor’s statement of affairs/Standard Financial Statement, which causes detriment to the creditor.*
- *The debtor did not satisfy the eligibility requirements to enter the Debt Settlement Arrangement procedure at the initiation of the procedure.*
- *The debtor did not comply with the duties and obligations imposed under the Debt Settlement Arrangement process;*
- *The continuation of the arrangement would lead to injustice and/or undue delay.*
- *The debtor has committed an offence under the legislation.*
- *A three-month arrears default has occurred.*

1.199 *The Commission recommends that a three-month arrears default should be defined as occurring at a particular time (the “test time”) in relation to a Debt Settlement Arrangement if:*

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<sup>337</sup> According to section 185LB of the *Bankruptcy Act 1966 (Cth.)* (Aus), a 3-month arrears default by a debtor occurs at a particular time (the “test time”) in relation to a debt agreement if:

- (a) at the beginning of the 3 month period ending immediately before the test time, one or more payments in respect of provable debts became due and payable by the debtor under the debt agreement; and
- (b) throughout that 3 month period, the debtor was in arrears in respect of any or all of those payments.

- *at the beginning of the 3 month period ending immediately before the test time, one or more payments in respect of provable debts became due and payable by the debtor under the debt agreement; and*
- *throughout that 3 month period, the debtor was in arrears in respect of any or all of those payments.*

1.200 *The Commission recommends that following a designated 6-month arrears default, a Debt Settlement Arrangement should be deemed to have failed, and on the application of a creditor or the Personal Insolvency Trustee, the Debt Settlement Office should formally recognise the failure of the arrangement and record the failure in the Personal Insolvency Register.*

1.201 *The Commission recommends that a designated 6-month arrears default occurs where both of the following apply:*

- (i) before the particular time, one or more payments in respect of provable debts became due and payable by the debtor under the Debt Settlement Arrangement;*
- (ii) at no time during the 6 month period ending immediately before the test time were any obligations in respect of those payments discharged.*

## **E Format of Debt Settlement Arrangements: Procedural Rules**

1.202 Having outlined the structural and institutional arrangements relating to the Debt Settlement Arrangement procedure, the following two parts discuss the Commission's recommendations for the format of individual Debt Settlement Arrangements, including the procedural and substantial rules applying to the creation and implementation of such arrangements. First, the procedural steps involved in reaching a valid Debt Settlement Arrangement are outlined. Secondly, the substantive terms of such arrangements, to the extent to which they are to be regulated by law, are discussed in Part 7 below.

1.203 The Commission's proposals for the appropriate procedural steps for reaching and implementing a Debt Settlement Arrangement are primarily based on the submissions received by the Commission, an analysis of comparative approaches and a consideration of the current procedure for Schemes of Arrangement under the *Bankruptcy Act 1988*.<sup>338</sup> It should be noted that the procedural steps outlined here are limited to the situation where a debtor makes an application for a Debt Settlement Arrangement. Issues concerning the interaction of procedures for the recovery of debts and the enforcement of judgment debts with the Debt Settlement Arrangement procedure are considered below.<sup>339</sup>

### **(1) Advice**

1.204 The Commission recommends that the first stage of the procedure should consist of the practitioner who is to act as the Personal Insolvency Trustee ensuring that the debtor has been appropriately advised as to his or her options for dealing with his or her debt difficulties. If the debtor has already received advice from another party such as a Money Advice and Budgeting Service advisor, this should be sufficient to satisfy this requirement. If the debtor has not received such advice, the practitioner who is to act as the Personal Insolvency Trustee should provide such advice. Based on the findings of research evaluating the IVA process in England and Wales, the Commission recommends that the provision of advice should involve at least one face-to-face meeting between the licensed practitioner and the debtor.<sup>340</sup> Details regarding the advice to be provided to debtors should be specified through codes of conduct published by the Debt Settlement Office. The Personal Insolvency Trustee should be obliged to

<sup>338</sup> See sections 87 to 109 of the *Bankruptcy Act 1988* and (LRC CP 56-2009) at paragraphs 3.156 to 3.158.

<sup>339</sup> See (LRC CP 56-2009) at paragraphs 6.129 to 6.140 and paragraphs 4.93 to 4.100 below.

<sup>340</sup> See Morgan *Causes of Early Failure in Individual Voluntary Arrangements* (Kingston Business School Occasional Paper No. 63, 2009) at 40-41, available at: <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/research/personaldocs/IVA%20Research%20-%20Occasional%20Paper.pdf>.



lodge a statement to the effect that the debtor has been appropriately advised when making an application for an arrangement.

1.205 *The Commission recommends that a Personal Insolvency Trustee must, prior to a debtor initiating a Debt Settlement Arrangement process, advise the debtor as to (a) any alternative options available to the debtor, including a Debt Relief Order or bankruptcy, and the general effect of such options, and (b) the general effect of initiating, and entering into, a Debt Settlement Arrangement process.*

## **(2) Protective order: stay of enforcement activity**

1.206 Once the debtor has been appropriately advised and has decided to seek to enter into a Debt Settlement Arrangement, the next step should be for the debtor to obtain a protective order preventing legal proceedings or enforcement measures from being taken against him or her while he or she attempts to reach an arrangement. The Commission proposes that this protective order should be issued by the Debt Settlement Office, as a requirement for the debtor to make an application to court at this stage may serve to deter debtors from entering the process. In order to respect duly creditors' right of access to a court<sup>341</sup> and the protection of the judicial function under the Constitution of Ireland,<sup>342</sup> it may not be possible for an order made administratively in this manner to stay all proceedings against the debtor. Therefore the effect of the order could rather be to inform creditors of the debtor's attempts to negotiate an arrangement, require any creditors bringing proceedings to inform the court of the existence of the order, and then the court would stay proceedings while the negotiations take place, bearing in mind in particular that a licensed Personal Insolvency Trustee will have already prepared a Report stating that the Debt Settlement has a good chance of succeeding. As regards the enforcement activities to be undertaken by the Debt Enforcement Office, the making of an order by the Debt Settlement Office should be sufficient to prevent the enforcement officers of the office from taking any steps to enforce a judgment against the debtor. When applying for a protective order, the debtor should be required to present to the Debt Settlement Office draft terms of the proposed arrangement.

1.207 *The Commission recommends that a procedure should exist for a debtor seeking to enter into a Debt Settlement Arrangement to apply to the Debt Settlement Office for a protective order in order to prevent enforcement while attempts are made to reach an arrangement.*

1.208 *The Commission recommends that a debtor must inform his or her creditors of the making of a protective order. The Commission also recommends that any creditor on whom notice of the making of a protective order has been served must, if commencing proceedings against the debtor for the recovery of a debt, notify the court of the making of such an order, and the court shall, without prejudice to any other order it may deem appropriate, make an order staying the proceedings for such period it deems appropriate pending the outcome of attempts to reach a Debt Settlement Arrangement.*

1.209 *The Commission recommends that officers of the Debt Enforcement Office should refrain from taking any steps to enforce a judgment against a debtor who is the subject of a protective order.*

1.210 *The Commission recommends that the debtor should be required to provide the Debt Settlement Office with draft terms of the arrangement when applying for a protective order.*

## **(3) Debt Settlement Arrangement Application**

1.211 The next step should be the presentation of the application for a Debt Settlement Arrangement to the Debt Settlement Office. The debtor, or the Personal Insolvency Trustee acting on the debtor's behalf, should be required to provide the following as part of the application:

- A statement by the Personal Insolvency Trustee indicating his/her consent to act in the capacity of Intermediary;<sup>343</sup>
- A completed statement of the debtor's financial affairs (showing the debtor's position of insolvency), taking the form of the Standard Financial Statement;<sup>344</sup>

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<sup>341</sup> See (LRC CP 56-2009) at paragraphs 2.07 to 2.15.

<sup>342</sup> See (LRC CP 56-2009) at paragraphs 6.99 to 6.109.

<sup>343</sup> See e.g. section 185C(2D)(a) of the *Bankruptcy Act 1966 (Cth.)* (Aus).

- The terms of the proposal to be sent to creditors for consideration;
- A report of the Personal Insolvency Trustee stating whether, in the opinion of the Personal Insolvency Trustee:
  - the proposal of the debtor has a reasonable prospect of being accepted by creditors;<sup>345</sup>
  - the proposal of the debtor is viable and the debtor is reasonably likely to be able to comply with its terms;<sup>346</sup>
  - a meeting of the debtor's creditors should be convened to consider the proposal;<sup>347</sup>
- A statement to the effect that the debtor has been appropriately advised of his or her options for managing his or her debt difficulty;<sup>348</sup>
- A statement to the effect that the Personal Insolvency Trustee has reasonable grounds to believe that the information contained in the debtor's statement of affairs is complete and accurate;<sup>349</sup>
- A statement to the effect that the Personal Insolvency Trustee has reasonable grounds to believe that the debtor is eligible to enter the Debt Settlement Arrangement procedure.<sup>350</sup> The relevant conditions for eligibility to enter the procedure include the insolvency of the debtor and the debtor's previous participation in the procedure.<sup>351</sup>

1.212 *The Commission recommends that the Personal Insolvency Trustee should prepare the following documents in advance of the application for entry to the Debt Settlement Arrangement procedure: (a) a statement by the Personal Insolvency Trustee indicating his or her consent to act as Personal Insolvency Trustee; (b) a completed statement of the debtor's financial affairs, showing the debtor's position of insolvency, in the form of the Standard Financial Statement; (c) the terms of the proposal to be sent to creditors for consideration; (d) a report of the Personal Insolvency Trustee stating whether, in the opinion of the Personal Insolvency Trustee: (i) the proposal of the debtor has a reasonable prospect of being accepted by creditors, (ii) the proposal of the debtor is viable and that the debtor is reasonably likely to be able to comply with its terms, (iii) a meeting of the debtor's creditors will be held on a specific date to consider the proposal, and (iv) the proposal is reasonably fair to all parties involved, and is an acceptable alternative to bankruptcy or a Debt Relief Order; (e) a statement to the effect that the debtor has been appropriately advised by the Personal Insolvency Trustee of his or her options for managing his or her debt difficulty; (f) a statement to the effect that the Personal Insolvency Trustee has reasonable grounds to believe that the information contained in the debtor's statement of affairs is complete and accurate; and (g) a statement to the effect that the Personal Insolvency Trustee has reasonable grounds to believe that the debtor is eligible to enter the Debt Settlement Arrangement procedure.*

#### **(4) Creditors' Meeting**

1.213 The next stage should be the holding of a creditors' meeting, at which the proposed arrangement can be considered and approved by the debtor's creditors. The Commission does not think that this meeting should be required to be held in public, and considers that it should be possible for the

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<sup>344</sup> See (LRC 96-2010) at paragraphs 2.45 to 2.47.

<sup>345</sup> See e.g. section 256(1)(a) of the *Insolvency Act 1986* (UK);

<sup>346</sup> See e.g. section 256(1)(a) of the *Insolvency Act 1986* (UK); section 185C(2D)(c) of the *Bankruptcy Act 1966 (Cth.)* (Aus).

<sup>347</sup> See e.g. section 256(1)(aa) of the *Insolvency Act 1986* (UK);

<sup>348</sup> See e.g. section 185C(2D)(b) of the *Bankruptcy Act 1966 (Cth.)* (Aus); section 66.13(2)(b) of the *Bankruptcy and Insolvency Act* (Can.).

<sup>349</sup> See e.g. 185C(2D)(d) of the *Bankruptcy Act 1966 (Cth.)* (Aus).

<sup>350</sup> See e.g. 66.13(3) of the *Bankruptcy and Insolvency Act* (Can.).

<sup>351</sup> See paragraphs 1.334 and 1.353 below.

intermediary to obtain the votes of creditors through communication by electronic or telephonic means. Detailed procedural rules for the holding of a creditors' meeting and the voting process should be specified in secondary legislation.

1.214 *The Commission recommends that procedures should allow for the creditors' meeting to be held otherwise than in the form of a physical meeting, and that procedures should permit the communication of creditors' votes to the Personal Insolvency Trustee by electronic or telephonic means.*

1.215 *The Commission recommends that detailed procedural rules for the holding of a creditors' meeting and the voting process should be specified in secondary legislation.*

1.216 A question arises as to the percentage of creditors votes required to approve the proposed arrangement and any other resolutions on which creditors are required to vote throughout the course of an active Debt Settlement Arrangement. The Commission has received views of stakeholders on this matter throughout its consultation process, has also considered the voting arrangements under procedures similar to the Commission's proposed Debt Settlement Arrangement regime. The Commission also recalls that its Consultation Paper, following a 2007 Recommendation of the Council of Europe,<sup>352</sup> provisionally recommended that the law should provide a means of giving binding effect to debt settlements that have been accepted by a majority of creditors but to which some creditors have unreasonably objected.<sup>353</sup>

1.217 Under the procedure for Arrangements under Control of Court contained in sections 87 to 109 of the *Bankruptcy Act 1988*, the approval of 60% of creditors *in number and value* voting at a private sitting of the High Court is required for a proposed arrangement to be deemed to be accepted and to be approved by the High Court.<sup>354</sup>

1.218 Under the IVA procedure in England and Wales, for a resolution approving the proposal or any modification of it to pass, the approval of over 75% in value of creditors voting at the creditors' meeting is required.<sup>355</sup> In relation to any other resolution the requisite majority must be in excess of one half of those voting on the resolution.<sup>356</sup> A review of the IVA procedure in England and Wales noted that "[t]here is general agreement that IVA terms are currently overly dictated by creditor groups", and provided data to confirm this view.<sup>357</sup> This study noted that evidence suggests that some modifications enforced by creditors actively contribute to the failure of arrangements. It referred to a previous study that found that the IVA process was controlled by key creditors through a handful of agents.<sup>358</sup> In particular, creditors require modifications to IVA proposals based on minimum thresholds for debtor repayment and creditor dividend levels, known as "hurdle rates".<sup>359</sup> Therefore certain creditors engage in practices of refusing an

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<sup>352</sup> The Council of Europe recommends that Member States should introduce, as part of debt settlement/debt adjustment procedures, measures ensuring the means of creditors to hinder debt settlements unreasonably are effectively limited. The Council suggests that a competent non-judicial body could be given the power to impose a debt settlement where a non-cooperating creditor can provide no legitimate reason for its refusal to participate in the settlement: see *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* CM/Rec(2007)8 at paragraph 4(e), and *Explanatory Memorandum* at paragraph 35.

<sup>353</sup> (LRC CP 56-2009) at paragraphs 5.90 to 5.91.

<sup>354</sup> Section 91(1)(a) of the *Bankruptcy Act 1988*.

<sup>355</sup> Rule 5.23(1) of the *Insolvency Rules 1986*.

<sup>356</sup> Rule 5.23(2) of the *Insolvency Rules 1986*.

<sup>357</sup> Morgan *Causes of Early Failure in Individual Voluntary Arrangements* (Kingston Business School Occasional Paper No. 63, 2009) at 41, available at: <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/research/personaldocs/IVA%20Research%20-%20Occasional%20Paper.pdf>.

<sup>358</sup> *Ibid*, citing Green *Individual Voluntary Arrangements – Over-indebtedness and the Insolvency Regime* (Full Report, Bangor, University of Wales 2002).

<sup>359</sup> Morgan *op cit.* at 42.

IVA proposal or demanding modifications whenever the amount of repayments offered by a debtor does not meet the creditors' hurdle rates, irrespective of the resources of the individual debtor. One commentator has described this situation as a handful of creditors effectively taking over the statutory process and setting new rules by establishing high rates of repayment of over 40% as a pre-condition for acceptance of an IVA.<sup>360</sup> As a consequence of the existence of these hurdle rates, IVA supervisors are proposing IVAs involving very high levels of income contribution by debtors, and studies show, as would be expected, a correlation between high contribution levels and the failure of IVAs.<sup>361</sup> It should be noted in this regard that the IVA Protocol that came into effect in 2008 contain two provisions that may serve to alleviate these problems somewhat.<sup>362</sup> First, limitations are placed on the modifications that may be proposed by creditors during the IVA negotiation process. Secondly, creditors and IPs are to use an agreed common financial statement containing a calculation of reasonable contributions from income and allowable expenditures. Despite these measures, some creditors have stated that they reserve the right to continue to propose modifications in relation to hurdle rates.<sup>363</sup> In light of these problems of the abuse by creditors of their power and the consequent frustration of the statutory purpose of the IVA procedure, submissions to the Commission have suggested that the majority required for a plan to be accepted should be small, in order to reduce the likelihood of creditors being able to frustrate the process by refusing unreasonably to consent to a proposed arrangement.

1.219 In Australia, a Debt Agreement proposal is accepted if the Official Receiver (who is responsible for processing applications for Debt Agreements) writes to affected creditors asking each of them to indicate whether the proposal should be accepted, and a majority in value of the creditors who reply before the applicable deadline state that the proposal should be accepted.<sup>364</sup>

In Canada, if no objection to a Consumer Proposal is received by the Official Receiver with 45 days of its filing, the Proposal is deemed to have been accepted by creditors.<sup>365</sup> If 25% of creditors refuse the Proposal within this 45 day period, a creditors' meeting must be held. At this creditors' meeting a simple majority of creditors is then required to approve the Proposal.<sup>366</sup> Therefore there are two stages to the Canadian process, with the Proposal coming into effect without a meeting if 75% of creditors fail to object to it, while at the second stage of a creditors' meeting the Proposal will come into effect unless more than 50% of those creditors voting at the meeting refuse to accept it.

1.220 The Commission received submissions on the issue of whether a power should exist to give binding effects to debt settlement that have been accepted by a majority of creditors and to which some creditors have unreasonably objected. Some submissions were opposed to the idea of an arrangement being made binding on those creditors who do not agree to it. This signals an opposition to the concept of debt settlement entirely, and would appear to argue that the present system of wholly voluntary debt management plans should be retained. This view is insupportable in light of the Commission's provisional recommendations for the establishment of a debt settlement system and the submissions received in support of such recommendations. The Commission must therefore reject this view. Other submissions acknowledged this point, and the reality that the system will not work if all creditors hold an

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<sup>360</sup> Green "New Labour: More Debt – the Political Response" in Niemi, Ramsay and Whitford *Consumer Credit, Debt and Bankruptcy* (Hart Publishing 2009) 393 at 408.

<sup>361</sup> Morgan *op cit.* at 42.

<sup>362</sup> *IVA Protocol: Straightforward Consumer Individual Voluntary Arrangement (Insolvency Service, 2008)*, available at: <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/policychange/foum2007/plenarymeeting.htm>.

<sup>363</sup> Morgan *op cit.* at 42.

<sup>364</sup> See sections 185EA and 185 EC of the *Bankruptcy Act (Cth.)* (Aus).

<sup>365</sup> Sections 66.15(2)(b) and 66.18(1) of the BIA.

<sup>366</sup> Section 66.19(1) of the BIA. An "ordinary resolution" is required for the acceptance of the proposal. Section 115 states that: "Subject to this Act, all questions at meetings of creditors shall be decided by resolution carried by the majority of votes, and for that purpose the votes of a creditor shall be calculated by counting one vote for each dollar of every claim of the creditor that is not disallowed."

unlimited right of veto over arrangements. These submissions argued that the primary position should be that the approval of a majority of creditors should be required for an arrangement to come into force. A balance must be struck between preventing arrangements from being approved – and so excluding debtors from accessing the procedure – and respecting creditor rights and the consequent impact of such on the supply of credit. Various proposals were then made as regards the appropriate qualified majority of creditor votes that should be required for a proposed arrangement to be approved and come into effect. The level of the qualified majority required as proposed in the submissions ranged from 60% to 75% of creditors in value.

1.221 Having considered these submissions and the comparative analysis discussed above, the Commission takes the view that an appropriate means of balancing the need to ensure that the public interest goals of the proposed Debt Settlement Arrangement are not frustrated with the need to protect the autonomy and property rights of creditors is to provide that the qualified majority threshold for the approval of a Debt Settlement Arrangement is set at a relatively low level. If the threshold is set at a sufficiently low percentage, this should provide a means of ensuring that creditors cannot unreasonably refuse to cooperate in the reaching of an arrangement. Also, the rules relating to reasonable income allowances discussed below should also serve to reduce some of the problems of “hurdle rates” discussed above.<sup>367</sup> Therefore the Commission takes the view that no specific mechanism for imposing a Debt Settlement Arrangement where the requisite majority of creditors refuse to accept a proposed arrangement should exist. Instead, the Commission recommends that a majority of 60% in value of actual votes cast in the creditors’ meeting should be sufficient for the approval and coming into effect of a proposed Debt Settlement Arrangement. When accepted by this qualified majority of creditors, the arrangement should be binding on all creditors who were entitled to vote on the proposed arrangement in the creditors’ meeting, including those who voted against the proposed arrangement.<sup>368</sup> Submissions received by the Commission were unanimous that the majority should be measured by reference to the value of the debt owed to each creditor, and that the number of creditors supporting or rejecting a proposal should be irrelevant.

1.222 *The Commission recommends that where a proposed Debt Settlement Arrangement is approved at a creditors’ meeting by a majority of 60% in value of actual votes cast at the meeting, the proposed Debt Settlement Arrangement shall become a Debt Settlement Arrangement and shall, subject to other conditions recommended below, then be binding on every creditor who was entitled to vote at the creditors’ meeting. The Commission also recommends that where a Debt Settlement Arrangement is approved at a creditors’ meeting, the Personal Insolvency Trustee must forthwith send a copy of the Debt Settlement Arrangement to the Debt Settlement Office.*

#### **(5) Result of Creditors’ Meeting**

1.223 The result of the creditors’ meeting should be communicated to the Debt Settlement Office by the chairperson of the meeting.<sup>369</sup> If the creditors’ meeting rejects the proposed arrangement, the Debt Settlement Office should communicate this decision to all affected creditors and the protective order in place should cease to have effect.<sup>370</sup> If the requisite qualified majority of creditors approves the proposal, the Debt Settlement Office should forward the terms of the proposal to the debtor’s local Circuit Court for the court’s approval, which could involve the mere approval of the arrangement in court offices by the County Registrar. Appropriate rules for this procedure could be specified in Rules of Court, but the Commission wishes to emphasise that this should be a simple formality, unless a creditor objects to the approval of the arrangement by the Court within a specified period of time (say, 30 days) after the result of the creditors’ meeting is communicated to the Debt Settlement Office. Where a creditor objects to the approval of the arrangement on the grounds specified above, a court hearing should take place. Detailed procedural rules for the conduct of this hearing should be specified in Rules of Court, again with an emphasis on keeping the procedure as free from complication as possible. Once the approval of the

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<sup>367</sup> See paragraph 1.285 to 1.287 below.

<sup>368</sup> See e.g. section 260(2) of the *Insolvency Act 1986* (UK).

<sup>369</sup> See e.g. section 259(1) of the *Insolvency Act 1986* (UK).

<sup>370</sup> See paragraphs 1.207 to 1.209 above.

Court has been given to the arrangement, it should come into effect as a Debt Settlement Arrangement and should be registered by the Debt Settlement Office in the Personal Insolvency Register.

1.224 *The Commission recommends that where the creditors' meeting rejects the proposed arrangement, the Debt Settlement Arrangement procedure should come to an end and the protective order issued by the Debt Settlement Office should cease to have effect.*

1.225 *The Commission recommends that where a qualified majority of creditors accepts the proposed arrangement, the Debt Settlement Office should send a copy of the proposed arrangement to the debtor's local Circuit Court for approval. The Commission recommends that the court approval should not involve a court hearing unless a creditor objects to the approval of the arrangement within a specified period of 30 days from the communication of the result of the creditors' meeting to the Debt Settlement Office. The Commission recommends that where a creditor objects to the approval of the arrangement on specified limited grounds, a court hearing should take place, with procedural rules for this hearing to be specified in Rules of Court.*

1.226 *The Commission recommends that: (a) where the Circuit Court upholds the objection to the Debt Settlement Arrangement, the Debt Settlement Arrangement procedure shall be deemed to have come to an end, and any protective order issued by the Debt Settlement Office shall cease to have effect; but that (b) where the Circuit Court rejects the objection to the Debt Settlement Arrangement, the Debt Settlement Arrangement procedure shall be deemed to have effect from the making of the Court's order. The Commission also recommends that where a Debt Settlement Arrangement is deemed to have effect because of the court decision, it must be registered by the Debt Settlement Office in the Personal Insolvency Register which is to be maintained by the Debt Settlement Office.*

1.227 The effect of the entering into force of a Debt Settlement Arrangement and its registration in the Personal Insolvency Register should be to prevent any legal proceedings being brought against the debtor for the purposes of recovering a debt covered by the Arrangement, to prevent a bankruptcy petition from being brought against the debtor in respect of a debt covered by the Arrangement, and to prevent any enforcement officer of the Debt Enforcement Office from taking action against the debtor for the enforcement of a judgment debt. As the Debt Settlement Arrangement has been approved by a court, concerns regarding the right of access to a court and the constitutional protection of the judicial function do not arise in this context, in contrast with the protective order procedure discussed above.<sup>371</sup>

1.228 *The Commission recommends that the effect of the coming into force and the entering in the Personal Insolvency Register of a Debt Settlement Arrangement should be that:*

- *No creditor may present a bankruptcy petition against the debtor;*
- *No creditor may commence legal proceedings for the recovery of a debt covered by the arrangement;*
- *No action may be taken by an enforcement officer to enforce a judgment debt owed by the debtor.*

## **(6) Procedures for Varying, Termination and Failure of a Debt Settlement Arrangement**

1.229 The Commission believes that clear rules should be put in place to provide for the variance, termination and failure of a Debt Settlement Arrangement.

1.230 The Commission recommends that a procedure for varying a Debt Settlement Arrangement should take the form of another creditors' meeting, at which the 60% in value qualified majority of votes of those creditors voting should be required for the variation to the arrangement to take effect. Notice of the variation should be given to the Debt Settlement Office. Personal Insolvency Trustees should provide information to the debtor concerning his or her right to apply for a variation where his or her circumstances have changed.<sup>372</sup>

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<sup>371</sup> See paragraphs 1.207 to 1.209.

<sup>372</sup> A 2009 study of the IVA procedure in England and Wales found that some debtors surveyed were unaware that an IVA could be varied within the first year, with IPs leading them to believe that there was a statutory

1.231 *The Commission recommends that (a) a Debt Settlement Arrangement may be varied at a creditors' meeting by a majority of 60% in value of actual votes cast at the meeting and such variation shall, subject to the other relevant recommendations on this matter, then be binding on every creditor who was entitled to vote at the creditors' meeting; (b) where a Debt Settlement Arrangement is varied, the Personal Insolvency Trustee must forthwith send a copy of the variation of the Debt Settlement Arrangement to the Debt Settlement Office; (c) when the Debt Settlement Office receives the variation of a Debt Settlement Arrangement it must forthwith register the variation in the Personal Insolvency Register; and (d) a variation comes into effect in the same manner as the original Debt Settlement Arrangement, and that a creditor may challenge the variation in the same manner.*

1.232 *The Commission recommends that the Personal Insolvency Trustee should provide information to the debtor concerning his or her right to apply for a variation where his or her circumstances have changed.*

1.233 In addition to the termination of a Debt Settlement Arrangement by court order, and the failure of an arrangement after a 6-month arrears default, a procedure should exist whereby the arrangement can be terminated through the agreement of the debtor and a majority of creditors, in the same manner as a variation may be agreed.<sup>373</sup> Such a procedure could be used for example where the debtor is no longer able to comply with the arrangement and wishes to petition for bankruptcy or apply for a Debt Relief Order, if eligible.

1.234 *The Commission recommends that a Debt Settlement Arrangement may be terminated at a creditors' meeting by analogy with the procedure for variation of a Debt Settlement Agreement, and that a creditor may challenge the termination in the same manner.*

1.235 The Commission's recommendations for procedures for the termination and failure of an arrangement are discussed below.<sup>374</sup> A final issue arising relates to the consequences of the failure of a Debt Settlement Arrangement. A problem identified under the IVA procedure in England and Wales is that where an arrangement fails, neither the supervisor of the arrangement nor any of the debtor's creditors tend to bring bankruptcy proceedings, meaning that the insolvent debtor is left without debt relief and remains vulnerable to debt collection efforts from all of his or her creditors.<sup>375</sup> Most debtors surveyed in a 2009 study resorted to filing their own bankruptcy petitions once they had saved or borrowed the deposit that must be paid in order to present a petition. The 2009 study called for further research into why creditors are not bringing bankruptcy proceedings against debtors in these circumstances, suggesting that creditors appear to prefer to leave open the option of continuing other debt collection methods against the debtor. It also suggested that the desire not to bring bankruptcy proceedings in every case of a failed IVA may be a way to keep down the levels of debt write-off on creditors' balance sheets.

1.236 In Australia, under the procedures for the termination of a Debt Agreement or for the avoidance of an agreement by order of court, a creditor may include an application for a bankruptcy order in the application for termination or avoidance of the Debt Agreement.<sup>376</sup> The court may then make a bankruptcy order at the same time as making an order terminating or avoiding the Debt Agreement.<sup>377</sup> Therefore these procedures require a creditor petition for bankruptcy before the court will adjudicate the

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prohibition on variations within the first year of an IVA: see Morgan *Causes of Early Failure in Individual Voluntary Arrangements* (Kingston Business School Occasional Paper No. 63, 2009) at 43.

<sup>373</sup> See e.g. sections 185P to 185PD of the *Bankruptcy Act 1966 (Cth.)* (Aus).

<sup>374</sup> See paragraphs 1.229 to 1.234 above.

<sup>375</sup> See Morgan *Causes of Early Failure in Individual Voluntary Arrangements* (Kingston Business School Occasional Paper No. 63, 2009) at 43, available at: <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/research/personaldocs/IVA%20Research%20-%20Occasional%20Paper.pdf>.

<sup>376</sup> See sections 185Q(2) and 185T(4) of the *Bankruptcy Act 1966 (Cth.)* (Aus).

<sup>377</sup> Sections 185Q(5) and 185U(4) of the 1966 Act.

debtor bankrupt, and do not provide for automatic bankruptcy on the termination or avoidance of a Debt Agreement.

1.237 Some submissions received by the Commission had suggested that bankruptcy proceedings should automatically be brought against the debtor on the failure of a Debt Settlement Arrangement. The suggestion has been made that bankruptcy proceedings could be brought against the debtor by the Debt Settlement Office in such circumstances. The threat of automatic bankruptcy in the case of default by the debtor is generally acknowledged as being a strong incentive for encouraging the debtor to comply with his or her obligations under the arrangement. The Commission has however also received strong arguments against the bringing of bankruptcy proceedings automatically on the failure of an arrangement. First, bankruptcy proceedings may be futile where creditors are aware that the debtor is insolvent and are no longer pursuing the debtor for any sums owed. Secondly, issues would arise as to who should pay the costs involved in bringing bankruptcy proceedings after a failed Debt Settlement Arrangement. If creditors do not wish to bring proceedings, and if the debtor is unable to afford the costs involved in bankruptcy proceedings, it would be inappropriate to require either party to pay the costs of proceedings. Similarly, it would be inappropriate for the State to bear such costs were the Debt Settlement Office to hold responsibility for bringing such proceedings. Finally, the bringing of automatic bankruptcy proceedings on the failure of a Debt Settlement Arrangement may lead to the courts becoming overburdened with bankruptcy proceedings.

1.238 For these reasons the Commission considers that bankruptcy proceedings should not be the automatic consequence of the failure of a Debt Settlement Arrangement. The Commission believes that instead creditors and the Personal Insolvency Trustee should be given the power to bring bankruptcy proceedings on the failure of the Debt Settlement Arrangement. The Commission recommends that, following the Australian approach, a creditor and/or the Personal Insolvency Trustee should be empowered to apply for an adjudication of bankruptcy against a debtor in the same proceedings as an application for termination of the Debt Settlement Arrangement.

1.239 *The Commission recommends that the failure or termination of a Debt Settlement Arrangement should not lead automatically to bankruptcy proceedings being brought against the debtor. The Commission recommends instead that legislation should empower a creditor and the Personal Insolvency Trustee to bring bankruptcy proceedings against the debtor where a Debt Settlement has failed, or has been terminated by order of court. The Commission recommends that creditors and Trustees should be empowered to apply to court for an adjudication of bankruptcy against a debtor in the same proceedings as an application for termination of the Debt Settlement Arrangement.*

## **F Substantive Rules**

1.240 The following paragraphs discuss the subject of the substantive terms of Debt Settlement Arrangements. The first issue addressed is whether the terms of a Debt Settlement Arrangement, such as the duration of the arrangement and the repayment amounts, should be specified in law or alternatively left to be agreed in individual cases by the creditors and debtor. Having discussed this issue, the following paragraphs then consider specific terms that could be imposed into each Debt Settlement Arrangement by law.

### **(1) Terms to be decided by parties or fixed in law??**

1.241 The above discussion shows that the Commission's view is that the terms of a Debt Settlement Arrangement should primarily be a matter for agreement between the debtor and his or her creditors. The Commission also notes that different terms may be appropriate in each individual case, depending on the particular circumstances. The Commission nonetheless takes the view that in the subject of personal indebtedness, consideration must be given to interests other than merely those of the debtor and his or her creditors, and that public interest concerns arise.<sup>378</sup> The Commission is also conscious that leaving complete freedom to the parties to draft all terms of the arrangement could lead to influential creditors using their position of power to impose their terms in all arrangements, with the consequence that these

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<sup>378</sup> See (LRC CP 56-2009) at paragraphs 2.63 to 2.86, 2.102 to 2.108.



lenders could in effect impose their view in deciding how the system should operate.<sup>379</sup> This problem has arisen in the IVA regime in the UK. Therefore the Commission has concluded that it is important to ensure a balance between providing a mechanism that is sufficiently flexible to cater for the circumstances of a wide variety of cases and to respect the rights of the parties involved. In this regard, the Consultation Paper provisionally recommended that the non-judicial debt settlement procedures should take place under conditions specified in legislation and should not be entirely voluntary in nature.<sup>380</sup> The submissions received by the Commission broadly supported this provisional recommendation, subject to appropriate consideration of the rights of creditors. Thus the Commission has concluded that certain mandatory terms should be imposed on Debt Settlement Arrangements by law in order to further the concept of the “fresh start” and the rehabilitation of the debtor.

**(a) Comparative Approaches**

**(i) England and Wales**

1.242 In England and Wales, very few mandatory terms or conditions must be included in an Individual Voluntary Arrangement. To qualify as an IVA, the proposal made by the debtor to his or her creditors must be for a composition in satisfaction of his debts or a scheme of arrangement of his affairs.<sup>381</sup> In addition, the proposal must contain a term providing for some person to act in relation to the voluntary arrangement either as trustee or otherwise for the purpose of supervising its implementation and this person must be an insolvency practitioner. An IVA proposal, or a modification to a proposal, may not provide for any preferential debt of the debtor to be paid otherwise than in priority to such of his or her debts as are not preferential debts.<sup>382</sup> Similarly, it may not provide for a preferential creditor of the debtor to be paid an amount in respect of a preferential debt that bears to that amount a smaller proportion than is borne to another preferential debt by the amount that is to be paid in respect of that other debt. Such terms may however be included in the IVA if the relevant preferential creditor consents. An arrangement that unfairly prejudices the interests of a creditor may be challenged in court, and so this in effect imposes a prohibition on terms that may be unfairly prejudicial.<sup>383</sup>

1.243 In addition to the statutory requirements as to the content of an IVA, the IVA Protocol also specifies certain information or terms that must be included in the proposal.<sup>384</sup> The Protocol provides for a standard repayment plan of 5-years duration. It states that the expenditure statement required to be included with the proposal should follow guidelines produced by the Consumer Credit Counselling Service or the UK Common Financial Statement, with explanations required where additional expenditure is necessary.<sup>385</sup> The Protocol also provides rules for making any equity held by the debtor in his or her home available for distribution to creditors.<sup>386</sup> Under these rules, the debtor’s home should be re-mortgaged, with up to 85% of the debtor’s equity being distributed to creditors. If the debtor cannot obtain a re-mortgage, the IVA should instead be extended by up to 12 months. A further example of the rules imposed by the Protocol is the provision that the supervisor of an IVA must review the debtor’s income and expenditure once in every 12 months, with a requirement that the debtor increase his or her monthly

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<sup>379</sup> See paragraph **Error! Reference source not found.** above.

<sup>380</sup> See (LRC CP 56-2009) at paragraph 5.97.

<sup>381</sup> Section 253(1) of the *Insolvency Act 1986* (UK). It should be noted that similar terminology is used in Irish law under section 201 of the *Companies Act 1963*, which concerns the procedure for the proposal of a compromise or arrangement by a company to its creditors or members.

<sup>382</sup> Section 258(5) of the *Insolvency Act 1986* (UK).

<sup>383</sup> Section 262(1)(a) of the *Insolvency Act 1986* (UK).

<sup>384</sup> *IVA Protocol: Straightforward Consumer Individual Voluntary Arrangement* (Insolvency Service, 2008), available at: <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/policychange/foum2007/plenarymeeting.htm>.

<sup>385</sup> *Ibid* at paragraph 7.5.

<sup>386</sup> *IVA Protocol: Straightforward Consumer Individual Voluntary Arrangement* at paragraphs 9.1 to 9.5.

contribution by half of any net surplus found to exist by the review.<sup>387</sup> Similarly, the supervisor may reduce the dividend by up to 15% to reflect a drop in the debtor's income. The supervisor is obliged under the protocol to present creditors with an annual report containing certain specified information.<sup>388</sup> The Protocol also imposes obligations on creditors, and provides that lenders should take reasonable measures to avoid offering further credit to individuals known to have an IVA in place.<sup>389</sup>

1.244 The Statement of Insolvency Practice on voluntary arrangements also provides guidance as to certain terms that should be included in the IVA.<sup>390</sup> These include for example provisions stating whether the arrangement is to be a composition in full and final settlement of all debts, or a scheme of arrangement; and confirmation that when the terms of the arrangement have been successfully completed the creditors will no longer be entitled to pursue the debtor for the balance of their claim. Similarly, the powers, duties and responsibilities of the supervisor should be specified.

1.245 From the above it can be seen that legislation in England and Wales contains few mandatory terms that must be included in an IVA, and largely leaves the terms to be decided by the parties to the arrangement (or by the standard terms of the IP acting as nominee/supervisor). Legislation does not provide for such terms as the duration of the repayment plan, the discharge of debts on completion of the plan; the reasonable expenditure allowance permitted to the debtor; or how the debtor's home should be addressed under an arrangement. It should be noted nonetheless that some minimum content of the arrangement is specified in legislation, and further mandatory or standard terms have been added through the IVA Protocol and Statement of Insolvency Practice.

**(ii) Australia**

1.246 The Australian *Bankruptcy Act 1988* is more prescriptive in relation to the content of a Debt Agreement proposed by a debtor for the settlement of his or her debts. The legislation states generally that "a Debt Agreement proposal may provide for any matter relating to the debtor's financial affairs",<sup>391</sup> but also specifies certain terms that must be included. First, in order to qualify as a statutory Debt Agreement, the proposal made by the debtor must:<sup>392</sup>

- be in the approved form;
- identify the debtor's property that is to be dealt with under the agreement; and
- specify how the property is to be dealt with; and
- authorise a specified person (being the Official Trustee, a registered trustee or another person) to deal with the identified property in the way specified; and
- provide that:
  - all provable debts in relation to the agreement rank equally; and
  - if the total amount paid by the debtor under the agreement in respect of those provable debts is insufficient to meet those provable debts in full, those provable debts are to be paid proportionately; and
- provide that a creditor is not entitled to receive, in respect of a provable debt, more than the amount of the debt; and

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<sup>387</sup> *IVA Protocol: Straightforward Consumer Individual Voluntary Arrangement* at paragraphs 10.2 to 10.4.

<sup>388</sup> *Ibid* at paragraph 11.1.

<sup>389</sup> *IVA Protocol: Straightforward Consumer Individual Voluntary Arrangement* at paragraph 12.3.

<sup>390</sup> *Statement of Insolvency Practice 3: Voluntary Arrangements (England and Wales)* (Version 4 Joint Insolvency Committee 2007), Appendix.

<sup>391</sup> Section 185C(3) of the *Bankruptcy Act 1966 (Cth.)* (Aus).

<sup>392</sup> Section 185C(2) of the *Bankruptcy Act 1966 (Cth.)* (Aus).

- provide that the amount of a provable debt in relation to the agreement is to be ascertained as at the time when the acceptance of the proposal for processing is recorded on the National Personal Insolvency Index; and
- if a creditor is a secured creditor—provide that, if the creditor does not realise the creditor’s security while the agreement is in force, the creditor is taken, for the purposes of working out the amount payable to the creditor under the agreement, to be a creditor only to the extent (if any) by which the amount of the provable debt exceeds the value of the creditor’s security; and
- if a creditor is a secured creditor—provide that, if the creditor realises the creditor’s security while the agreement is in force, the creditor is taken, for the purposes of working out the amount payable to the creditor under the agreement, to be a creditor only to the extent of any balance due to the creditor after deducting the net amount realised; and
- be signed by the debtor; and
- specify the date on which the debtor signed the proposal.

Furthermore, a proposal must not provide for the transfer of property (other than money) to a creditor.<sup>393</sup>

1.247 A proposal may provide for the remuneration of the administrator of the Debt Agreement.<sup>394</sup> In such a case the proposal must provide that the total remuneration is an amount equal to a specified percentage of the total amount payable by the debtor under the agreement in respect of provable debts; and that if the debtor pays an amount under the agreement in respect of these provable debts, the debtor must also pay to the administrator an amount ascertained in accordance with the agreement.<sup>395</sup>

1.248 In Australia, legislation provides when a debt agreement shall end, with this event said to occur when all the obligations that it created have been discharged.<sup>396</sup> The legislation also provides for the effect of the end of a Debt Agreement, stating that on the occurrence of this event the debtor is released from provable debts from which the debtor would have been released if the debtor had been discharged from bankruptcy.<sup>397</sup> Therefore, while under the IVA procedure in England and Wales the parties must specify in the proposal the effect the agreement is to have – particularly whether it is a scheme of arrangement or a composition in full and final settlement – in Australia the legislation specifies that each Debt Agreement is to result in the discharge of all of the debtor’s obligations.

1.249 In addition to these substantive rules concerning the terms of Debt Agreements, the Australian legislation also provides substantive rules relating to the eligibility of a debtor to avail of the Debt Agreement procedure. Therefore a debtor may not apply to the Official Receiver with a Debt Agreement proposal if at any time in the previous 10 years the debtor has been a bankrupt, has previously availed of the Debt Agreement procedure, or has availed of the similar Personal Insolvency Agreement procedure.<sup>398</sup> As the Debt Agreement procedure is designed for consumer/non-business debtors, the debtor is also excluded if his or her unsecured debts total more than the threshold amount of AUS\$88,379.20 (€61,197), the total value of his or her assets exceed AUS\$88,379.20 (€61,197); or the debtor’s after-tax income exceeds AUS\$66,284.40 (€45,897).<sup>399</sup>

**(iii) Canada**

1.250 In Canada, similarly to Australia, legislation specifies certain key terms that must be included in a Consumer Proposal. First, a Consumer Proposal must be made to the debtor’s creditors generally.<sup>400</sup>

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<sup>393</sup> Section 185C(2A) of the *Bankruptcy Act 1988 (Cth.)* (Aus).

<sup>394</sup> Section 185C(3) of the *Bankruptcy Act 1988 (Cth.)* (Aus).

<sup>395</sup> Section 185C(3A) of the *Bankruptcy Act 1988 (Cth.)* (Aus).

<sup>396</sup> Section 185N(1) of the *Bankruptcy Act 1988 (Cth.)* (Aus).

<sup>397</sup> Section 185NA(1) of the 1988 Act.

<sup>398</sup> Section 185C(4)(a) of the *Bankruptcy Act 1988 (Cth.)* (Aus).

<sup>399</sup> Section 185C(4)(b)-(d) of the *Bankruptcy Act 1988 (Cth.)* (Aus).

<sup>400</sup> Section 66.12(3) of the *Bankruptcy and Insolvency Act* (Can.).

Importantly, a Consumer Proposal must provide that its performance is to be completed within five years.<sup>401</sup> The proposal must also provide for:<sup>402</sup>

- the payment in priority to other claims of all claims directed to be so paid in the distribution of the property of the consumer debtor;
- the payment of all prescribed fees and expenses of the administrator on and incidental to proceedings arising out of the consumer proposal, and of any person in respect of debt counselling provided; and
- the manner of distributing dividends.

The Canadian Act also contains a provision regarding debt discharge. It states that an approved Consumer Proposal does not release the debtor from any of the debts exempt from discharge unless the proposal has expressly provided for the discharge of such debts and the creditors in respect of such debts consent to their discharge.<sup>403</sup> Such debts include family maintenance payments, debts arising out of fraud or certain awards of damages by a court in civil proceedings in respect of the intentional infliction of bodily harm, sexual assault or wrongful death.<sup>404</sup>

1.251 The effect of a debtor's entering into a Consumer Proposal on existing contracts of the debtor is also stated in the Act, which provides that "no person may terminate or amend any agreement, including a security agreement, with the consumer debtor, or claim an accelerated payment, or the forfeiture of the term, under any agreement, including a security agreement, with the consumer debtor, by reason only that (a) the consumer debtor is insolvent, or (b) a consumer proposal has been filed in respect of the consumer debtor until the consumer proposal has been withdrawn, refused by the creditors or the court, annulled or deemed annulled."<sup>405</sup> In addition, no public utility may discontinue service to the consumer debtor by reason only that the consumer is insolvent, has filed a proposal, or has not paid for services rendered before filing the proposal unless the consumer proposal has been withdrawn, refused or annulled.<sup>406</sup> A similar prohibition on the termination of a lease is specified, while the debtor's employment is protected from being adversely affected by entering a proposal also.<sup>407</sup> An assignment of wages made by a consumer debtor before the filing of a consumer proposal is of no effect in respect of wages earned after the filing of the consumer proposal.<sup>408</sup>

**(iv) Recommendation**

1.252 Having considered submissions received and the above approaches of countries demonstrating similar legal systems to that of Ireland, the Commission recommends that a balanced approach should be adopted, based on the agreement of terms of a Debt Settlement Arrangement between the parties, coupled with the laying down of certain core mandatory terms in statute. Therefore the Debt Settlement Arrangement procedure should allow sufficient flexibility to enable appropriate arrangements to be reached in a wide variety of cases, and should involve sufficient input from the parties to the arrangement to allow creditors to assert their rights. Meanwhile, the Commission emphasises the public interest involved in the procedure, and the wider benefits of debt discharge beyond the interests of the parties involved.<sup>409</sup> Therefore in order to ensure that the public interest goals of the Debt Settlement

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<sup>401</sup> Section 66.12(5) of the *Bankruptcy and Insolvency Act* (Can.).

<sup>402</sup> Section 66.12(6) of the *Bankruptcy and Insolvency Act* (Can.).

<sup>403</sup> Section 66.28(2.1) of the *Bankruptcy and Insolvency Act* (Can.).

<sup>404</sup> Section 178(1) of the *Bankruptcy and Insolvency Act* (Can.).

<sup>405</sup> Section 66.34(1) of the *Bankruptcy and Insolvency Act* (Can.).

<sup>406</sup> Section 66.34(1) of the *Bankruptcy and Insolvency Act* (Can.).

<sup>407</sup> Section 66.36 of the *Bankruptcy and Insolvency Act* (Can.).

<sup>408</sup> Section 66.35(1) of the *Bankruptcy and Insolvency Act* (Can.).

<sup>409</sup> See paragraph 1.05 above and (LRC CP 56-2009) at paragraphs 5.04 to 5.15.

Arrangement procedure are achieved, the Commission recommends that certain core terms of arrangements should be specified in legislation.

1.253 *The Commission recommends that while the terms of Debt Settlement Arrangements should primarily be a matter for agreement between the debtor and his or her creditors, certain core mandatory terms of Debt Settlement Arrangements should be specified in legislation.*

1.254 The following paragraphs therefore present the Commission’s proposal for the core terms of Debt Settlement Arrangements. The Commission’s recommendations are based on the Consultation Paper’s provisional recommendations and the submissions received by the Commission in response.

**(2) Duration of repayment plan**

1.255 In order to ensure that the benefits to individual debtors and the society at large of debt discharge and the “fresh start” policy are provided by the Debt Settlement Arrangement procedure, the Commission recommends that the maximum duration of repayment plans under the procedure should be limited by legislation. In the Consultation Paper, the Commission noted that the justifications for debt discharge and the fresh start policy all suggest that the repayment period before discharge is granted should be short.<sup>410</sup> The Consultation Paper also suggested that long repayment periods may lead to debtors becoming disillusioned and thus failing to complete the repayment plan.<sup>411</sup> The Commission therefore provisionally recommended that the duration of the repayment period under the debt settlement scheme should be three to five years, while also inviting submissions on this matter.<sup>412</sup>

1.256 The Commission’s Consultation Paper noted that in most European Member States where the duration of the repayment plan is fixed in law the requisite period is 3-5 years. The following table, taken from a 2010 paper written by Professor Jason Kilborn, illustrates the duration of *non-consensual* repayment plans imposed under the debt settlement procedures of European countries:<sup>413</sup>

1.257 Similarly, as the table below shows, in the non-European countries where a procedure similar

**Table 1. Ordinary, nonconsensual debt adjustment plan periods in 18 EU Member States and Norway**

France	up to 8 years
Austria	7 years (possible extension to 10 to reach 10% min. dividend)
Luxembourg	up to 7 years
Germany	6 years (from beginning of simplified insolvency proceedings)
Norway	5 years (though commonly up to 7 to 10 years) <sup>414</sup>
Denmark	5 years (possible extension to regain missed payments)
Sweden	5 years (possible extension up to 7 to regain missed payments)
Finland	5 years (possible up to 7 for guarantors, 10 for mortgages)
Czech Republic	5 years (min. 30% dividend, unless hardship)
Estonia	5 years
Portugal	5 years
Belgium	3-5 years (in non-capital discharge plan, no min., possible extension for mortgage)
Slovenia	2-5 years (from beginning of proceedings)
Poland	up to 5 years
Greece	4 years
Latvia	3.5 years (down from 7 in original 1/1/2008 law)
Slovakia	3 years
Netherlands	3 years (up to 5 if more than minimum income provided, but > 3 extremely rare)
United Kingdom:	up to 3 years (of income payments, but discharge after 1 year)

<sup>410</sup> (LRC CP 56-2009) at paragraph 5.172.

<sup>411</sup> (LRC CP 56-2009) at paragraph 5.174.

<sup>412</sup> (LRC CP 56-2009) at paragraph 5.177.

<sup>413</sup> These duration periods refer to debt repayment plans mandated by law and/or State authorities under the debt settlement systems of the countries, in question, as opposed to plans agreed between the debtor and his or her creditors. See Kilborn “Expert Recommendations and the Evolution of European Best Practices for the Treatment of Over-indebtedness, 1984-2010”, (John Marshall Law School Working Paper), available at: <http://ssrn.com/abstract=1663108> (accessed 9<sup>th</sup> November 2010).

to the proposed Debt Settlement Arrangement procedure exists, repayment plans generally last for a period of between 3-5 years, with most systems allowing the period to be agreed between the parties rather than specifying it in legislation. While legislation in England and Wales does not provide for the duration of an Individual Voluntary Arrangement, leaving it to be agreed between the parties, the IVA Protocol provides for a standard repayment period of 5 years in a straightforward consumer IVA.<sup>414</sup>

1.258 The Commission received several submissions in relation to this issue. A majority took the view that the maximum limit of the repayment period should be five years. This period was deemed to be of a suitable duration to allow adequate returns from creditors, while also affording relief to debtors. One submission argued that a period of 3-5 years would be too short, and that a longer period should be introduced to allow more debt to be repaid. This submission however did not consider the public interests involved in the system, and was focussed on creditor interests. Several submissions called for flexibility in the duration of the repayment period in order to provide for different circumstances of individual debtors. Therefore the procedure should allow for a suitable duration to be agreed by the parties based on the individual circumstances of the debtor. For example, where the debtor has assets of value that could be sold to distribute funds to creditors an appropriate proposal may simply involve the sale of these assets and distribution of proceeds to creditors in the immediate settlement of the debts owed. Therefore the Commission does not wish to mandate a specified term for Debt Settlement Arrangements. The Commission nonetheless believes that the furtherance of the objects of the system requires that the debtor be entitled to discharge after the completion of a repayment period of reasonable duration. Therefore the Commission recommends that a Debt Settlement Arrangement should last for no more than 5 years. In order to qualify as a statutory Debt Settlement Arrangement, a proposal must therefore provide for the performance of its obligations within a period of five years.

1.259 *The Commission recommends that the maximum duration of a Debt Settlement Arrangement should be limited to five years. The Commission recommends that in order to qualify as a statutory Debt Settlement Arrangement, a proposal must provide for the performance of its obligations within a period of five years.*

### **(3) Debt Discharge Provisions**

1.260 The fundamental principle of the Commission's recommendations for the introduction of a non-judicial debt settlement system was that of "earned discharge", and the discharge of a debtor's remaining obligations on completion of a plan involving the part repayment of his or her debts.<sup>415</sup> This principle was unanimously supported by the submissions received by the Commission, subject to certain conditions for the protection of creditors' interests.

#### **(a) Debt Settlement Arrangement to discharge portion of debt remaining unpaid**

1.261 The Commission notes that legislation governing certain analogous arrangement procedures, such as that applying to the IVA procedure in England and Wales, does not expressly state that the debtor's obligations covered by the arrangement will be discharged on the completion of the repayment plan. Instead, the IVA procedure requires the agreed terms of the IVA to state whether or not the arrangement is to result in full and final settlement of the debtor's obligations and a debt discharge. In contrast, the Australian *Bankruptcy Act 1966* provides that the effect of the completion of the Debt Agreement procedure is that the debtor is discharged from all provable debts (debts covered by the arrangement).<sup>416</sup>

1.262 The Commission recommends that in order to enshrine the fresh start principle of the proposed Debt Settlement Arrangement procedure, legislation should state expressly that all arrangements should provide that on the successful completion of their terms, the debtor will be discharged from all remaining obligations covered by the arrangement.

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<sup>414</sup> *IVA Protocol: Straightforward Consumer Individual Voluntary Arrangement* (Insolvency Service, 2008), available at: <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/policychange/foum2007/plenarymeeting.htm>.

<sup>415</sup> See (LRC CP 56-2009) at paragraphs 5.109 to 5.112.

<sup>416</sup> Section 185NA(1) of the *Bankruptcy Act 1966 (Cth.)* (Aus).

1.263 *The Commission recommends that legislation should state expressly that on completion of the obligations specified under a Debt Settlement Arrangement the debtor should be discharged from the remainder of the debts covered by the arrangement.*

**(b) Debts exempt from discharge**

1.264 The Commission has qualified the discussion of debt discharge above by limiting it to debts covered by the Debt Settlement Arrangement. This acknowledges that in most legal systems certain debts are incapable of being discharged through bankruptcy proceedings or schemes of arrangement. The Commission's Consultation Paper presented an outline of the debts incapable of being discharged in a range of European countries.<sup>417</sup> This showed that categories of debts not discharged in such countries include family maintenance debts, criminal law fines, damages awarded by courts in respect of torts committed by the debtor, and, in some countries, student loans. The Commission invited submissions as to whether certain debts should be excluded from discharge, and if so which debts should be included in this non-dischargeable category.<sup>418</sup>

1.265 The Commission received numerous submissions on this issue. There was almost unanimous agreement that secured debts should not be discharged under a Debt Settlement Arrangement. The Commission accepts this submission, and discusses this issue further below.<sup>419</sup>

1.266 Submissions were also unanimous that family maintenance debts should be incapable of being discharged, and there was some support for exempting fines from discharge. Some submissions argued that revenue debts should be incapable of being discharged, and that such debts should be given priority status. Other submissions however were strongly opposed to giving any preferential status to revenue debts.

1.267 The Commission acknowledges that questions of the debts incapable of being discharged under the Debt Settlement Arrangement procedure raise policy choices that may be more appropriately addressed by the Oireachtas rather than an independent law reform body. The Commission nonetheless makes tentative suggestions on this issue.

1.268 The starting point of the Commission's approach, just as it is in relation to preferential payments in judicial bankruptcy proceedings, is that all creditors of the same class should be treated equally, and that as few obstacles as possible should be placed in the way of the fresh start principle and the discharge of the debtor.<sup>420</sup> Therefore the Commission recommends that the categories of non-dischargeable debt should be as few as possible. The Commission also wishes to clarify that the payment of certain categories of debt should not be a pre-condition to the debtor's discharge from the Debt Settlement Arrangement procedure. Instead the creation of categories of non-dischargeable debts means that such debts are either excluded from the arrangement entirely, or are repaid in part along with other debts in the repayment plan, but with the remaining amount unpaid not being discharged (unless, as is seen below, the relevant creditor expressly agrees to such a discharge). Therefore under no circumstances does the Commission recommend the replication of a provision similar to that of section 85(4) of the *Bankruptcy Act 1988*, which links the debtor's discharge to his or her payment of preferential debts.

1.269 The Commission accepts the submissions that family maintenance debts should be incapable of being discharged under the Debt Settlement Arrangement procedure. This is "not only because of the social primacy of family welfare but also because the claimants are unable effectively to pass on the loss."<sup>421</sup> The privileged status of such claims is also said to represent "the State's protection of special values", and this is evidenced in Ireland from the fact that more effective and far-reaching mechanisms

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<sup>417</sup> See (LRC CP 56-2009) at paragraph 5.117.

<sup>418</sup> (LRC CP 56-2009) at paragraph 5.119.

<sup>419</sup> See paragraphs 1.312 to 1.316 below.

<sup>420</sup> See Chapter 3 below.

<sup>421</sup> *Report of the Commission on the Bankruptcy Laws of the United States* H.R. Doc. No. 137, 93d Cong., 1<sup>st</sup> Sess., pt. I at 79.

exist for enforcing the payment of family maintenance debts than those available in respect of the enforcement of ordinary civil debt.<sup>422</sup> The Commission therefore recommends that, subject to the recommendation below, any debts arising from court orders under the *Family Law (Maintenance of Spouses and Children) Act 1976*, the *Family Law Act 1995*, and the *Family Law (Divorce) Act 1996* should be excluded from discharge under a Debt Settlement Arrangement.

1.270 In relation to debts owed to the Revenue Commissioners, the Commission reiterates its view that any questions of the priority status of such debts or their ability to be discharged are matters of policy for the Oireachtas. The Commission nonetheless also wishes to reiterate the arguments made above in relation to the priority status of revenue debts.<sup>423</sup> There the Commission notes that the making of a debtor's discharge conditional on the full repayment of all preferential debts under the *Bankruptcy Act 1988* is a feature of Irish law that is not replicated in any of the similar countries examined. The Commission also notes that the wide range of preferential debts under Irish law and in particular the priority position given to tax debts appears outdated given the developments in comparable legal systems in recent times. The Commission recommends that the condition for discharge from bankruptcy that all expenses, fees, costs and preferential payments must be paid should be abolished.<sup>424</sup> The Commission therefore suggests that no preferential status should be given to debts owed to the Revenue Commissioners in respect of tax liability under the Debt Settlement Arrangement procedure.

1.271 In relation to the payment of fines, the Commission acknowledges that fines incurred in respect of criminal law offences are entirely different from debts owed under the civil law. Such criminal fines involve a punitive aspect which differentiates their payment from the repayment of lawfully-incurred debts which are granted willingly by a creditor, having conducted such checks as are necessary to ensure responsible lending standards are observed. Furthermore, under the *Fines Act 2010*, the court is to take into account the circumstances of a person when imposing a fine on him or her.<sup>425</sup> This should reduce the need for fines to be discharged through a Debt Settlement Arrangement, as a fine should be based on the debtor's means and financial circumstances. The Commission therefore accepts the submission that fines should be treated differently from civil debts, and should be excluded from discharge under a Debt Settlement Arrangement (subject to the recommendation below).

1.272 The Commission also notes that the laws of several of the countries studied also prevent the discharge of a debt in respect of a loan obtained through fraud, misappropriation or embezzlement.<sup>426</sup> A strong case exists for introducing such a similar exception to the debt discharge under the Debt Settlement Arrangement scheme.

1.273 Similarly, legislation in other countries excludes the discharge of an amount payable under an order made under proceeds of crime legislation, and the Commission recommends that a similar exception may be appropriate under the Debt Settlement Arrangement procedure.

1.274 The final category of debt to be addressed is that of awards of damages owing as a judgment debt in respect of a tort found to have been committed by the debtor. The Commission notes that under section 75 of the *Bankruptcy Act 1988*, claims in the nature of unliquidated damages for which the bankrupt or is liable by reason of a wrong within the meaning of the *Civil Liability Act 1961* shall be provable in bankruptcy. Therefore tort claims are provable in bankruptcy proceedings in Ireland. Strong arguments can be made for the inclusion of tort claims in the Debt Settlement Arrangement also. First, if tort claims were excluded from the Debt Settlement Arrangement but claims for say, breach of contract, were not, plaintiffs could simply frame their claims in tort in order to ensure that they would not be

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<sup>422</sup> See (LRC CP 56-2009) at paragraphs 6.261 to 5.263, 6.328.

<sup>423</sup> See paragraphs Chapter 3 below.

<sup>424</sup> See Chapter 3 Below.

<sup>425</sup> Section 14(2) of the *Fines Act 2010*.

<sup>426</sup> See .e.g. section 178(1)(d) of the *Bankruptcy and Insolvency Act (Can)*; section 281 of the *Insolvency Act 1986 (UK)*; section 153(b) of the *Bankruptcy Act 1966 (Cth.) (Aus)*.



discharged by the judgment debtor through a Debt Settlement Arrangement.<sup>427</sup> Also, the incapability of tort claims would impair the fresh start philosophy of bankruptcy, as noted above. The Commission has not received any argument that would justify this impairment of the fresh start, and indeed one of the primary reasons why claims for unliquidated damages arising from tort claims are not provable in bankruptcy proceedings in certain countries is the problem of quantifying the amount owed. This question is not as great a difficulty when the issue is not the admissibility of a tort claim, but the question of whether or not it should be discharged along with the debtor's other liabilities.

1.275 Under the law of England and Wales, debts arising in respect of personal injuries to any person which result in a liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other duty are not dischargeable in bankruptcy except to such extent and such conditions as the court may direct.<sup>428</sup> Under the Canadian legislation, any debt arising from any award of damages by a court in civil proceedings in respect of bodily harm intentionally inflicted or sexual assault, or wrongful death resulting therefrom are not discharged under a Consumer Proposal arrangement unless such debts are expressly included in the terms of the proposal, and the relevant debtor in respect of each such debt voted in favour of the proposal.<sup>429</sup>

1.276 Therefore the Commission accepts that this is a complex question, and recommends that the appropriate balance between the arguments for and against can be found in the Commission's recommended approach, which would require the consent of the tort creditor in question for such a liability to be discharged.

1.277 The Commission believes that an appropriate compromise may be to adopt an approach similar to that in the Canadian legislation whereby debts in these categories can only be discharged if they are expressly included in the terms of the arrangement, and if the creditor in respect of each of such debts has voted in favour of the debtor's proposal.<sup>430</sup> This position adopts a balance in recognising the special status of the debts in question, while also promoting the fresh start policy and acknowledging the reality that insolvent debtors will not be able to repay their obligations in full, no matter the special status of the debt in question. While acknowledging that this is ultimately a policy matter for the Oireachtas, the Commission nonetheless recommends that (consistently with the Commission's approach to reform of the *Bankruptcy Act 1988*) the Revenue Commissioners should not have preferential status in an accepted Debt Settlement Arrangement. The Commission also recommends that an accepted Debt Settlement Arrangement should not release the debtor from any debt arising under a court order in family proceedings, from damages for the tort of the debtor, or from a loan obtained through fraud unless the proposal for the arrangement explicitly provides for the compromise of that debt or liability and the creditor in relation to that debt or liability voted for the acceptance of the arrangement.

1.278 *The Commission recommends that (consistently with the Commission's approach to reform of the Bankruptcy Act 1988) the Revenue Commissioners should not have preferential status in an accepted Debt Settlement Arrangement but that, otherwise, the Debt Settlement Arrangement should not release the debtor from any of the following debts and/or liabilities unless the proposal for the arrangement explicitly provides for the compromise of that debt or liability and the creditor in relation to that debt or liability voted for the acceptance of the arrangement:*

- *Any liability arising out of a court order made in family law proceedings;*
- *Any liability arising out of damages awarded in respect of personal injuries or wrongful death arising from the tort of the debtor;*
- *Any debt or liability arising from a loan (or forbearance of a loan) obtained through fraud, misappropriation, embezzlement or fraudulent breach of trust.*

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<sup>427</sup> See The Law Reform Commission of Australia *General Insolvency Inquiry Volume 1* (Report No. 45, 1988) at 318.

<sup>428</sup> Section 281(5) of the *Insolvency Act 1986* (UK).

<sup>429</sup> See section 66.28(2.1) and section 178(1)(a.1) of the *Bankruptcy and Insolvency Act*.

<sup>430</sup> Section 66.28(2.1) of the *Bankruptcy and Insolvency Act*.

1.279 *The Commission recommends that any debt or liability arising under a court order made under the Proceeds of Crime Acts 1996 and 2005 or under a fine ordered to be paid by a court in respect of a criminal offence should not be capable of being discharged under a Debt Settlement Arrangement.*

**(4) Reasonable income and assets exemptions**

1.280 The Commission's Consultation Paper provisionally recommended that the maintenance of a reasonable standard of living for the debtor should be a fundamental principle of debt settlement and bankruptcy legislation.<sup>431</sup> The Commission invited submissions as to the most appropriate means of establishing this standard in respect of both exemptions relating to the sale of the debtor's assets (with distribution of proceeds to creditors) and the level of the debtor's income to be exempt from the requirement to make repayments to creditors.<sup>432</sup> Therefore the following paragraphs discuss the restrictions to be placed on the sale of assets and income contributions which can be agreed as terms of a Debt Settlement Arrangement.

1.281 The Commission received several submissions on this subject. The submissions were generally based on the two ideas of ensuring that a minimum standard of living is protected for debtors participating in the Debt Settlement Arrangement procedure, while also permitting sufficient flexibility for appropriate arrangements to be made in each case, based on the individual circumstances of the debtor in question. Therefore submissions suggested that a basic list of exempt assets should be established in order to ensure a baseline of protection for debtors, while also suggesting that rules should not be so rigid as to prevent flexible arrangements from being made taking into account the circumstances of the individual debtor.

1.282 One submission argued that the exemption of assets should be reviewed on a case-by-case basis, with no rules specified as being applicable to all cases. Another suggested that legislation should establish a non-exhaustive list of exempt assets. This list should include motor vehicles necessary for transport to work, household goods, items required for children's educational needs, and any other items necessary for the individual debtor's particular circumstances. This submission suggested that if a limit of the value of exempted assets is introduced, it should be significantly higher than the current limit of €3,100, and that any such limit should be index-linked in order to allow for changing standards of living. This submission, like others, raised concerns as to how the debtor's assets should be valued.

1.283 Another submission suggested that the exemptions on assets to be sold under the Debt Settlement Arrangement procedure should correspond to the exemptions from seizure in enforcement proceedings.<sup>433</sup> This submission favoured the introduction of a formal list of assets not to be sold as part of a Debt Settlement Arrangement, on the grounds that this would increase certainty in the system. This submission raised concerns regarding the valuation of the debtor's assets, particularly for complicated assets such as insurance policies, shares and pension funds. One submission was particularly strong in its support for the inclusion of pension funds in arrangements. Further submissions suggested that tools of trade, equity in the debtor's home that is uneconomical to realise, personal possessions having no realisable value, motor vehicles with modest value, and household goods should not be required to be sold as part of a Debt Settlement Arrangement.

1.284 The Commission reiterates its position that Debt Settlement Arrangements must allow sufficient flexibility and input of the parties to the arrangement to allow individual circumstances to be taken into account and creditor interests to be respected, while establishing sufficient basic rules to ensure debtor and public interests are also protected. Therefore the Commission proposes that primary legislation should simply establish basic principles regarding the prohibitions on terms of arrangements providing for the sale of certain essential assets of the debtor, while more detailed guidelines could be contained in secondary legislation or in codes of practice issued by the Debt Settlement Office. The Commission therefore recommends that primary legislation should prohibit a Debt Settlement Arrangement from requiring the sale of any assets of the debtor that are essential to ensure a reasonable

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<sup>431</sup> (LRC CP 56-2009) at paragraphs 5.151 to 5.156.

<sup>432</sup> (LRC CP 56-2009) at paragraphs 5.165 to 5.168.

<sup>433</sup> See (LRC CP 56-2009) at paragraphs 6.359 to 6.366.

standard of living for the debtor. Primary legislation should establish certain general categories of assets that may be exempt, with more detailed guidelines to be prepared by secondary legislation or through codes as described above. The categories should include essential household goods, any assets necessary for the furtherance of the debtor's livelihood, and a motor vehicle the use of which is reasonably required by the debtor not exceeding a certain value (with the value to be specified in secondary legislation). The goods to be exempt from sale under a Debt Settlement Arrangement should largely resemble the goods exempt from seizure in procedures for the enforcement of a judgment debt.<sup>434</sup>

1.285 *The Commission recommends that legislation should provide that a Debt Settlement Arrangement may not contain any terms requiring the debtor to sell any assets of the debtor that are necessary to ensuring a reasonable standard of living for the debtor.*

1.286 *The Commission recommends that primary legislation should establish certain general categories of assets that are deemed essential to ensuring a reasonable standard of living for the debtor, while detailed guidelines should be established in secondary legislation or in codes published by the Debt Settlement Office.*

1.287 *The Commission recommends that the categories of goods in secondary legislation could include the following (among others):*

- *Such household goods as are necessary for maintaining a reasonable standard of living for the debtor and his or her family;*
- *Such material items as are necessary to the debtor for use personally by him in his employment, business or vocation.*

1.288 The Commission recommends that a similar approach should be adopted in relation to the calculation of the amount of repayments to be made by the debtor to his or her creditors under a Debt Settlement Arrangement. Again the need for flexibility and creditor input must be balanced with the need to ensure that debtors' interests are respected and that the public interest goals served by the system are achieved. Therefore while debtors and creditors should be free to agree on the appropriate repayment levels in individual cases, the terms of arrangements should not allow for repayment levels that would leave a debtor with insufficient income to maintain a reasonable standard of living.

1.289 Submissions received by the Commission as to how the reasonable income levels should be calculated varied quite widely. All submissions however agreed on the need for retainable income levels to be established, and some submissions made similar points regarding how this income level should be calculated. Thus the definition of "poverty" in the National Anti-Poverty Strategy (2007) and National Action Plan for Social Inclusion 2007-2016 was cited as being useful. This definition states that "people are living in poverty if their income and resources (material, cultural and social) are so inadequate as to preclude them from having a standard of living regarded as acceptable by Irish society generally."<sup>435</sup> Similarly, several submissions suggested that the benchmark for establishing reasonable income levels should be the amount of the Basic Supplementary Welfare Allowance. Others suggested that a debtor whose only income is derived from social welfare payments should not participate in a repayment plan, but should instead enter an alternative debt relief procedure not involving any repayments.<sup>436</sup> This view also suggested that the protected income level should possibly be higher than the Basic Supplementary Welfare Allowance level, in order to allow a "buffer" for debtors to address emergency expenses and to permit the debtor to enjoy some measure of a social life so as to prevent social exclusion. This view also noted the Commission's citation of certain studies showing that more lenient bankruptcy exemption

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<sup>434</sup> *Ibid.*

<sup>435</sup> *National Action Plan for Social Inclusion 2007-2016* (The Stationary Office 2007 Prn:A7/0029) at 20. This definition adds that "as a result of inadequate income and resources people may be excluded and marginalised from participating in activities which are considered the norm for other people in society."

<sup>436</sup> This corresponds to the Commission's recommendations regarding the Debt Relief Order procedure: see CHAPTER 1 above.

provisions tend to lead to increased entrepreneurial activity and economic productivity.<sup>437</sup> Therefore this submission acknowledged the benefit of relatively high income exemptions.

1.290 Several submissions pointed out that the budgeting guidelines produced by the Vincentian Partnership for Justice would be useful in drafting such reasonable income levels.<sup>438</sup> One submission argued that the reasonable income amount should be equal to the minimum wage. Another suggested that general guidelines on typical reasonable expenditure should be issued by an independent body, but that the ultimate decision on the level of expenditure and repayment made by the debtor should be left to the vote of creditors, based on the debtor's individual circumstances.

1.291 The Commission acknowledges that the calculation of reasonable living expenses is an issue lying far outside the competence of a law reform body and raises issues of policy to be decided by the Oireachtas. The Commission nonetheless recommends that primary legislation should establish the principle that the terms of a Debt Settlement Arrangement should not require such repayments as would leave the debtor with insufficient income to maintain a reasonable standard of living for the debtor and his or her family. The Commission recommends that detailed guidelines regarding appropriate expenditure and basic income levels should be specified in secondary legislation or by codes issued by the Debt Settlement Arrangement office. The precise amounts of repayments made to creditors should be decided by the creditors' meeting, taking into account these guidelines.

1.292 The Commission believes that it is essential that debtors are incentivised to find and maintain employment, and that debtors must benefit from such employment.<sup>439</sup> The Commission therefore suggests that the level of income allowed to be retained by debtors in employment should at least be higher than that which the debtor would receive if he or she was unemployed and in receipt of social welfare benefits. The Commission also suggests that the debtor should be incentivised to engage in career advancement and to contribute to society and the economy, and so in the event of an increase in the debtor's income, the debtor should be permitted to retain a significant portion of the income, with the creditors receiving only the remainder (in addition to the repayment amount originally agreed). For example, under the IVA Protocol in England and Wales, where a debtor's income increases above the level on which an IVA had been based, the debtor retains 50% of the increase, with the other 50% added to the contributions to creditors.<sup>440</sup> Similarly, submissions have evidenced support for the Commission's citation of a feature of the German debt settlement system under which the amount of the repayments made by debtors are reduced proportionately on the completion of certain stages of the repayment plan as a means of ensuring a debtor's motivation is maintained.<sup>441</sup> One submission received by the Commission also convincingly argued that the level of reasonable expenditure allowed to debtors under the Debt Settlement Arrangement system should be slightly higher than that allowed to debtors under mechanisms for the enforcement of judgments such as attachment of earnings. It was suggested that this would incentivise debtors to take an active role in negotiating an arrangement with creditors, rather than doing nothing and allowing creditors to bring enforcement proceedings. The Commission accepts the reasoning behind this approach.

1.293 In relation to the preparation of expenditure and reasonable necessary income standards, the Commission further recommends that these standards should be based on the framework of the MABS Standard Financial Statement. This would be part of the general policy of establishing this statement as a

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<sup>437</sup> See (LRC CP 56-2009) at paragraph 5.152, citing Fan and White "Personal Bankruptcy and the Level of Entrepreneurial Activity" (2003) 46 *J. L. & Econ.* 543.

<sup>438</sup> *2009 Expenditure Guidelines for Six Households* (Vincentian Partnership for Justice 2009), available at: [http://www.budgeting.ie/images/stories/Publications/meb\\_leaflet\\_2009\\_-\\_final.pdf](http://www.budgeting.ie/images/stories/Publications/meb_leaflet_2009_-_final.pdf)

<sup>439</sup> See (LRC CP 56-2009) at paragraph 6.269 for similar arguments in respect of the establishment of a minimum exempt income level in attachment of earnings procedures.

<sup>440</sup> See *IVA Protocol: Straightforward Consumer Individual Voluntary Arrangement* (Insolvency Service, 2008) at paragraph 10.2, available at: <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/policychange/foum2007/plenarymeeting.htm>.

<sup>441</sup> See (LRC CP 56-2009) at paragraph 5.165.

standard universally acceptable mechanism for the development of budgeting plans and realistic and sustainable repayment arrangements.<sup>442</sup>

1.294 The Commission therefore recommends that in drafting detailed reasonable expenditure and required income standards, these issues should be considered by the appropriate body (such as the Debt Settlement Office).

1.295 *The Commission recommends that while the amount of repayments under a Debt Settlement Arrangement is primarily a matter to be agreed by the creditors' meeting, primary legislation should establish the principle that the terms of a Debt Settlement Arrangement should not require such repayments as would leave the debtor with insufficient income to maintain a reasonable standard of living for the debtor and his or her family.*

1.296 *The Commission recommends that, in drafting detailed reasonable expenditure and essential income guidelines, the Debt Settlement Office (or other appropriate body) should take into account:*

- *the structural framework of the MABS Standard Financial Statement;*
- *the definition of "poverty" in the National Anti-Poverty Strategy (2007) and National Action Plan for Social Inclusion 2007-2016: "people are living in poverty if their income and resources (material, cultural and social) are so inadequate as to preclude them from having a standard of living regarded as acceptable by Irish society generally."*
- *the amount of the Basic Supplementary Welfare Allowance, subject to the conditions below regarding the need to incentivise the debtor to seek and maintain employment;*
- *the need to incentivise the debtor to seek and maintain employment and to cooperate in the completion of his or her obligations under the Debt Settlement Arrangement as far as possible, in particular by:*
  - *ensuring that the reasonable essential income permitted to be maintained by a debtor is higher than that which the debtor would receive if he or she was unemployed and reliant on social welfare payments for income;*
  - *ensuring that the debtor is allowed to retain a significant portion of any income increase;*
  - *providing for proportionate reductions in the amount of payments to be made by the debtor as a "reward" for completing certain stages of the repayment plan;*
  - *ensuring that the level of income allowed to the debtor under a Debt Settlement Arrangement is greater than that exempted under an instalment order, attachment of earnings mechanism or other method for the enforcement of judgment debts.*

1.297 The Commission has noted above that a very significant problem under the IVA procedure in England and Wales has been the practice of creditors of imposing "hurdle rates" for debtor repayments which must be met before a proposal for an IVA will be accepted.<sup>443</sup> Under this practice creditors will refuse to accept an offer of a lower amount than the threshold, irrespective of the means of the debtor in question. This policy of creditors has served to deny access to the IVA procedure for certain debtors, and so to frustrate public policy.

1.298 The Commission's recommendation that a relatively small qualified majority of 60% in value of creditors actually voting at the creditors' meeting should be sufficient to approve a proposal for a Debt Settlement Arrangement will help to reduce this problem.<sup>444</sup> In addition however the Commission recommends that the relevant regulatory bodies for various categories of debtors should introduce provisions to prevent creditors from acting in this manner. Creditors will be obliged under the Commission's recommendations to accept the contents of the Standard Financial Statement where they have no reason to believe that any information provided is incomplete or inaccurate. Where the creditors

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<sup>442</sup> See (LRC 96-2010) at paragraphs 2.45 to 2.47.

<sup>443</sup> See paragraph 1.242 above.

<sup>444</sup> See paragraph 1.222 above.

have grounds to believe that any information provided is incomplete or inaccurate, they should in contrast be free to reject the debtor's proposal on this ground, with the reasons for rejection to be provided to the debtor and/or the Personal Insolvency Trustee. Therefore the Commission considers that the Central Bank should amend the *Consumer Protection Code* (which at the time of writing, December 2010, is currently under review) to provide that creditors may not engage in the practice of setting "threshold" levels for accepting DSA proposals, and that creditors should be obliged to accept the information provided in the Standard Financial Statement as evidence of the debtor's ability to make repayments, unless they have reasonable grounds to believe that the information provided is incomplete or inaccurate. As credit unions are not currently subject to the *Consumer Protection Code*, similar provisions should be established in the regulatory codes applicable to credit unions under the regulatory regime to be established following the review of this sector.<sup>445</sup> The codes issued by the Commission for Energy Regulation in respect of creditors under its supervision should also be amended to include such a provision.<sup>446</sup> While the Commission acknowledges that other creditors not regulated by these bodies would be unaffected by the introduction of such provisions, the Commission notes that these provisions should ensure that at least the requisite simple majority of creditors needed to approve a proposed arrangement will not engage in the practice of applying hurdle rates.

1.299 *The Commission recommends that the Central Bank should amend the Consumer Protection Code to prohibit regulated entities from engaging the practice of setting "hurdle rates" for the approval of proposed Debt Settlement Arrangements, and to require creditors to accept the information contained in the Standard Financial Statement as evidence of the debtor's true ability to make repayments, unless the creditors have reasonable grounds to believe that the information supplied is incomplete or inaccurate.*

1.300 *The Commission recommends that the Central Bank should introduce regulatory rules to prohibit credit unions from engaging the practice of setting "hurdle rates" for the approval of proposed Debt Settlement Arrangements, and to require credit unions to accept the information contained in the Standard Financial Statement as evidence of the debtor's true ability to make repayments, unless the creditors have reasonable grounds to believe that the information supplied is incomplete or inaccurate.*

1.301 *The Commission recommends that the Commission for Energy Regulation should introduce regulatory rules to prohibit credit unions from engaging the practice of setting "hurdle rates" for the approval of proposed Debt Settlement Arrangements, and to require credit unions to accept the information contained in the Standard Financial Statement as evidence of the debtor's true ability to make repayments, unless the creditors have reasonable grounds to believe that the information supplied is incomplete or inaccurate.*

## **(5) Duties and Obligations of the Debtor**

1.302 The Commission's Consultation Paper invited submissions as to whether other obligations in addition to the completion of a repayment plan should be imposed on debtors under the Debt Settlement Arrangement procedure.

1.303 The Commission received several submissions on this issue. The submissions stressed the need to ensure that the debtor's discharge was "earned", and that the gain of debt discharge should be balanced with obligations and duties on the debtor. Three primary obligations were suggested by submissions. First, the debtor should be under a duty to make ongoing comprehensive disclosure of his or her financial circumstances throughout the course of the Debt Settlement Arrangement procedure. Secondly, the debtor should be precluded from obtaining further credit during the course of the procedure, or at least from obtaining credit without first disclosing the fact of his or her participation in the procedure. Finally, several submissions suggested that the debtor should be required to obtain debt counselling or engage in a financial education programme as a condition to obtaining a discharge.

1.304 The Commission readily accepts the first two suggestions that the debtor must make a comprehensive and honest disclosure of his or her financial circumstances, and that restrictions should be placed on the debtor's access to credit. The Commission considers that similar obligations and

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<sup>445</sup> See (LRC 96-2010) at paragraphs 2.26 to 2.30.

<sup>446</sup> See e.g. (LRC 96-2010) at pages 90-92.

restrictions should therefore apply to debtors under the Debt Settlement Arrangement procedure as apply to debtors under the Debt Relief Order procedure described in CHAPTER 1. The Commission therefore makes the following recommendations.

1.305 *The Commission recommends that the following duties should be imposed on debtors participating in the Debt Settlement Arrangement procedure, (from the time of applying for entry to the completion of the procedure): (a) to cooperate fully in the process, and in particular to comply with any reasonable request from the Personal Insolvency Trustee to provide assistance, documents and information necessary for the application of the process to the debtor's case; (b) to inform the Personal Insolvency Trustee as soon as reasonably practicable of any material change in the debtor's circumstances, particularly an increase in the level of the debtor's assets or income, which would affect the debtor's ability to make repayments under the Debt Settlement Arrangement; (c) not to obtain credit above a prescribed amount without disclosing the fact that the debtor is party to a Debt Settlement Arrangement; and (d) not to engage directly or indirectly in any business under a name other than that in which the Debt Settlement Arrangement has been registered (in the Personal Insolvency Register) without disclosing the name in which the arrangement was registered to all persons with whom the debtor enters into a business transaction.*

1.306 The Commission therefore considers that there may be merit to the suggestion made in one submission, drawn from the German debt settlement system,<sup>447</sup> that debtors must not voluntarily refuse available employment during the course of the procedure. The Commission however notes that the issue of the steps to be taken by debtors to seek or not to refuse available employment as part of the procedure raise issues of national employment and social welfare policy, which lie outside of the remit of law reform.

1.307 The Commission recommends that a creditor or the Personal Insolvency Trustee should be empowered to apply for the termination of the Debt Settlement Arrangement where a debtor has failed to comply with the specified duties, under the procedure described above.<sup>448</sup> These parties should also be empowered to petition the court to have the debtor declared bankrupt in the same proceedings, as noted above.

1.308 The Commission is less inclined to accept the submissions that the debtor should be required to obtain debt counselling or to engage in a financial education programme as part of the Debt Settlement Arrangement procedure. This requirement would raise issues regarding the availability of money advice services and may also not take due account of the policy of self-empowerment whereby debtors should be encouraged to manage their own affairs as much as possible. In addition, as the Personal Insolvency Trustee is under a duty to advise debtors, there may be duplication of advice or counselling if debtors are required to obtain further counselling. Also, the Commission has suggested that money advisors may wish to apply to be licensed to act as Personal Insolvency Trustees, in which case this duplication of advice would certainly be unnecessary. In relation to financial education programmes, the Commission has indicated that the question of financial education lies outside the scope of its project, and so more properly is a question for a body such as the National Steering Group on Financial Education.<sup>449</sup> The Commission therefore makes no recommendation regarding placing an obligation on debtors entering the Debt Settlement Arrangement procedure to obtain debt counselling or to undertake a financial education programme.

## **(6) Priority Debts**

1.309 The Commission takes the view that, for the sake of consistency, the system of priority debts in the Debt Settlement Arrangement regime should be the same as that operating in bankruptcy proceedings. The Commission therefore wishes to reiterate its recommendations in respect of priority debts under the bankruptcy regime by stating that the payment of preferential debts in full should not be a

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<sup>447</sup> See (LRC CP 56-2009) at paragraph 5.114.

<sup>448</sup> See paragraphs 1.229 to 1.234 above.

<sup>449</sup> See (LRC CP 56-2009) at paragraphs 4.09 to 4.14.

condition to discharge.<sup>450</sup> The Commission also considers that there is a strong case for reducing significantly the number of priority debts under the bankruptcy system.<sup>451</sup>

1.310 While acknowledging that the primary feature of the Debt Settlement Arrangement system is that arrangements should be reached through the agreement of debtors and creditors, the Commission has also expressed its view that certain basic features of arrangements must be specified in law in order to protect the rights of parties involved and to achieve the public interest aims the procedure is to serve. In order to ensure that the rights of priority creditors are as adequately protected by the non-judicial Debt Settlement Arrangement procedure as in judicial bankruptcy proceedings, the Commission therefore recommends that the terms of a Debt Settlement Arrangement must provide for the payment of debts identified as preferential under the bankruptcy system in priority to such of the debtor's debts as are not preferential debts. This term should be capable of being excluded however where a preferential creditor agrees to waive his or her preferential status. This recommendation is however subject to the Commission's view that the system of preferential debts in bankruptcy should be reduced in line with most comparable regimes in other European states.

1.311 *The Commission recommends that, unless the relevant preferential creditors agree otherwise, the terms of a Debt Settlement Arrangement must provide for the payment of debts identified as preferential under the bankruptcy system in priority to such of the debtor's debts as are not preferential debts.*

## **(7) Mortgage loans and Secured Debts**

### **(a) Secured Debts Generally**

1.312 As noted above, there was unanimous agreement in submissions received by the Commission that secured debts should not be capable of being discharged under the Debt Settlement Arrangement procedure.

1.313 The usual position under personal insolvency systems is that a secured creditor may exercise one of a number of options. First, the secured creditor may realise his or her security and seek to claim any balance due after deducting the net amount realised. Secondly, the creditor may surrender his or her security to the trustee and claim for the full amount of the debt in the insolvency proceedings. Finally, the secured creditor may value the security when proving his or her debt under the insolvency proceedings, and thus may claim for the balance due after the amount of this valuation.<sup>452</sup> Section 11(2) of the *Bankruptcy Act 1988* follows this approach, providing that:

“If a creditor who presents or joins in presenting the petition is a secured creditor, he shall in his petition set out particulars of his security and shall either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudicated bankrupt or give an estimate of the value of his security. Where a secured creditor gives an estimate of the value of his security, he may be admitted as a petitioning creditor or joint petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated in the same manner as if he were an unsecured creditor but he shall on application being made by the Official Assignee after the date of adjudication give up his security to the Official Assignee for the benefit of the creditors upon payment of such estimated value.”

1.314 This position is reflected in the non-judicial arrangement schemes of many countries. Australian law provides that the terms of a (consumer) Debt Agreement must provide that:<sup>453</sup>

- if a secured creditor does not realise the creditor's security while the agreement is in force, the creditor is taken, for the purposes of working out the amount payable to the creditor under the agreement, to be a creditor only to the extent (if any) by which the amount of the provable debt exceeds the value of the creditor's security; and

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<sup>450</sup> See paragraphs Chapter 3 below.

<sup>451</sup> See Chapter 3 below .

<sup>452</sup> See Fletcher *The Law of Insolvency* (4<sup>th</sup> ed. Sweet and Maxwell 2009) at 333.

<sup>453</sup> Section 185C(2) of the *Bankruptcy Act (Cth.)* (Aus).



- if a secured creditor realises the creditor's security while the agreement is in force, the creditor is taken, for the purposes of working out the amount payable to the creditor under the agreement, to be a creditor only to the extent of any balance due to the creditor after deducting the net amount realised.

The Australian legislation further provides that nothing in the legislation relating to Debt Agreements affects the right of a secured creditor to realise or otherwise deal with the creditor's security.<sup>454</sup>

1.315 The Commission recommends that a similar approach should be adopted under the Debt Settlement Arrangement procedure. A secured creditor should be free to decide between the three options of:

- Realising its security and claiming for the balance due, if any, after deducting the net amount realised;
- Surrendering its security to the debtor and claiming for the full amount of the debt owed as if it was unsecured; or
- Valuing the security when proving its debt, and claiming alongside unsecured creditors for the balance due after deducting the amount of the valuation.

The Commission takes the view that, subject to the provisions of other areas of the law, the ability of a creditor to exercise his or her security should not be affected by the Debt Settlement Arrangement procedure.

1.316 *The Commission recommends that the Debt Settlement Arrangement procedure a secured creditor should be free to decide between the three options of:*

- *Realising its security and claiming for the balance due, if any, after deducting the net amount realised;*
- *Surrendering its security to the debtor and claiming for the full amount of the debt owed as if it was unsecured; or*
- *Valuing the security when proving its debt, and claiming alongside unsecured creditors for the balance due after deducting the amount of the valuation.*

**(b) Shortfalls on secured debts: situations of negative equity**

1.317 The Commission acknowledges that problems in relation to mortgage debt raise several issues of policy, and that this area is being considered by the Government's Mortgage Arrears and Personal Debt Expert Group.<sup>455</sup> The Commission therefore does not seek to consider the area of mortgage arrears, repossessions and debt problems relating to mortgages in its entirety, but rather only considers this area in so far as it overlaps with the Commission's work on personal insolvency law and the procedures for the enforcement of judgment debts. The following paragraphs therefore discuss the Commission's view on how a residual balance of a loan owing where the security under the loan has been realised should be addressed under the Debt Settlement Arrangement procedure.

1.318 The Commission's Interim Report noted that the issue of mortgage loans where the value of the asset on which the loan is secured is less than the amount due under the loan – negative equity – has caused considerable public concern.<sup>456</sup> The Commission noted that the question of negative equity is not directly related to the Commission's discussion of personal over-indebtedness and repayment difficulties. The Interim Report nonetheless noted that one aspect of the negative equity issue is of interest in the context of the law on personal insolvency, namely how the deficiency obligation or shortfall owed by a

<sup>454</sup> Section 185XA of the *Bankruptcy Act (Cth.)* (Aus.).

<sup>455</sup> See (LRC 96-2010) at paragraphs 12-14; Mortgage Arrears and Personal Debt Expert Group *Interim Report* (July 2010), available at: <http://www.finance.gov.ie/documents/publications/reports/2010/mortgagearrearsjul.pdf>.

<sup>456</sup> (LRC 96-2010) at paragraph 1.25.

mortgage borrower where the proceeds of realised security do not cover the extent of the borrower's obligation. The Interim Report noted that the Commission would return to this subject in this Report.

1.319 The starting point for this discussion is the recognition that after the mortgagee's security right in the mortgaged asset has been exercised and the proceeds of the sale of the asset have been applied to reduce the debt, any sum remaining to be paid is an unsecured personal debt arising under the contract between mortgage lender and mortgage borrower. This debt should be treated as an ordinary unsecured personal debt. This is especially so in a situation where the borrower/debtor is insolvent, as the principle of collectivity and of equal distribution of the debtor's resources (*pari passu*) among all creditors is fundamental to insolvency law.<sup>457</sup>

1.320 The Commission's Interim Report indicates that mortgage debt (that is, before the security is crystallised) is treated differently from personal debt for two reasons: first, from a legal point of view, it is a secured debt as opposed to an unsecured debt; and secondly, from a personal point of view, a mortgage loan is connected with people's sense of security in their family homes.<sup>458</sup> In contrast, where a mortgaged asset has been sold the mortgage shortfall debt bears neither of these characteristics to distinguish it from other unsecured personal debt. Therefore, the treatment of the mortgage shortfall debt should be decided based on the same principles applicable to other unsecured personal debts.

1.321 In most situations where a mortgage loan has become unsustainable, the borrower/debtor is likely to be insolvent or over-indebted. In this case the mortgage shortfall debt should be treated collectively with other obligations of the debtor as part of a holistic approach to the resolution of the individual's debt difficulties. Such an approach is required both from the point of view of treating the entirety of the debtor's financial difficulties;<sup>459</sup> and from the point of view of fairness to the debtor's other creditors.

1.322 Some submissions received by the Commission addressed the issue of how the Debt Settlement Arrangement procedure should accommodate the shortfall owed on a mortgage loan after the security has been realised. One argued that the approach suggested in the preceding paragraphs should be adopted, and that the shortfall should simply be treated in the same manner as other unsecured debts in the arrangement procedure. Therefore the mortgage shortfall could be discharged along with all other debts on the successful completion of an approved Debt Settlement Arrangement. Another submission however argued that the discharge of the shortfall or deficiency obligation in situations of negative equity could have serious consequences for the mortgage and housing markets in Ireland, including raising borrowing costs for all mortgage loans. This submission also cautioned against the risk of moral hazard, whereby mortgage borrowers in negative equity could seek to evade their obligations through the debt settlement system. This submission suggested that there is no easy solution for situations of negative equity, as the alternative option of excluding mortgage debts entirely from the debt settlement system would be contrary to the holistic treatment of an individual's debt difficulties and would be inimical to the fresh start principle. The submission ultimately suggested that a "qualified fresh start" approach could be most appropriate, whereby the mortgage shortfall would be discharged after a longer period than other debts forming part of the Debt Settlement Arrangement, after a period of, say, 10 years.

1.323 The Commission accepts these concerns regarding the potential consequences of the widespread discharge of large amounts of mortgage shortfall debts. From a legal point of view, however, the Commission does not consider that these concerns justify the departure from the established approach to secured debts in insolvency proceedings outlined above. The principle of collectivity and equality amongst creditors demands that the portion of a mortgage loan debt not covered by the realisation of the mortgaged asset should be treated in the same manner as unsecured debt. Therefore the Commission does not recommend that a distinct approach should be adopted to the shortfall on a mortgage debt where the asset on which the loan is secured has been realised.

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<sup>457</sup> See Fletcher *The Law of Insolvency* (4<sup>th</sup> ed. Sweet and Maxwell 2009) at 3-4.

<sup>458</sup> (LRC 96-2010) at paragraph 13.

<sup>459</sup> See (LRC CP 56-2009) at paragraphs 1.80 to 1.95.

**(c) Mortgage loans and the debtor's principal private residence**

1.324 The following paragraphs discuss further distinct issues relating to mortgage loans that arise under the Debt Settlement Arrangement system. The first issue discussed is how mortgage repayments should be addressed generally in the repayment plan to be completed by the debtor in a Debt Settlement Arrangement. The next subject is that of appropriate solutions where an over-indebted individual participating in a Debt Settlement Arrangement is also experiencing difficulties in repaying his or her mortgage loan. Finally, the question of when a debtor should be required to realise any equity he or she may have in his or her principal private residence is discussed.

**(i) Mortgage loan repayments generally**

1.325 While the preceding paragraphs illustrate that the proposed Debt Settlement Arrangement is primarily concerned with unsecured debts, a holistic approach to the debt difficulties of an individual must take into account the entirety of a debtor's obligations, including secured debts. Also, as part of a consideration of the debtor's ability to make repayments under a Debt Settlement Arrangement, it is necessary to exclude a protected amount of income required to cover the debtor's reasonable living expenses.<sup>460</sup> The debtor's reasonable living expenses should obviously include the costs of accommodation, in the form of either payments of rent or mortgage repayments. Therefore the guidelines on reasonable income to be prepared as per the Commission's recommendations above should include a reasonable allowance towards mortgage repayments in respect of accommodation appropriate to the needs of the debtor and his or her family. Creditors voting on a proposed arrangement would then decide whether to permit the debtor to retain this level of income towards mortgage repayments, taking into account the reasonable income guidelines and the debtor's completed Standard Financial Statement. Where the portion of the debtor's income being dedicated to mortgage repayments is higher than that specified in the relevant guidelines, the Commission recommends that it may be appropriate for the debtor to try to find less expensive accommodation. Where the debtor has equity in his or her home, this could be realised, with the money raised distributed to creditors. This issue is discussed further below.

**(ii) Repossession and sale of the debtor's home during the course of a Debt Settlement Arrangement?**

1.326 The following paragraphs discuss the circumstances in which a debtor's home could be repossessed during the course of a Debt Settlement Arrangement. Two situations must be distinguished in this regard. The first situation refers to a position where a debtor who enters the Debt Settlement Arrangement procedure is experiencing difficulties in meeting or is in default in respect of his or her mortgage repayments. The second is where a debtor is in a position to make mortgage repayments (of an amount falling within that allowed by the reasonable income and expenditure guidelines),<sup>461</sup> and where the debtor has an equity in his or her property. In this second scenario the question arises as to the circumstances in which it would be appropriate to force the debtor to sell the house and to distribute the proceeds amongst his or her creditors.

**(8) Conditions of Access: insolvency and good faith**

1.327 The Consultation Paper noted that access to debt settlement schemes in most European countries is regulated by the two conditions of "insolvency" and "good faith".<sup>462</sup> The Commission expressed the view that a fundamental principle of the system should be that insolvency proceedings should be widely available to all genuine over-indebted individuals, and that unnecessary obstacles to access should not be put in place. The Commission nonetheless recognised that certain limitations on access must exist in order to preserve the integrity of the process and prevent abuse, and so provisionally recommended that access should be governed by these two conditions of insolvency and good faith. The Commission provisionally recommended that the "insolvency" condition should consist of a test as to whether the debtor is unable to meet his or her obligations, with this inability continuing over a significant period of time. The Commission invited submissions as to whether any other considerations should be

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<sup>460</sup> See paragraphs 1.285 to 1.287 above.

<sup>461</sup> See paragraphs 1.285 to 1.287 above.

<sup>462</sup> (LRC CP 56-2009) at paragraphs 5.121 to 5.133.

taken into account in formulating this condition.<sup>463</sup> Similarly, the Commission discussed various formulations of the requirement that a debtor must act in good faith existing in procedures in other countries, and invited submissions as to the appropriate content of such a condition for accessing the proposed debt settlement procedure.<sup>464</sup>

**(a) Insolvency**

1.328 The Commission received several submissions in response to these invitations. The submissions relating to the insolvency question are first discussed. One submission emphasised that the Debt Settlement Arrangement procedure should only be available to debtors in genuine need of debt relief, and that it must not be open to abuse. This submission noted that if the insolvency condition is to involve insolvency over a significant period of time, there is a need to define this period of time, with the length of the term of the loan possibly being a useful consideration in this regard. This submission stressed the importance of ensuring that the information used to assess the debtor's insolvency is comprehensive and accurate. It also suggested that debtors entering the process should be required to apply for any social welfare assistance to which they are entitled in order to maximise their ability to repay.

1.329 Another submission argued that a critical distinction should be drawn between those debtors whose insolvency is likely to continue over a prolonged period of time as opposed to those whose insolvency is temporary and who, with revised payment arrangements, are likely to be able to discharge their total indebtedness over a reasonable timeframe. This submission suggested that where there is disagreement between the debtor/the debtor's advisor and creditors on the extent of the debtor's insolvency, the Debt Settlement Office should be responsible for determining the issue. It was also emphasised that any repayment plan should be suitably flexible as to allow the arrangement to be revised where financial circumstances of the debtor change. A further submission expressed a similar view, agreeing with the Commission's provisional recommendation that a debtor seeking to access the procedure should demonstrate that his or her inability to repay will persist over a significant period of time. A final submission suggested that the insolvency tests should be similar to those used in corporate insolvency, which are the "balance sheet" test and the "cash flow" test. The "balance sheet" test means that upon a balance of the debtor's liabilities and assets, the former exceed the latter with the consequence that it is impossible for all the liabilities to be discharged in full.<sup>465</sup> The "cash flow" test means that a debtor is unable to meet his or her obligations at the time they fall due.<sup>466</sup> It should be noted that both of these tests are employed under Irish corporate insolvency law. For example, the test for the appointment of an examiner to a company involves an assessment as to whether a company is unable to pay its debts.<sup>467</sup> This test is satisfied if a company is either unable to pay its debts as they fall due, the value of the company's assets is less than the amount of its liabilities, or if the specified circumstances in which a company is deemed to be unable to pay its debts exist.<sup>468</sup> Under the procedure for the debtor's petition for bankruptcy under the *Bankruptcy Act 1988*, the wording of section 15 of the Act is to the effect that the debtor must show that he or she "is unable to meet his [or her] engagements with his [or her] creditor".

1.330 It should be noted that under the Canadian Consumer Proposal procedure, a person who is insolvent may apply for entry to the procedure, with the insolvency conditions encompassing both the "balance sheet" and "cash flow" tests. Therefore an "insolvent person" is someone:<sup>469</sup>

- who is for any reason unable to meet his obligations as they generally become due,

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<sup>463</sup> (LRC CP 56-2009) at paragraph 5.126.

<sup>464</sup> (LRC CP 56-2009) at paragraph 5.133.

<sup>465</sup> See Fletcher *The Law of Insolvency* (4<sup>th</sup> ed. Sweet and Maxwell 2009) at 1.

<sup>466</sup> *Ibid.*

<sup>467</sup> See section 2(3) of the *Companies (Amendment) Act 1990*.

<sup>468</sup> These circumstances are contained in section 214 of the *Companies Act 1963*.

<sup>469</sup> See section 2 of the *Bankruptcy and Insolvency Act (Canada)*.

- who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
- the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

1.331 Under the Australian Part IX (Consumer) Debt Agreement procedure, a debtor who is insolvent may submit a proposal for a debt agreement.<sup>470</sup> In this context, a person is “insolvent” if he or she is not able to pay all the person’s debts, as and when they become due and payable.<sup>471</sup> It can be seen that this embodies the “cash-flow” test for solvency.

1.332 No such condition of insolvency is specified in relation to the Individual Voluntary Arrangement procedure in England and Wales.

1.333 The Commission therefore concludes from these submissions that it is appropriate that the provisional recommendation that a debtor seeking to enter the Debt Settlement Arrangement procedure must be unable to repay his or her debts over a significant period of time is an appropriate condition. The Commission recommends that, as the maximum period of a Debt Settlement Arrangement is to be set at five years,<sup>472</sup> this significant period of time should also be set at a period of five years. The Commission recommends that the test for inability to pay debts or insolvency should involve the “balance sheet” and “cash flow” test, applied over a period of five years. As noted above, the Commission considers that the efficiency of the procedure requires that applications should not be subject to detailed scrutiny by an independent body, but should instead be controlled by the Personal Insolvency Trustee and creditors’ meeting, with limited supervision from the Debt Settlement Office. Therefore the insolvency condition can be established by the inclusion in the report of the Personal Insolvency Trustee to the Debt Settlement Office a statement that in the Personal Insolvency Trustee’s opinion, (as verified by a completed Standard Financial Statement):

- The value of the debtor’s assets is less than the amount of his/her liabilities, and it is unforeseeable that at any stage within a five year period the value of the assets will be equal to, or larger than, the value of the liabilities; or
- The debtor is unable to pay his/her debts as they fall due, and it is unforeseeable that over the course of a five year period the debtor will be able to pay his/her debts in full.

1.334 *The Commission recommends that the Personal Insolvency Trustee’s report to the Debt Settlement Office, as part of an application for a Debt Settlement Arrangement, should include a statement by reference to cash flow and balance sheet that, in the Trustee’s opinion, as verified by a completed Standard Financial Statement:*

- *The value of his/her assets is less than the amount of his/her liabilities, and it is unforeseeable that at any stage within a five year period the value of the assets will be equal to, or larger than, the value of the liabilities; or*
- *The debtor is unable to pay his/her debts as they fall due, and it is unforeseeable that over the course of a five year period the debtor will be able to pay his/her debts in full.*

**(b) Good Faith**

1.335 The Commission also received submissions regarding the “good faith” condition for accessing the Debt Settlement Arrangement procedure. This condition was considered by those making submissions to be crucial in ensuring that the proposed system was not abused. Submissions emphasised the importance of ensuring that the debtor makes an honest and comprehensive disclosure of his or her means and that the debtor cooperates fully throughout the course of an arrangement. Some submissions argued that the key content of the “good faith” test should be that the debtor act honestly at

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<sup>470</sup> Section 185C(1) of the *Bankruptcy Act 1966 (Cth.)* (Aus).

<sup>471</sup> Section 5(2) of the *Bankruptcy Act 1988 (Cth.)* (Aus).

<sup>472</sup> See paragraph 1.259 above.

all times, and that the debtor has not acted fraudulently or has sought to intentionally defeat the claims of creditors. Some submissions also suggested that the debtor's cooperation in attempting to repay a debt in advance of entering the Debt Settlement Arrangement procedure should be relevant. In this regard information relating to participation in court proceedings for the recovery of a debt, and previous referrals of the debtor to the MABS by creditors should be taken into account.

1.336 Submissions also suggested methods by which the good faith obligations imposed on debtors could be enforced. Some submissions suggested that there should be penal sanctions in the event of fraud or the misrepresentation of assets or income on the part of the debtor. Another submission suggested that the threat of bankruptcy proceedings should be used to ensure adherence to the debtor's duty to cooperate in the process and the assessment of his or her assets and income. Finally, the debtor's proposal for an arrangement (and in particular the completed Standard Financial Statement) should include a statement that complete disclosure of all assets, income and liabilities has been made, and that all information provided is truthful.

1.337 The Commission notes that elements of the proposed Debt Settlement Arrangement procedure discussed in other areas of this chapter serve to ensure that the debtor acts in good faith. The following safeguards are relevant in this regard:

- The grounds on which a creditor may challenge a proposed Debt Settlement Arrangement before it has been approved by the court include the existence of a material inaccuracy in the debtor's Standard Financial Statement and the commission by the debtor of an offence under the procedure;
- The grounds on which a creditor or the Personal Insolvency Trustee may apply for the termination of a Debt Settlement Arrangement and/or for an adjudication of bankruptcy against the debtor include the existence of a material inaccuracy in the debtor's Standard Financial Statement, the failure of the debtor to comply with the duties and obligations imposed on debtors under the procedure (see below) and the commission by the debtor of an offence under the procedure;
- The duty of the Personal Insolvency Trustee to include in the application for a Debt Settlement Arrangement a statement to the effect that he or she has reasonable grounds to believe that all information contained in the application is comprehensive and accurate;
- The duty on creditors to accept the information in the debtor's Standard Financial Statement does not apply where creditors have reasonable grounds to believe that the information is incomplete or inaccurate;
- The duties imposed on debtors throughout the course of an arrangement include a duty to cooperate throughout the process; a duty to inform the Personal Insolvency Trustee of any change in the debtor's circumstances; a duty not to obtain credit or to trade except under certain conditions;
- The Commission recommends that any debt or liability arising from a loan (or forbearance of a loan) obtained through fraud, misappropriation, embezzlement or fraudulent breach of trust should only be capable of being discharged where expressly included in a Debt Settlement Arrangement and where the creditor in question has voted in favour of the arrangement;
- The criminal offences under the Debt Settlement Arrangement procedure described below act as a disincentive for the debtor to engage in dishonest or fraudulent conduct.<sup>473</sup>

1.338 The Commission believes that these safeguards provide rigorous protection against the abuse of the proposed Debt Settlement Arrangement procedure. These provisions should ensure that only honest debtors who are willing to cooperate fully should receive the benefits of debt discharge provided by the procedure. The Commission also believes that these provisions serve as more efficient means of achieving this aim and of upholding the integrity of the system than a formal subjective assessment of the "good faith" of a debtor by an independent body on application by the debtor to enter the procedure, as is

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<sup>473</sup> See paragraphs 1.362 to 1.363 below.

the case in the systems of some European countries.<sup>474</sup> This position also reflects the Commission's policy of moving away from a position whereby debtors are presumed to be dishonest and must demonstrate their honesty, to a position where those debtors specifically found to have acted in a dishonest manner are duly punished.<sup>475</sup>

1.339 Therefore the Commission makes no further recommendation as to a "good faith" test for accessing the Debt Settlement Arrangement procedure, as the requirement that the debtor act in good faith is ensured by other safeguards proposed in this chapter.

#### **(9) Business v Consumer Debtors**

1.340 The Consultation Paper invited submissions as to whether the Debt Settlement Arrangement procedure should be limited to debtors whose over-indebtedness has arisen due to consumer activity, or whether business debtors should also be included within the procedure.<sup>476</sup> The Commission discussed the differences arising between cases of consumer and business debt, and also outlined reasons why both business and consumer debt should be included within any such system. The Commission also explored the possibility of limiting access to the non-judicial debt settlement system to cases involving total indebtedness of an amount lower than a certain monetary threshold.

1.341 The Commission received several submissions on this point. There was almost unanimous agreement that monetary indebtedness thresholds should not be used to limit access to the procedure. The Commission therefore discounts this option.

1.342 A majority of submissions were in favour of not limiting access to the procedure to consumer debtors. Just one submission suggested that access should be limited to consumers, and even this submission only suggested that the procedure should be initially limited to consumers and later expanded to include business debtors once it was well established. Remaining submissions recognised that there is an overlap between business and consumer debt in many cases, and that it can be quite difficult to isolate cases of business debt from those of consumer debt. This is especially the case due to the practice in recent years of individuals without business backgrounds obtaining personal loans to undertake small-scale business ventures, often without first obtaining appropriate legal or accounting advice. Therefore a majority of submissions suggested that there should be no distinction between consumer and business debtors, and that all insolvent individuals should be in a position to propose a Debt Settlement Arrangement to their creditors.

1.343 The Commission notes that various approaches to this subject have been taken in other countries. In England and Wales, all insolvent individuals, including business and consumer debtors, may use the IVA procedure. This procedure was originally designed for business debtors, but quickly became used by consumer debtors as the levels of consumer over-indebtedness in the economy rose.<sup>477</sup> In recognition of the widespread use of the mechanism by consumers, the IVA Protocol has been introduced in order to establish among creditors and Insolvency Practitioners an agreed set of procedures and proposal terms to facilitate the reaching of straightforward arrangements in consumer cases.<sup>478</sup>

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<sup>474</sup> See (LRC CP 56-2009) at paragraphs 5.127 to 5.133.

<sup>475</sup> See also the Commission's discussion of the restrictions regime in bankruptcy law: in Chapter 3 below.

<sup>476</sup> (LRC CP 56-2009) at paragraphs 5.136 to 5.142.

<sup>477</sup> See e.g. Green "New Labour: More Debt – the Political Response" in Niemi, Ramsay, Whitford (eds.) *Consumer Credit, Debt and Bankruptcy: Comparative and International Perspectives* (Hart Publishing 2009) 393 at 399ff.; Morgan *Causes of Early Failure in Individual Voluntary Arrangements* (Kingston Business School Occasional Paper No. 63, 2009) at 4, available at: <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/research/personaldocs/IVA%20Research%20-%20Occasional%20Paper.pdf>.

<sup>478</sup> See *IVA Protocol: Straightforward Consumer Individual Voluntary Arrangement* (Insolvency Service, 2008), available at: <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/policychange/foum2007/plenarymeeting.htm>.

1.344 In other jurisdictions, such as Australia and Canada, separate arrangement procedures exist for consumer and business debtors. In Australia, access to the Part IX (Consumer) Debt Agreement procedure is limited to debtors whose total indebtedness and total assets do not exceed AUS\$88,379.20 (€61,197), and the debtor's after tax income does not exceed AUS\$66,284.40 (€45,897).<sup>479</sup> Since before the introduction of this Part IX consumer procedure, the more complex Part X Personal Insolvency Agreement procedure has existed, which was designed as an alternative to bankruptcy for business debtors. Due to the complex procedural steps and consequent cost involved under this procedure, it is inappropriate for situations of consumer debt.<sup>480</sup> The Part IX procedure was therefore introduced in order to act as "a viable low cost alternative to bankruptcy for low income debtors with little or no property, with few creditors and with low levels of liability, for whom entry into a Part X administration is not possible because of set up costs."<sup>481</sup> Therefore the separation of consumer and business personal debt under the Australian Debt Agreements system is largely the result of the failure of the first Debt Agreement procedure to cater for situations of consumer debt. Therefore if the original procedure had been suitably low-cost and lacking in complexity as to be amenable for use by consumers (as was the case with the IVA procedure, irrespective of the original intention that it should be used by business debtors), there may have been no need to introduce a separate consumer procedure.

1.345 The Commission concludes from the above discussion that there is no compelling justification for excluding business debtors from the Debt Settlement Arrangement procedure. The Commission acknowledges that the insolvency of an individual who has incurred his or her debts as part of his/her trade or profession may be more complex than those of consumer debtors, with issues such as obligations to employees arising. The Commission however considers that the proposed Debt Settlement Arrangement procedure is sufficiently flexible to deal with such cases, and the supervisory regime for Personal Insolvency Trustees should be in a position to ensure that these actors have the requisite expertise to address such matters. The Commission therefore recommends that access to the Debt Settlement Arrangement procedure should be open to individual debtors, including both those whose indebtedness arises from debts incurred for consumption and debts incurred for the purposes of the debtor's trade or profession. Such debts should be defined as those for a definite (liquidated) sum or sums payable either immediately or at some certain future time, and which are not secured or excluded debts.

1.346 *The Commission recommends that access to the Debt Settlement Arrangement procedure should be open to all insolvent individual debtors, including both those whose indebtedness arises from debts incurred for consumption and debts incurred for the purposes of the debtor's trade or profession. Such debts should be defined as those for a definite (liquidated) sum or sums payable either immediately or at some certain future time, and which are not secured or excluded debts.*

**(10) Access to debt settlement: once-in-a-lifetime**

1.347 The Consultation Paper raised the issue of whether access to the Debt Settlement Arrangement procedure should be limited in the case of a debtor who has already previously availed of the procedure.<sup>482</sup> The Commission noted that the rehabilitative, social welfare and functional economic justifications for insolvency debt discharge suggest that once the debtor has completed the process he or she should be restored to a sound economic and social position and should not suffer from further over-indebtedness. The Commission however also noted that the consumer protection rationale for debt discharge, based on the realisation that open consumer credit markets inevitably lead to a number of

<sup>479</sup> Insolvency and Trustee Service Australia *Indexed Amounts* (updated 1 August 2010), available at: [http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/About+Us->Publications->Current+Amounts+Document/\\$FILE/Current\\_Amounts.pdf?OpenElement](http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/About+Us->Publications->Current+Amounts+Document/$FILE/Current_Amounts.pdf?OpenElement). Currency conversions as at 4 August 2010.

<sup>480</sup> Mason and Duns "Developments in Consumer Bankruptcy in Australia" in Niemi-Kiesilainen (ed), Ramsay (ed) and Whitford (Ed) *Consumer Bankruptcy in Global Perspective* (Hart Publishing 2003) 227 at 232ff.

<sup>481</sup> *Ibid* at 243, citing House of Representatives *Bankruptcy Legislation Amendment Bill 1996: Explanatory Memorandum* (Australian Government Publishing Service 1996) at paragraph 135.16.

<sup>482</sup> (LRC CP 56-2009) at paragraphs 5.143 to 5.144.



over-indebted individuals, recognises that debtors may continue to suffer from financial difficulties even after undergoing the debt settlement process. The Commission noted the approaches in various European countries, such as the rules in Netherlands and Austria that access to the debt settlement procedure is permitted a second time after the passage of a period of 10-20 years. An alternative approach, existing under Swedish law, of permitting a second use of the procedure in exceptional circumstances irrespective of the time that has passed since the first use of the procedure, was also noted. The Commission ultimately invited submissions as to the restrictions which should be placed on the use of the proposed debt settlement scheme by individuals who have already availed of debt discharge under the scheme.

1.348 The Commission received several submissions on this issue. Some submissions suggested that access should only be available on a once-off basis as increased access could risk the abuse of the process and the disrespect of creditors' rights. The majority of submissions called for a much less restrictive approach. Most submissions suggested that while there should be a primary rule against multiple use of the procedure, a flexible system of exceptions is required, and debtors should not automatically be excluded from accessing the procedure a second time. Instead consideration should be given to the individual circumstances of the debtor, including the situation giving rise to the debtor's difficulties, with access to be allowed where factors external to the debtor have caused his or her debt problems. The length of time since the debtor last used the procedure should also be considered. One submission called for a more rigid system, with a debtor only permitted to apply to use the scheme once every 10 years. A final submission suggested that no express restrictions should be placed on access to the system. Instead debtors should be obliged to disclose their financial histories when proposing an arrangement to creditors, and creditors should be permitted to refuse a proposal where they suspected abuse.

1.349 The Commission again reiterates its view that the Debt Settlement Arrangement procedure should be based on a combination of sufficient flexibility to accommodate the circumstances of individual cases and the protection of the parties' interests, while also establishing certain core rules in order to achieve the public interest goals the system is designed to serve. The Commission also reiterates its goal that the procedure should be as efficient and simple as possible, largely based on the agreement of a proposal by a majority of creditors, subject to the right to challenge the agreement, rather than on the assessment, adjudication or imposition of an arrangement by an independent third party.

1.350 The Commission notes that certain other legal systems place limits on the use of their arrangement procedures, even where these arrangements are based on the acceptance of a debtor's proposal by a majority of creditors. Therefore in Australia, a debtor may not submit a debt agreement proposal if at any time during a 10 year period immediately before the presentation of the proposal the debtor has been a bankrupt or has previously availed of the non-judicial insolvency arrangement procedures.<sup>483</sup> Alternatively, under the IVA procedure in England and Wales, there are no such statutory restrictions on access to the procedure, with the sole limitation on entry to the procedure being the creditors' refusal to accept the debtor's proposal.

1.351 The Commission recognises that the majority of submissions received were in favour of the introduction of some restriction on the multiple uses of the Debt Settlement Arrangement procedure by debtors. Of this majority most favoured a primary rule excluding access to the procedure on multiple occasions, with flexible exceptions based on the individual circumstances of the debtor in question. The Commission also notes here that, in its proposals for the Debt Relief Order procedure, discussed below, it recommends that a primary rule should exist to the effect that a debtor may only access the procedure once, subject to a proviso that a debtor may exceptionally access the procedure a second time if his or her difficulties have been caused by external factors outside of the debtor's control. The Commission recommends that a presumption should exist to the effect that the debtor's circumstance are not sufficiently exceptional to warrant recourse to the procedure for a second time where less than six years have expired since a debt relief order was granted in respect of the debtor. The Commission recommends that a similar approach with appropriate changes should be adopted in respect of the Debt Settlement Arrangement procedure. The Commission notes that, unlike under the Debt Relief Order

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<sup>483</sup> Section 185C(4) of the *Bankruptcy Act (Cth.)* (Aus).

procedure, the Debt Settlement Arrangement procedure will not involve a comprehensive assessment of all applications by an independent body, instead relying on the professional oversight of the properly regulated Personal Insolvency Trustee, the consent of the creditors' meeting, and limited court supervision. In order to make the procedure more efficient and less procedurally complicated, the Commission proposes that the debtor should be deemed to be eligible, subject to a right for creditors to challenge the debtor's eligibility before a court and/or the Debt Settlement Office.

1.352 The Commission therefore recommends that a debtor should be eligible to propose a Debt Settlement Arrangement to creditors on multiple occasions. This eligibility should however be subject to the approval of the creditors' meeting, and subject to a right for a minority creditor to challenge the debtor's eligibility where the debtor has previously availed of the procedure within the last ten years and cannot point to exceptional or external circumstances for his or her current over-indebtedness. In order to assess the eligibility of the debtor, an application for a Debt Settlement Arrangement should include a declaration by the debtor or his/her Personal Insolvency Trustee as to the debtor's prior participation, if any, in the arrangement procedure.

1.353 *The Commission recommends that there should be a primary rule to the effect that a debtor may only access the Debt Settlement Arrangement procedure once during a ten-year period, subject to a proviso that a debtor may exceptionally access the procedure a second time more sooner if his or her difficulties have been caused by external factors outside of the debtor's control.*

1.354 *The Commission recommends however that all debtors, even those who have accessed the procedure within this ten-year period, should be presumed to be eligible to propose a Debt Settlement Arrangement to creditors on multiple occasions, subject to:*

- *the approval of the creditors' meeting; and*
- *a right for a creditor to challenge the debtor's eligibility where the debtor has previously proposed a Debt Settlement Arrangement within the ten years prior to proposing another arrangement to creditors;*
- *and that it is for the debtor to establish the existence of the exceptional factors or other external factors outside his or her control.*

1.355 *The Commission recommends that, in any application for a Debt Settlement Arrangement, the debtor or his or her Personal Insolvency Trustee shall make a statutory declaration as to the debtor's previous participation, if any, in a Debt Settlement Arrangement.*

## **(11) Offences**

1.356 As noted above, the integrity and efficacy of the proposed Debt Settlement Arrangement procedure requires that debtors and creditors act honestly and transparently throughout the process. This point has been discussed further above in relation to the requirement that a debtor must act in good faith.<sup>484</sup> Submissions received by the Commission suggested that legislation should provide for criminal offences where debtors act dishonestly or fraudulently throughout the Debt Settlement Arrangement process. Similar offences exist under similar procedures in other countries, as is now discussed.

1.357 Under the Individual Voluntary Arrangement in England and Wales, a debtor commits an offence if for the purpose of obtaining the approval of his creditors to a proposal for a voluntary arrangement, he or she makes any false representation or fraudulently does, or omits to do, anything.<sup>485</sup> This offence is committed even if the debtor's proposal is not approved. Furthermore, if it appears to the nominee or supervisor of an IVA that the debtor has been guilty of any offence in connection with the IVA for which he or she is criminally liable, the nominee/supervisor must report the matter to the Secretary of State and provide the Secretary of State with information and access to documents in his or her

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<sup>484</sup> See paragraphs 1.335 to 1.339 above.

<sup>485</sup> Section 262A of the *Insolvency Act 1986* (UK).

possession.<sup>486</sup> The nominee/supervisor is also under a duty to give the relevant prosecuting authority all assistance in connection with the prosecution which he is reasonably able to give.<sup>487</sup>

1.358 Under Canadian legislation, far more offences exist in relation to debtors involved in the bankruptcy procedure than in the proposal procedures, which more closely resemble the Commission's proposed Debt Settlement Arrangement procedure. Nonetheless some offences are also applicable to debtors participating in the proposal procedure. Any person making a proposal who has on any previous occasion been bankrupt or made a proposal to the person's creditors is guilty of an offence and is liable to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both, if

- (a) being engaged in any trade or business, at any time within the period beginning on the day that is two years before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, that person has not kept and preserved proper books of account; or
- (b) within the period mentioned in paragraph (a), that person conceals, destroys, mutilates, falsifies or disposes of, or is privy to the concealment, destruction, mutilation, falsification or disposition of, any book or document affecting or relating to the person's property or affairs, unless the person had no intent to conceal the state of the person's affairs.

The Canadian legislation also provides for offences that can be committed by creditors. Therefore if a creditor will be guilty of an offence if it wilfully and with intent to defraud makes any false claim or any proof, declaration or statement of account that is untrue in any material particular.<sup>488</sup>

1.359 Australian legislation provides for numerous offences that apply to debtors both in respect of bankruptcy proceedings and the Personal Insolvency Agreement procedure, although some of the offences do not appear to be applicable in the Consumer Debt Agreement procedure. The offences apply to conduct in areas such as:

- Concealment of property;<sup>489</sup>
- The making of false affidavits;<sup>490</sup>
- Failure to attend before the court or before the Official Receiver when summoned/ordered;<sup>491</sup>
- Refusal to be sworn, to answer a question he or she is required to answer by the court, or to produce any books required to be produced by the court;
- To prevaricate or evade questioning during a court examination, or to fail to cooperate in an examination in other specified ways;<sup>492</sup>
- Failure of debtor to disclose property;<sup>493</sup>
- Disposal of property with intent to defraud creditors;<sup>494</sup>
- False declaration by a debtor;<sup>495</sup>

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<sup>486</sup> Section 262B(2) of the 1986 Act.

<sup>487</sup> Section 262B(3) of the 1988 Act.

<sup>488</sup> Section 201(1) of the *Bankruptcy and Insolvency Act* (Can).

<sup>489</sup> Section 263 of the *Bankruptcy Act 1966 (Cth.)* (Aus).

<sup>490</sup> Section 263A of the 1966 Act.

<sup>491</sup> Sections 264A and 267D of the 1966 Act.

<sup>492</sup> Sections 264C-264E of the 1966 Act.

<sup>493</sup> Sections 265, 268(2)(a) of the 1966 Act.

<sup>494</sup> Section 266 of the 1966 Act.

<sup>495</sup> Sections 267 and 268(3) of the 1966 Act.

- Failure of a person to provide information when ordered to do so;<sup>496</sup>

In addition, the Australian legislation also provides for criminal liability of creditors under certain circumstances. Therefore a creditor will be guilty of an offence where it gives to the trustee a voting document knowing or reckless that the document is false or misleading in a material particular.<sup>497</sup>

1.360 From the above it can be seen that legal systems tend to provide for a series of criminal offences and punishments intended to deter debtors and creditors from acting in a dishonest or uncooperative manner. The Commission therefore considers that as a safeguard against the abuse of the proposed Debt Settlement Arrangement procedure, and in order to ensure its efficacy and integrity, criminal offences should exist to prevent dishonest conduct. The Commission refers to the similar discussion in Chapter 2 in relation to the Debt Relief Order procedure, where the Commission recommended that the procedure should be safeguarded through a series of criminal offences.<sup>498</sup>

1.361 The Commission also recommends that where the Personal Insolvency Trustee becomes aware that the debtor may have committed an offence, the Personal Insolvency Trustee should be required to notify the Debt Settlement Office of this. The Personal Insolvency Trustee should also be under a duty to cooperate with any criminal investigation being conducted by the relevant authorities.

1.362 *The Commission recommends that it should be a criminal offence for a debtor participating in the Debt Settlement Arrangement procedure to engage in fraudulent or dishonest conduct, including, inter alia, engaging in the following activities:*

- *Fraudulently making a false or incomplete representation for the purposes of obtaining the acceptance by creditors' meeting and/or court approval of a proposed Debt Settlement Arrangement;*
- *Knowingly concealing or refusing to produce documents or information when required to do so by the Personal Insolvency Trustee, Debt Settlement Office or court, or producing falsified documents;*
- *Concealing or disposing of property with the intention of defrauding creditors;*
- *Fraudulently dealing with property obtained on credit;*
- *Obtaining credit above a certain limit without disclosing that the debtor is a party to a Debt Settlement Arrangement;*
- *Carrying on business in a name other than the debtor's own without disclosing the name under which the Debt Settlement Arrangement has been registered in the Personal Insolvency Register.*

1.363 *The Commission recommends that where the Personal Insolvency Trustee has reasonable grounds to believe that the debtor may have committed a criminal offence, the Trustee should be required to notify the Debt Settlement Office of this. The Trustee should also be under a duty to cooperate with any criminal investigation being conducted by the relevant authorities.*

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<sup>496</sup> Sections 267B and 268(2)(ba)-(d) of the 1966 Act.

<sup>497</sup> Section 263C of the 1966 Act.

<sup>498</sup> See paragraphs 2.110 to 2.112 above.

## CHAPTER 2      PERSONAL INSOLVENCY LAW: “NO INCOME, NO ASSETS” CASES AND DEBT RELIEF ORDERS

### A            Introduction

2.01      In this Chapter, the Commission recommends the introduction of a Debt Relief Order procedure to allow for the non-judicial resolution of “no income, no assets” cases involving debtors who lack the necessary means to make even part repayments to their creditors. As noted above, the Commission’s Consultation Paper proposed a two-step approach to reforming personal insolvency law in Ireland. This involved the creation of a non-judicial personal insolvency law system and a comprehensive review of the *Bankruptcy Act 1988*. The Commission proposes that the non-judicial debt settlement system should in turn consist of two procedures, with the Debt Settlement Arrangement procedure described in Chapter 2 to be augmented by the Debt Relief Order procedure. These two procedures are designed to accommodate different categories of debtor, with the Debt Relief Order intended to provide relief to those “no income, no assets” debtors who have extremely low levels of income and assets, and for this reason cannot avail of bankruptcy proceedings and cannot afford a partial repayment plan. The Debt Settlement Arrangement procedure in contrast is designed for “standard” debtors who have sufficient disposable income, and some other assets, to fund a partial repayment plan over a number of years.

### B            A “No Income, No Assets” Procedure

2.02      In the following Part, the Commission advances the considerations which have led to its recommendation for the introduction of the Debt Relief Order procedure for “no income, no assets” cases, before Part C presents the Commission’s conclusions and recommendations themselves.

#### (1)          *Consultation Paper and Submissions Received*

2.03      The Commission provisionally recommended that a debtor seeking to enter the debt settlement system should be required to demonstrate his or her insolvency, meaning that the debtor should satisfy a test as to whether he or she is unable, over a significant period of time, to meet his or her obligations.<sup>1</sup> In this manner the Commission excluded from the proposed debt settlement system “could pay” debtors who are temporarily insolvent but who may be able to pay their debts through financial reorganisation. A further issue in relation to the structure of debt settlements raised was that of whether access to debt settlement should be only available to consumer debtors, or whether over-indebted individuals who had incurred personal debts should also be included within the scheme. The Commission outlined possible reasons for distinguishing between consumer and business debtors, and possible tests which could be used to place debtors into these two categories. Ultimately the Commission invited submissions on this issue.<sup>2</sup>

2.04      The above issues essentially can be distilled into a question of whether different procedures or “streams” will be required for different categories of debtors under the proposed debt settlement system. A fundamental principle of the Commission’s Consultation Paper is that the law should be drafted to take account of the different circumstances in which over-indebtedness arises.<sup>3</sup> Similarly, the Consultation Paper similarly provisionally recommends that the law should distinguish between debtors who cannot pay their debts and those who refuse to pay, thus taking an individualised approach to issues of debt

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<sup>1</sup> (LRC CP 56-2009) at paragraph 5.126.

<sup>2</sup> *Ibid* at paragraph 5.142.

<sup>3</sup> See (LRC CP 56-2009) at paragraph 1.60.

enforcement and personal insolvency.<sup>4</sup> The Commission also recommended that the law must recognise an intermediate category of debtor who cannot pay their debts at present, but with appropriate assistance could enter a position where he or she could pay partially or in full.<sup>5</sup>

2.05 From the discussion of these issues in the Consultation Paper, the following categories of over-indebted individuals can be identified:

- The “standard” debtor: a debtor who is unable to repay his or her debts in full over a reasonable period of time, but who is in receipt of sufficient surplus income to make partial repayments while maintaining a reasonable standard of living.
- The “No Income, No Assets” (“NINA”) debtor: a debtor receiving no income above the minimum required to maintain a reasonable standard of living and so incapable of making even partial repayments.<sup>6</sup>
- The “temporary NINA” debtor: a debtor who, through job loss or a fall in income, is temporarily in receipt of no income above the minimum required to maintain a reasonable standard of living. This debtor however exhibits prospects of being able to at least make partial repayments in the near future.
- The “could pay” debtor: a debtor who is temporarily unable to meet his or her obligations, but is in receipt of an income above the minimum required to maintain a reasonable standard of living, and so could repay his or her obligations over a reasonable period of time through financial reorganisation. The Consultation Paper envisages that such a debtor should not be eligible for the debt settlement scheme and partial debt discharge, but would instead be eligible for a voluntary debt management plan.<sup>7</sup>
- The “business” debtor: a debtor whose obligations have been incurred in his or her trade or profession. Such a debtor could fit any of the four above categories.

2.06 Several submissions responding to the Consultation Paper directly addressed the issue of “No Income, No Assets” cases of personal over-indebtedness. There was universal agreement among submissions that the fundamental principle of the debt settlement system should be one of “earned start”, whereby debtors should be required to make repayments to creditors over a period of 3-5 years, before obtaining a debt discharge of the remainder of their obligations. There was also no opposition to the Commission’s provisional recommendation that this requirement of partial repayment should not apply to debtors who are in receipt of no income above that required to maintain a reasonable standard of living. Submissions varied however as to how the situations of such over-indebted individual should best be addressed.

2.07 One submission argued that there may be a need for a flexible or “tiered” system, reflecting the complexity of different cases. This tiered system would allow for a more streamlined process in more straightforward cases, while containing more procedural safeguards in more complex cases. This submission also recommended that NINA debtors who possess no ability to make any repayment to creditors should not have access to the debt settlement programme at all. In these circumstances, the most appropriate course of action may be for all of the debts owed by the NINA debtor to be simply written-off. This submission suggested however that if such debtors are to be included in the debt settlement programme, their participation should be subject to fixed and regular reviews in order for any changes in the debtor’s circumstances to be taken into account.

2.08 Another submission adopted a similar approach, suggesting that debtors who have no ability to repay partially their obligations should be excluded from the debt settlement system. This submission argued that bankruptcy, involving the discharge of the individual’s debts in full without any repayment, would be more appropriate in the case of a NINA debtor. This submission suggested that bankruptcy

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<sup>4</sup> See (LRC CP 56-2009) at paragraphs 1.65 to 1.74; 2.109 to 2.111.

<sup>5</sup> *Ibid* at paragraphs 1.71 to 1.72.

<sup>6</sup> See (LRC CP 56-2009) at paragraphs 5.113 and 5.169 to 5.170.

<sup>7</sup> (LRC CP 56-2009) at paragraphs 5.124 to 5.125.

proceedings should be made more readily accessible, for example by allowing bankruptcy proceedings to take place in local courts rather than the current position of requiring all proceedings to take place before the High Court.

2.09 One submission supported the idea of “zero payment plans” for NINA debtors under the proposed debt settlement system, but called for the Commission to provide more precise detail as to how such plans would operate. Specifically, this submission suggested that consideration should be given to whether there should be a finite period within which a decision would be made as to the debtor’s ability to make any repayments. The Commission should, according to this submission, recommend at what point such NINA debtors would become entitled to debt discharge. This submission in this regard discussed the Swedish debt settlement system,<sup>8</sup> which provides for the immediate discharge of obligations of NINA debtors, suggesting that this may be a radical change to Irish law which may generate some opposition from creditors and from members of the public. This submission concluded that the debts of a NINA debtor should be discharged in full after a period of three to five years at the very latest.

2.10 A further submission supported the concept of “zero payment plans” within the debt settlement system, while suggesting that such plans should be subject to regular reviews to take account of any changes in the debtor’s financial circumstances. If the debtor’s circumstances were to improve during the discharge waiting period, he or she should be obliged to begin a repayment plan. This submission suggested that a debtor could perhaps be required to swear a statement of affairs at yearly intervals, a proposal that also suggests the submission envisaged that a period of several years should pass before a NINA debtor’s obligations would be discharged.

**(2) A Multi-Layered Debt Settlement System: Different Mechanisms for Different Categories of Debtors**

2.11 As noted above, a majority of respondents agree that the Commission’s proposals for a debt settlement scheme must be sufficiently nuanced to take into account the different circumstances of varying categories of debtors entering the scheme. The Commission takes the view that this consideration is fundamental to the design of the system, and that decisions regarding its institutional framework and the actors involved must necessarily depend on the circumstances and needs of the debtors for whom the system is designed.

2.12 A clear result of the Commission’s consultation process has been the widespread agreement that “No Income, No Assets” debtors, who are unable to afford even partial repayment of their obligations, should not be subject to the same regime as those debtors who are able to make partial repayments. Submissions however varied regarding the appropriate mechanism for addressing the situation such debtors without income or assets and who demonstrate no reasonable prospect of repaying any of their debts. Some suggested that such debtors could be best served by bankruptcy proceedings rather than a debt settlement system, while others suggested either debt write-off outside the legal process or the accommodation of such debtors in the proposed debt settlement system through the mechanism of “zero payment” debt settlement plans.

2.13 The Commission believes that a fundamental distinction must be drawn between the different categories of debtors described above, and that different debt relief options must be available to fit the varying needs of all debtors. Therefore the Commission proposes that its non-judicial system should consist of two processes. The primary statutory debt settlement process would be designed for the “standard” debtor, whose income and/or assets are such as to enable him or her to make partial repayment of his or her obligations over a reasonable period of time. This process should be based on the principle of “earned discharge”, whereby on the completion of the repayment plan, the remainder of the debtor’s obligations would be discharged.<sup>9</sup> This approach was universally accepted by the submissions received by the Commission.

2.14 The Commission proposes that a second procedure Debt Relief Order mechanism should exist for “NINA” debtors whose income and assets are such as to render them unable to make part repayments

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<sup>8</sup> See (LRC CP 56-2009) at paragraph 5.45.

<sup>9</sup> See (LRC CP 56-2009) at 279.

within the foreseeable future. As such debtors would not be in a position to participate in a repayment plan under a Statutory Debt Settlement, their debts should be discharged in their entirety following a much shorter period than the duration of a statutory Debt Settlement Arrangement as described above. The Commission now provides a discussion of comparative approaches to providing different solutions for debtors of varying means, before elaborating further on its proposals in this area and the rationale behind them.

### **(3) Comparative Analysis of “No Income, No Asset” Consumer Debt Settlement Procedures**

2.15 The following paragraphs present a brief discussion of how similar legal systems to that of Ireland have introduced various different debt relief mechanisms in order to cater for the varying circumstances of over-indebted individuals.<sup>10</sup> The discussion illustrates how a general trend towards the introduction of low-cost procedures designed for debtors of very low income who hold no reasonable prospect of paying their debts, which provide for the discharge of the entirety of these debtors’ obligations immediately or after a waiting period of very short duration. In addition to such mechanisms, the discussion illustrates that most systems also include procedures designed for debtors of more means who are in a position to make partial repayments of their debts over a period of several years, with the amount remaining unpaid then being discharged.

#### **(a) England and Wales**

2.16 In England and Wales, a major over-indebtedness policy review was conducted in the last decade which resulted in the creation of a new template for the reform of legal solutions to over-indebtedness.<sup>11</sup> This review produced the following 13 new underlying principles and public policy directives:

- (a) the Individual Voluntary Arrangement (repayment plan) process,<sup>12</sup> for those in work, should be preferred to bankruptcy and, therefore, should be the initial alternative within the formal/informal regime and hence seen as the ‘gateway criterion’. This approach will minimise the cost to the state and result in higher yields for creditors;
- (b) bankruptcy should be seen as a last resort and principally directed against those who ‘can pay but will not’ or have been guilty of some offence or where the medium-term economics for recovery are hopeless;
- (c) the regime should move from a judicial to an administrative basis unless there was empirical and persuasive evidence that this was inoperable;
- (d) where (private sector) market providers could administer the mechanisms this should be the route rather than publicly funded entities or the court;
- (e) the range of mechanisms within the regime should be extended to reflect more appropriately the practical demands of the over-indebted and the credit market; these mechanisms should be specifically directed to remove those mismatches between ‘needs’ and ‘availability’;
- (g) that the State should be protected from incurring additional costs—other than where poverty and low income is the general basis of over-indebtedness, as in the dependent economy—and that debtors and creditors should foot the bill, that is, there should be no costs of ‘externalities’;

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<sup>10</sup> For a discussion of the policy documents behind these trends, see e.g. Department of Constitutional Affairs *A Choice of Paths: better options to manage over-indebtedness and multiple debt* (CP 23/04); The Insolvency Service *Relief for the Indebted – An Alternative to Bankruptcy* (2005); *Proposed Debt Relief Scheme for Northern Ireland: Consultation on Policy* (Department of Enterprise, Trade and Investment Northern Ireland Insolvency Service 2009).

<sup>11</sup> This process is well documented in Green “New Labour: More Debt – the Political Response” in Niemi, Ramsay, Whitford (eds.) *Consumer Credit, Debt and Bankruptcy: Comparative and International Perspectives* (Hart Publishing 2009) at 393ff.

<sup>12</sup> See (LRC CP 56-2009) at paragraphs 5.26 to 5.29.



- (h) that the principles of ‘can pay will pay’, and maintenance of commercial morality, should remain central to the system;
- (i) it must recognise the implications of the changing retail credit market such as the rapid expansion in number of products and suppliers, weak assessment of individuals’ credit risk in relation to ability to repay, the use of statistical models ill-designed to cope with conditions of change; increasing incidence of unpaid balances, and profits generated not from lending but from fees, penalties, excessive rates of margin for delinquency;
- (j) for those in the dependent economy the issues are fundamentally those of low income/poverty, and policy making should address these issues;
- (k) it should be recognised that there are opportunities within the criminal and civil law for debtors to be sanctioned by creditors when fraud or deceit are suspected. Such powers are rarely used;
- (l) it must recognise the issue of potential abuse by debtors and creditors and specify sanctions to deal with potential abuse;
- (m) the regime must be capable of dealing with both consumer and business debtors who are seriously over-indebted and recognise the demands of government policy in encouraging an entrepreneurial culture.<sup>13</sup>

2.17 The practical results of these principles and policy directives included the reform to the bankruptcy procedure in England and Wales as discussed above, and most importantly for present purposes, the introduction of the Debt Relief Order (DRO) mechanism.<sup>14</sup> This mechanism was introduced following extensive consultation and policy development,<sup>15</sup> which sought to provide solutions for over-indebted individuals with “low levels of liabilities, no assets over and above a nominal amount and no surplus income with which to come to an arrangement with their creditors”.<sup>16</sup> Such debtors were excluded from the other debt relief solutions under English law. The costs of bankruptcy proceedings create financial barriers preventing such debtors from availing of this form of debt relief; while the lack of surplus income among such debtors prevent them from proposing a repayment plan to creditors under a statutory Individual Voluntary Arrangement or informal debt management plan.<sup>17</sup> Therefore the Debt Relief Order procedure was introduced by the *Tribunals, Courts and Enforcement Act 2007* and provides for the making of an administrative order resulting in the complete discharge of a NINA debtor’s obligations after a period of one year.<sup>18</sup> During this 12 month period creditors are prevented from enforcing their debts against the debtor.<sup>19</sup> The same restrictions applying to a bankrupt under English law apply to the debtor during this period, and in addition if the debtor is found to have acted dishonestly or irresponsibly, a Debt Relief Restriction Order, similar to the Bankruptcy Restriction Orders described below, may be imposed on him or her.<sup>20</sup> This procedure is limited solely to debtors meeting certain strict conditions relating to

<sup>13</sup> Green “New Labour: More Debt – the Political Response” in Niemi, Ramsay, Whitford (eds.) *Consumer Credit, Debt and Bankruptcy: Comparative and International Perspectives* (Hart Publishing 2009) 393 at 401-403.

<sup>14</sup> See (LRC CP 56-2009) at paragraphs 5.30 to 5.31.

<sup>15</sup> *A Choice of Paths: better options to manage over-indebtedness and multiple debt* (CP 23/04); The Insolvency Service *Relief for the Indebted – An Alternative to Bankruptcy* (2005)

<sup>16</sup> *Relief for the Indebted – An Alternative to Bankruptcy op cit.* at 5.

<sup>17</sup> For a discussion of the operation of Individual Voluntary Arrangements (IVAs), see (LRC CP 56-2009) at paragraphs 5.2 to 5.29. For a discussion of the operation of debt management plans, see (LRC CP 56-2009) at paragraphs 3.196 to 3.199; 4.239 to 4.246.

<sup>18</sup> Section 108 of the *Tribunals, Courts and Enforcement Act 2007*, inserting sections 251A to 251X and Schedules 4ZA and AZB to the *Insolvency Act 1986*. Section 251I provides that “at the end of the moratorium applicable to a debt relief order the debtor is discharged from all the qualifying debts specified in the order (including all interest, penalties and other sums which may have become payable in relation to those debts since the application date)”.

<sup>19</sup> Section 251G of the *Insolvency Act 1986*.

<sup>20</sup> See paragraphs 3.99 below and section 251V and Schedule 4ZB of the *Insolvency Act 1986*.

levels of income and assets, and so the debtor's disposable income (after tax and normal household expenses) must not exceed £50 per month, and the debtor's total gross assets must not exceed £300.<sup>21</sup> In addition, the debtor's liabilities (excluding certain debts, such as family maintenance debts, which are not included in the scheme) must not exceed £15000. In this way, the DRO procedure is designed for low-income debtors who have no reasonable prospect of repaying their debts. Debtors seeking to enter the DRO system must pay a fee, but this is set at £90 in order to be considerably lower than the total fees of £510 payable in order to enter bankruptcy procedures.<sup>22</sup> Applications for DROs are made online, and debtors seeking to apply are obliged to first obtain debt advice from authorised intermediaries.<sup>23</sup> The DRO procedure is administrative in nature, and applications are made to the Official Receiver, who then adjudicates on these applications and decides whether to make a DRO.<sup>24</sup> The procedure however allows interested parties to invoke the intervention of the court on a number of specified grounds.<sup>25</sup> If the debtor's income increases or if he or she acquires any property during the moratorium period, he or she must notify the Official Receiver as soon as reasonably practicable.<sup>26</sup> The Official Receiver may then revoke or amend the DRO if the requirements relating to income and assets are no longer met as a result of such changes of circumstances.<sup>27</sup> Legislation creates a range of criminal offences in respect of a debtor who provides false information or documents in applying for a DRO, who deals fraudulently with property, or who obtains credit or trades in a fraudulent or prohibited manner.<sup>28</sup> A register of DROs, Debt Relief Restriction Orders and Debt Relief Restrictions Undertakings is to be kept by the relevant Secretary of State.<sup>29</sup>

**(b) Northern Ireland**

2.18 Proposals are in place for Northern Ireland to adopt a similar approach to that of England and Wales by introducing an administrative debt relief mechanism for NINA debtors who hold no reasonable prospect of paying their debts. Following extensive research and consultation,<sup>30</sup> the Northern Ireland Executive proposed the *Debt Relief Bill (Northern Ireland) 2010*, which as of the time of writing is being considered by the Northern Ireland Assembly. The proposed scheme mirrors the Debt Relief Order (DRO) procedure in England and Wales. The Northern Ireland Department of Trade, Enterprise and Investment states that the purpose of the *Debt Relief Bill 2010* is to "provide access to a remedy for those who can neither fund an individual voluntary arrangement nor afford the cost of petitioning for bankruptcy, and are therefore unable to free themselves from a lifetime burdened by debt they have no reasonable prospect of being able to pay."<sup>31</sup> Therefore the Bill contains provisions for an analogous system to the DRO procedure in England and Wales, whereby a debtor meeting the income, asset and level of debt requirements may apply to the Official Receiver for a DRO, which if granted would cause a moratorium of

<sup>21</sup> See Regulation 3 of the *Insolvency Proceedings (Monetary Limits) (Amendment) Order 2009*.

<sup>22</sup> See The Insolvency Service *Consultation: Reforming Debtor Petition Bankruptcy and Early Discharge from Bankruptcy* (2009) at 21, citing the *Civil Proceedings Fees Order 2004* (SI 2004/3121) and the *Insolvency Proceedings (Fees) (Amendment) Order 2009*.

<sup>23</sup> See section 251U of the 1986 Act for provisions relating to the approval of intermediaries.

<sup>24</sup> Sections 251C to 251E of the *Insolvency Act 1986*.

<sup>25</sup> See section 251M of the *Insolvency Act 1986*.

<sup>26</sup> Section 251J of the *Insolvency Act 1986*.

<sup>27</sup> See section 251L(4) of the *Insolvency Act 1986*.

<sup>28</sup> Sections 251O to 251S of the *Insolvency Act 1986*.

<sup>29</sup> Section 251W of the *Insolvency Act 1986*.

<sup>30</sup> See e.g. NI Insolvency Service *Proposed Debt Relief Scheme for Northern Ireland: Consultation on Policy* (Department of Enterprise, Trade and Investment Northern Ireland 2009); Northern Ireland Assembly *Debt Relief Orders* (NI Assembly Research and Library Services Research Paper 117/08 2008); Northern Ireland Assembly *Debt Relief Bill* (NI Assembly Research and Library Services Bill Paper 24/10 2010).

<sup>31</sup> Northern Ireland Assembly *Debt Relief Bill* (NI Assembly Research and Library Services Bill Paper 24/10 2010) at 4.

12 months on the enforcement of the debts included in the order. At the end of this 12 month period the debtor's debts are discharged, provided that they were not incurred through fraud and that the debtor has cooperated fully with the Official Receiver's investigation of his or her financial affairs. The majority of the conditions applicable to the DRO procedure in England and Wales above are equally applicable under the Northern Irish proposals, which largely mirror the English procedure.

**(c) New Zealand**

2.19 In response to the similar dilemma posed by the inaccessibility of other debt relief mechanisms to debtors in receipt of very low incomes, the New Zealand legislature introduced a "No Assets" bankruptcy procedure under the *Insolvency Law Act 2006*.<sup>32</sup> This procedure, which is operated administratively by the Official Assignee, is available to debtors who have not previously availed of the procedure or of bankruptcy proceedings, who have no realisable assets, owe debts of between NZ\$1,000 and NZ\$40,000 (approximately €565-€22,625), and do not have the means of repaying any amount towards their debts (under a prescribed means test).<sup>33</sup> Debtors are however prevented from entering the procedure if any of the following conditions exist:

- (a) the debtor has concealed assets with the intention of defrauding his or her creditors, for example, by transferring property to a trust; or
- (b) the debtor has engaged in conduct that would, if the bankrupt were adjudicated bankrupt, constitute an offence under this Act; or
- (c) the debtor has incurred a debt or debts knowing that the debtor does not have the means to repay them; or
- (d) a creditor intends applying for the debtor's adjudication as a bankrupt and it is likely that the outcome for the creditor if the debtor is adjudicated bankrupt will be materially better than if the debtor is admitted to the no asset procedure.<sup>34</sup>

2.20 If the Official Assignee accepts the debtor's application<sup>35</sup> and sends the debtor a notice of his or her admission to the no asset procedure, creditors are prohibited from beginning or continuing any step to recover or enforce a debt owed by the debtor (with the exclusion of family maintenance or child support debts, and student loan balances).<sup>36</sup> The debtor must cooperate with the Official Assignee's investigation of his or her financial circumstances during the process,<sup>37</sup> and may not obtain credit above a certain threshold without first informing the lender of his or her status as a participant in the procedure.<sup>38</sup> If the debtor's financial circumstances change so that the debtor becomes able to repay an amount towards his or her debts, the Official Assignee may terminate the process.<sup>39</sup> In this case the debtor becomes liable once again for all of his or her debts, and also must pay any interest or penalties that have accrued.<sup>40</sup>

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<sup>32</sup> See Part 5, Subpart 4 of the *Insolvency Law Act 2006* (NZ).

<sup>33</sup> Section 363 of the 2006 Act.

<sup>34</sup> Section 364 of the *Insolvency Law Act 2006* (NZ).

<sup>35</sup> It should be noted that even at the stage of applying to enter this procedure, the debtor is prohibited from obtaining credit above a certain threshold without informing the lender that he has applied for entry to the procedure: section 366 of the 2006 Act.

<sup>36</sup> Sections 367 and 369 of the 2006 Act.

<sup>37</sup> Section 370 of the 2006 Act.

<sup>38</sup> Section 371 of the 2006 Act.

<sup>39</sup> Section 373(1)(b) of the 2006 Act. Section 373(1)(a) provides that the process may also be terminated by the Official Assignee if it becomes apparent that the debtor was wrongly admitted into the procedure, e.g. where the debtor concealed assets. Where the procedure has been terminated, the Official Assignee may apply to court for an order preserving the assets of the debtor under section 374.

<sup>40</sup> Section 375 of the 2006 Act.

2.21 The debtor is automatically discharged from the no asset procedure 12 months after the date when the debtor was admitted to it.<sup>41</sup> The Official Assignee may however defer the debtor's discharge where it is satisfied that the an extension is necessary for the purpose of properly considering whether the debtor's participation in the procedure should be terminated.<sup>42</sup> The effect of discharge is to cancel the debts of the debtor, who is no longer liable to pay any part of the debts, including any penalties and interest.<sup>43</sup> However, the debtor will remain liable in full for any debts incurred by fraud, which are not discharged.<sup>44</sup>

**(d) Australia**

2.22 Unlike the systems in New Zealand, Northern Ireland, and England and Wales, Australian law does not include a specific administrative procedure designed for NINA debtors. The Australian debtor-petition bankruptcy however resembles closely such a mechanism as it has been modified to allow a debtor's petition to be adjudicated administratively rather than by a court. This procedure has been described below in the context of the introduction of administrative processing of debtors' bankruptcy petitions without court involvement.<sup>45</sup> The debtor may apply for bankruptcy by presenting a petition to the Official Receiver together with a statement of the debtor's financial affairs, and it is the Official Receiver who then adjudicates on the debtor's petition.<sup>46</sup> Importantly, no fee is payable by a debtor on applying for bankruptcy, although fees apply for the administration of the estate of a debtor following an adjudication of bankruptcy.<sup>47</sup> Once adjudicated bankrupt on his or her own petition, the debtor is subject to the same conditions as all bankrupts, and is automatically discharged on the expiry of a period of three years,<sup>48</sup> provided that this period has not been extended due to the presentation of objections to the discharge.<sup>49</sup> The full conditions applying to discharge are outlined in Chapter 3.

**(e) Canada**

2.23 A recent study of the Canadian bankruptcy system has sought to identify the most appropriate means of making debt relief procedures accessible to debtors whose assets and income do not permit them to avail of standard insolvency procedures.<sup>50</sup> The primary problem identified in Canada was that as the private sector trustees responsible for administering bankruptcies are remunerated from the proceeds of the sale of the debtor's assets, trustees may refuse to accept the case of a debtor where the proceeds of the debtor's estate are unlikely to yield sufficient income to make the case profitable for the trustee.<sup>51</sup> Two options were identified as existing for these debtors: relying on trustees to lower the fees they charge in the case of impecunious debtors; or availing of the publicly-funded Bankruptcy Assistance Program, which subsidises the services of listed trustees for debtors who are unable to afford the trustee fees. The study noted that the latter option is under-used, and this factor, combined with a reliance on the goodwill

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<sup>41</sup> Section 377(1) of the 2006 Act.

<sup>42</sup> Section 377(2)(a) of the 2006 Act.

<sup>43</sup> Section 377A(1) of the 2006 Act.

<sup>44</sup> Section 377A(2) and (3) of the 2006 Act.

<sup>45</sup> See Chapter 3 below and sections 54A to 55 of the *Bankruptcy Act 1966* (Cth.) (Aus).

<sup>46</sup> Section 55 of the 1966 Act as amended.

<sup>47</sup> The fee schedule for bankruptcy and other personal insolvency procedures can be found on the website of the Insolvency and Trustee Service Australia, at <http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/Bankruptcy->Personal+Insolvency+Information->6.+ITSA+Fees+and+Charges>.

<sup>48</sup> Section 149 of the *Bankruptcy Act 1966* (Cth.) (Aus).

<sup>49</sup> Section 149 of the 1966 Act.

<sup>50</sup> Ben-Ishai and Schwartz *Bankruptcy for the Poor?* (Office of the Superintendent in Bankruptcy Canada 2007), available at: <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br02009.html>.

<sup>51</sup> *Ibid* at 9-10.

of trustees to accept lower remuneration in cases of impecunious debtors, resulted in a situation of inconsistency whereby some such debtors have low-cost bankruptcy, while others do not.<sup>52</sup>

2.24 Having reviewed the NINA mechanisms in other similar legal systems, this study made several recommendations for the reform of the Canadian system. Unlike the reforms introduced in other countries, this study did not advocate the creation of a new discrete procedure for impecunious debtors. Rather its recommendations primarily focused on the reform of the Bankruptcy Assistance Program described in the previous paragraph. The report argued that this programme should be readily publicised so that impecunious debtors are made aware of the available assistance,<sup>53</sup> and that consistency should be established regarding the eligibility standards for such assistance.<sup>54</sup> Also, the authors suggested that impecunious debtors should be permitted to file for bankruptcy without paying any fees. They also recommended that if no private sector trustee could be found to accept a debtor's case, the Office of the Superintendent in Bankruptcy should take responsibility for applying for bankruptcy on behalf of the debtor and for administering the debtor's estate. A final recommendation of this report was that an impartial agency should be established to provide impecunious debtors with free advice on how to deal with their debt problems.<sup>55</sup>

**(f) France**

2.25 The French approach to providing debt relief for debtors lacking in assets and income is very interesting, and provides a strong argument for the necessity of specialised procedures for such debtors. A brief overview of the legal procedures for treating over-indebtedness in France is provided in the Commission's Consultation Paper.<sup>56</sup> The French approach has been described as one "that attempts to interfere as little as possible with private contractual arrangements and encourage creditors and debtors to negotiate voluntary settlements."<sup>57</sup> This system therefore contrasts sharply with the Anglo-Saxon approaches to personal over-indebtedness, which have been characterised by the "fresh start" principle of the discharge of personal debt after a short waiting period.<sup>58</sup> It relies in the first place on the development of repayment plans by public bodies called Commissions on Individual Over-Indebtedness, which largely involve only modest concessions on the part of creditors.<sup>59</sup> The purpose of the commission is stated by law to be "to reconcile the parties with a view to drawing up a contractual recovery plan approved by the debtor and his main creditors".<sup>60</sup> Where any creditor refuses to accept the commission's plan, the commission forwards the case to a court, with a recommendation for the type of relief which should be ordered by the court, including measures such as a deferral or extension of time to pay; a full or partial remission of debt; a reduction or elimination of accruing interest; or the creation or substitution of a guarantee.<sup>61</sup> In exceptional cases a court may impose "extraordinary" measures such as moratoria on enforcement and partial forced discharge of debts.<sup>62</sup> The maximum duration of a repayment plan is limited to 10 years.<sup>63</sup> Therefore it can be seen that the fundamental approach to resolving a situation of personal over-indebtedness in French law is based upon the completion of a repayment plan by a debtor

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<sup>52</sup> Ben-Ishai and Schwartz *op cit.* at 13.

<sup>53</sup> Ben-Ishai and Schwartz *Bankruptcy for the Poor?* (Office of the Superintendent in Bankruptcy Canada 2007) at 33.

<sup>54</sup> *Ibid* at 34.

<sup>55</sup> Ben-Ishai and Schwartz *op cit.* at 35.

<sup>56</sup> (LRC CP 56-2009) at paragraphs 5.50 to 5.55.

<sup>57</sup> See Kilborn *Comparative Consumer Bankruptcy* (Carolina Academic Press 2007) at 27.

<sup>58</sup> See (LRC CP 56-2009) at paragraphs 5.17 to 5.20.

<sup>59</sup> Kilborn *op cit.* at 28.

<sup>60</sup> Article I331-6 of the *Code de la consommation*.

<sup>61</sup> Article L331-6 of the Code.

<sup>62</sup> See Article L.331-7 of the *Code de la Consommation*.

<sup>63</sup> Article L331-6 of the *Code de la consommation*.

under which modest adjustments have been made to the initial repayment terms. Such a repayment plan should in the first place be voluntarily negotiated, but may be imposed by a court where agreement is impossible.

2.26 It became clear by 2004 that these minor forms of support for debtors were insufficient to solve the problems of over-indebted individuals, and particularly those whose income was so low as to render them unable to make partial repayments to creditors. Therefore French law saw a radical new departure as a “personal recovery” procedure resembling the “fresh start” model of debt relief was introduced for the first time. The personal recovery procedure allows certain debtors who are “irremediably compromised” to obtain an immediate debt discharge, bypassing the requirements to engage in voluntary negotiations or complete a repayment plan. A debtor is “irremediably compromised” if he or she demonstrates a “manifest impossibility to put in place treatment measures” of the ordinary and extraordinary type described above. If a debtor could repay a significant portion of debt over a 10 year period, this personal recovery procedure is unavailable. The procedure for accessing the personal recovery system again begins before the over-indebtedness commission, which must determine within six months whether the debtor’s situation is “irremediably compromised”. If so, the commission may direct the case to the court for the opening of a procedure of “personal recovery”. The court will then verify that the debtor is irremediably compromised and will assess his or her good faith, before opening the proceedings.<sup>64</sup> Then the court or an appointed trustee verifies all creditors’ claims, and prepares a statement of the debtor’s financial circumstances.<sup>65</sup> If the debtor has assets available, they must be sold within four months.<sup>66</sup> The debtor is not required to contribute any future income to repayments, as debtors entering the procedure will not have any such disposable income. After the sale of assets or a finding that no assets are available for sale, proceedings are closed and the debtor’s obligations are immediately discharged.<sup>67</sup> “Social follow-up” requirements, such as mandatory debt counselling, may be imposed on the debtor by the court at its discretion. This personal recovery procedure is available to a debtor as many times as is necessary throughout his or her lifetime, although it has been suggested that a second or third application on the part of a debtor could be refused on the basis that it indicates a lack of good faith on the part of the applicant.<sup>68</sup>

2.27 Therefore it can be seen that even a system such as the French model, which is opposed to the Anglo-Saxon fresh start approach and takes the voluntary renegotiation of minor adjustments to contractual terms as its touchstone, recognised the need for a procedure allowing debtors of the lowest income to obtain a discharge of their obligations without delay.

**(g) Netherlands**

2.28 A brief outline of the consumer insolvency system operating in the Netherlands is presented in the Commission’s Consultation Paper.<sup>69</sup> As can be seen in that discussion, the Dutch system for addressing consumer over-indebtedness has traditionally concentrated on the voluntary negotiation of repayment arrangements through the assistance of the publicly-funded debt counselling system. These voluntary arrangements are well-structured however, and mostly follow the terms of a code of practice developed by the Dutch Association of Municipal Banks (NVVK). Under the terms of this code, debtors

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<sup>64</sup> Article L.332-6.

<sup>65</sup> *Ibid* and article L.332-7.

<sup>66</sup> Article L.332-8.

<sup>67</sup> Article L.332-9.

<sup>68</sup> See Kilborn “La Responsabilisation de l’Économie: What the United States can Learn from the New French Law on Consumer Over-Indebtedness” 26 *Michigan Journal of International Law* 619 (2005) at 660, citing Rondey “La réforme du surendettement par la loi “Borloo” du 1er août 2003”, *D. 2003, Doctrine* 2162 at 2166.

<sup>69</sup> See (LRC CP 56-2009) at paragraphs 5.56 to 5.65. See also Kilborn “The Hidden Life of Consumer Bankruptcy Reform: Danger Signs for the New US Law from Unexpected Parallels in the Netherlands” (2006) *Vand. J. Transnat’l L* 77 at 98; Huls, Jungmann and Niemeijer “Can Voluntary Debt Settlement and Consumer Bankruptcy Coexist? The Development of Dutch Insolvency Law” in Niemi-Kiesilainen, Ramsay, Whitford (eds.) *Consumer Bankruptcy in Global Perspective* (Hart Publishing 2003) at 305.

pay as much as possible over a three-year period, in return for which creditors agree to discharge the remaining amount owed.

2.29 In 1998, the Dutch legislature introduced a Consumer Bankruptcy Act which introduced a statutory right to debt discharge for good faith debtors. This created a court-based debt settlement process, as part of which a judge orders the debtor to make partial repayments under a plan usually lasting for three years. At the end of this period the remaining obligations are discharged. A court-appointed trustee also liquidates any non-essential assets of the debtor. Repayment amounts are calculated by reference to the official social welfare assistance level.

2.30 Importantly for present purposes, a fast-track discharge procedure exists for debtors who have no available income above the level of exempted income. In such a case, the court-appointed trustee may after one year of the plan declare to a court that it is no anticipated that the debtor can fulfil his obligations in full or in part. In these circumstances the court may grant an immediate discharge.

2.31 Therefore it can be seen once more that even in a system founded upon the consensual negotiation of repayment terms and which establishes the completion of a repayment plan by a debtor as a core principle of its consumer insolvency system, “fast-track” provisions exist for debtors of limited means in order to provide them with a debt discharge without unnecessary and unproductive delay.

#### **(h) Germany**

2.32 Germany’s consumer insolvency law involves a complex four-step system of:

- voluntary non-judicial negotiations between debtor and creditors;
- court-driven negotiation process between debtor and creditors (with judicial power to compel dissenting minority of creditors to participate in a repayment plan);
- liquidation of the debtor’s non-essential assets (if any);
- completion of a six-year “good behaviour period”, including a repayment plan.<sup>70</sup>

2.33 The beginning of a consumer insolvency case requires the debtor to attempt to negotiate a reasonable repayment arrangement with creditors outside of the legal system. Therefore before an application for debt adjustment can ever be made, the debtor must submit a certificate issued “by a suitable person or agency” demonstrating that within the last six months prior to the request to open insolvency proceedings an unsuccessful attempt has been made to settle out of court with the creditors on the basis of a plan.<sup>71</sup> The German Länder are to determine which persons or agencies are to be regarded as suitable, and for the most part such persons shall include lawyers and state-sponsored debt counsellors. As most consumer debtors will be unable to afford legal fees, and because lawyers have shown little interest in the low-pay yet intensive consumer insolvency work, debtors are for the most part reliant on the services of the state-funded money advice agencies.<sup>72</sup> Waiting lists for access to these services are very long, ranging from three months to a year in some regions.<sup>73</sup> A recent study found that over half of the debtors surveyed had carried their debts for at least five years before filing for insolvency.<sup>74</sup> At the second step, and first stage of the formal insolvency proceedings, a court-driven negotiation attempt takes place. The court can compel a dissenting minority of creditors to participate in

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<sup>70</sup> See Kilborn “The Innovative German Approach to Consumer Debt Relief: Revolutionary Changes in German Law, and Surprising Lessons for the United States” 24 *Nw. J. Int’l L & B* 257 (2003-4); *Insolvenzordnung* (InsO), Bundesgesetzblatt 1994 I S.2866, 5 October 1994, as amended.

<sup>71</sup> Section 305(1)(1) InsO.

<sup>72</sup> Kilborn *op cit.* at 273.

<sup>73</sup> *Ibid* at 274.

<sup>74</sup> Backert, Brock, Lechner and Maischatz “Bankruptcy in Germany: Filing Rates and the People Behind the Numbers” in Niemi, Ramsay and Whitford *Consumer Credit, Debt and Bankruptcy* (Hart Publishing 2009) 273 at 285.

a plan at this stage if a majority of creditors in number and value votes in favour of the plan or fails to vote at all within a month of the service of the proposed plan.<sup>75</sup>

2.34 If no resolution to the debt dispute is reached through the first two steps, the case proceeds to the third and fourth stages. The third stage has been described as being almost meaningless as consumer debtors will rarely have any non-exempt assets available for liquidation.<sup>76</sup> Once the debtor's available assets, if any, have been liquidated, the debtor proceeds to step four of the insolvency process, which is the most burdensome "good behaviour period". This lasts for six years, during which the debtor must assign to a trustee all non-exempt income<sup>77</sup> as well as half of the value of any property received via inheritance.<sup>78</sup> This money is then distributed to the debtor's collection of creditors once per year. The debtor is provided with an incentive bonus system, whereby on completion of year 4 of the six years, the debtor obtains a rebate of 10% of contributions made, with this rebate rising to 15% on the completion of year 5. In addition to these obligations, the German system requires that the debtor must hold or actively seek and not refuse to accept, any suitable available employment during the 6 year period.<sup>79</sup> The debtor's discharge will be denied if he or she does not comply with this requirement, which includes a duty to take up available work outside his or her profession, and to engage in temporary employment if needs be.<sup>80</sup> This period had initially been one of 7 years from the conclusion of the liquidation stage, but reforms in 2001 reduced it to 6 years from the *beginning* of that third stage. In addition, reforms at this time increased the amount of exempt income which debtors may retain during the repayment period, with this amount rising by between 30-50%, depending on the debtor's family situation, from January 2002.<sup>81</sup> As a result of these rises in the exemption levels, most households have no non-exempt money available for distribution to debtors, and in 80% of cases no repayments are made during the 6 year period.<sup>82</sup>

2.35 The requirement of a repayment plan therefore does not appear to provide any benefit to creditors, and seems to exist more for moralistic reasons than economic purposes. This casts significant doubt on the appropriateness of a requirement for the completion of a repayment plan in all cases, and suggests that the approaches adopted in other continental European systems such as the Netherlands and France in allowing discharge without delay for impecunious debtors may be more appropriate. No such "fast-track" procedure exists for NINA debtors in Germany however. One reform which was favourable to such debtors however was the amendment to the procedure in 2001 which allows court costs to be deferred in all of the cases in which the debtor's means are insufficient to pay these costs.<sup>83</sup> This reform at least ensures that debtors of limited means may access the debt settlement system.

**(i) Summary of Comparative "No Income, No Asset" Procedures**

2.36 The following table summarises the above discussion by providing a comparative picture of the approach legal systems similar to Ireland's have taken to accommodating "No Income, No Assets" debtors into insolvency procedures.

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<sup>75</sup> Sections 307(1)-309 InsO.

<sup>76</sup> Kilborn *op cit.* at 278.

<sup>77</sup> Section 287(2) InsO.

<sup>78</sup> Section 295(1)(1) InsO.

<sup>79</sup> Section 295(1)(1) InsO.

<sup>80</sup> See Kilborn "The Innovative German Approach to Consumer Debt Relief: Revolutionary Changes in German Law, and Surprising Lessons for the United States" 24 *Nw. J. Int'l L & B* 257 (2003-4) at 275

<sup>81</sup> See Kilborn *op cit.* at 286.

<sup>82</sup> Backert, Brock, Lechner and Maischatz "Bankruptcy in Germany: Filing Rates and the People Behind the Numbers" in Niemi, Ramsay and Whitford *Consumer Credit, Debt and Bankruptcy* (Hart Publishing 2009) 273, at 285.

<sup>83</sup> See Backert, Brock, Lechner and Maischatz "Bankruptcy in Germany: Filing Rates and the People Behind the Numbers" in Niemi, Ramsay and Whitford *Consumer Credit, Debt and Bankruptcy* (Hart Publishing 2009) at 273-4, 286.



Country	“Fast-track” Judicial Bankruptcy for NINA Debtors	Repayment Plan: “Standard” Insolvent Debtors	Fast-track NINA Discharge Outside of Bankruptcy
Ireland	No: all debtors subject to identical access and discharge provisions.	Arrangement mechanism under the Bankruptcy Act 1988: very rarely used.	No
England and Wales	No – all debtors subject to identical access and discharge provisions.  Plans to reduce costs of access by introducing administrative adjudication of debtor’s petition.	Individual Voluntary Arrangements under Part VIII of the <i>Insolvency Act 1986</i> (UK)	Debt Relief Orders under sections 251A to 251X of the <i>Insolvency Act 1986</i> (UK)
Northern Ireland	No – all debtors subject to identical access and discharge provisions.	Individual Voluntary Arrangements under Part VIII of the <i>Insolvency (Northern Ireland) Order 1989</i>	Debt Relief Bill 2010 – modelled on Debt Relief Orders
Australia	To reduce costs, debtor petitions may be adjudicated by Official Receiver: s. 55 <i>Bankruptcy Act 1966</i> (Cth.)	Personal Insolvency Agreement under Part X of the <i>Bankruptcy Act 1966</i> (Cth.) (generally only used by non-consumer debtors)  Debt Agreement under Part IX of the <i>Bankruptcy Act 1966</i> (Cth.)	No
New Zealand	No fast-track discharge, but to reduce costs, debtor petitions may be adjudicated by Official Receiver: section 12 of the <i>Insolvency Act 2006</i>	Proposals under Part 5 Subpart 2 of the <i>Insolvency Law Act 2006</i> (NZ)  Summary Instalment Orders under Part 5 Subpart 3 of the <i>Insolvency Law Act 2006</i> (NZ)	“No Asset” Procedure under Part 5 Subpart 4 of the <i>Insolvency Law Act 2006</i> (NZ)
Canada	Access and discharge provisions are identical for all debtors.  Bankruptcy Assistance Program provides support for debtors who cannot afford trustee fees: Directive No. 11, made under s.5(4)(b) of the <i>Bankruptcy and Insolvency Act 1985</i> .	Repayment plan under a Proposal/Consumer Proposal under Part III of the <i>Bankruptcy and Insolvency Act 1985</i>	

Country	“Fast-track” Judicial Bankruptcy for NINA Debtors	Repayment Plan: “Standard” Insolvent Debtors	Fast-track NINA Discharge Outside of Bankruptcy
USA	Debtors may petition the court to have the application fee waived if income falls below a certain standard and unable to pay fee in instalments: section 418 of the <i>Bankruptcy Abuse Prevention and Consumer Protection Act 2005</i>	Repayment plan under Chapter 13 of the US Bankruptcy Code: 11 USC §1328(a) (2005)	
Netherlands	Statutory consumer bankruptcy law: trustee may, after <i>one year</i> of repayment plan, declare that debtor has no available income above the exemption level, and so cannot complete a plan. Court can then grant <i>immediate discharge</i> : Article 352(3) <i>Faillissementswet</i> (Bankruptcy Law) (Neth.)	Voluntary repayment plan code of practice – 3 year repayment period.  Statutory consumer bankruptcy law: judicial discretion as to length of repayment plan, with 3 year standard duration: Article 343(2) <i>Faillissementswet</i> (Bankruptcy Law) (Neth.)	
Sweden		Repayment plan of (almost always) 5 years	Enforcement authority may present a “zero proposal”, and if this is accepted by creditors, debts are immediately discharged.
Germany		6 year repayment plan and “good behaviour period” (after voluntary negotiations have first been attempted).	
France	“Personal recovery” procedure – full immediate debt discharge available where debtor is “irremediably compromised”.  Over-indebtedness Commission recommends that personal recovery proceedings be commenced in court.	- Voluntary repayment plans proposed by Over-indebtedness Commissions and accepted by creditors (can last no longer than 10 years) - Other measures can be imposed – forced renegotiation, moratoria, partial discharge.	

#### **(4) Irish Empirical Evidence on Different Debtor Categories**

2.37 In addition to the above comparative analysis, the Commission's conclusion has been influenced by empirical research conducted in Ireland. Research conducted by Dr. Stuart Stamp for the Combat Poverty Agency examining financial difficulties among those living in poverty in Ireland is useful in this context.<sup>84</sup> This work seeks to identify the extent and characteristics of those experiencing financial difficulties below the poverty line in Ireland and to identify the severity and nature of the debt problems experienced by people in this group. The study then seeks to identify the causes of these difficulties. Finally, the study concludes first that debt difficulties are more widespread and persistent among people living in poverty and secondly that the debt problems experienced by this group are different and distinct from those suffered by other groups in society. This is because they are caused largely by external factors and unforeseen circumstances rather than factors related to debtors' own behaviour. Importantly for present purposes, this research concludes that as a result, a distinct policy response may be necessary to address the debt difficulties of this population.

2.38 This study adopted the following definition of poverty provided by the National Anti-Poverty Strategy in 2007:<sup>85</sup>

People are living in poverty if their income and resources (material, cultural and social) are so inadequate as to preclude them from having a standard of living, which is regarded as acceptable by Irish society generally. As a result of inadequate income and resources, people may be excluded and marginalised from participating in activities, which are considered the norm for other people in society.

In addition, the paper defines people with financial difficulty as:

those who have experienced arrears or gone into debt to meet ordinary living expenses, and those who have approached an Irish money advice service (one of the state-funded network of Money Advice and Budgeting Services or MABS) with at least one reported debt.<sup>86</sup>

The study notes that international literature has found strong links between poverty and low income, but seeks to establish whether there is any evidence that financial difficulties are specifically associated with poverty in Ireland.<sup>87</sup> It also indicates, however, that financial difficulties are recognised as being a much broader issue, also affecting members of society who lie above the poverty line. In this regard the study seeks to identify appropriate policy responses to debt difficulties among members of the population falling into the low income category, stating that:

Policy responses to financial difficulties should directly relate to the factors that give rise to them in the first place. Thus, responses based on helping individuals to modify their behaviour may only work successfully if errant behaviour or money mismanagement was the cause in the first place. If a combination of socio-economic and external factors caused these difficulties to occur however, more "structural" policy measures may be required to resolve them.<sup>88</sup>

2.39 Having reviewed data from Living in Ireland Surveys and MABS records, this study concluded that there are strong indications of an overlap between financial difficulties and poverty.<sup>89</sup> The following conclusions were drawn by the study:

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<sup>84</sup> Stamp *An Exploratory Analysis of Financial Difficulties among Those Living Below the Poverty Line in Ireland* (Combat Poverty Agency Working Paper Series 09/02 2009).

<sup>85</sup> *Ibid* at 13.

<sup>86</sup> Stamp *An Exploratory Analysis of Financial Difficulties among Those Living Below the Poverty Line in Ireland* (Combat Poverty Agency Working Paper Series 09/02 2009) at 13.

<sup>87</sup> *Ibid* at 14, 17.

<sup>88</sup> Stamp *op cit.* at 20.

<sup>89</sup> Stamp *op cit.* at 51.

- Households in poverty are more likely to experience financial difficulties than households not in poverty.
- Households in financial difficulty are significantly more likely to be consistently poor and to be experiencing fuel poverty than the general household population as a whole.
- Households in financial difficulty have significantly lower incomes and assets than the general population as a whole, and are significantly more likely to be dependent on a social welfare payment (particularly in the case of those in poverty).
- Households in financial difficulty, and particularly those in poverty, were found to be significantly more likely to be tenant households than home purchasers or owners.

2.40 This study also made some important observations regarding the characteristics of debt difficulty among those households in poverty, as well as among those not in poverty. Using 2006 MABS client statistics, the study found that the average level of debt owed by those whose income was derived from social welfare was lower than the levels of debts for those clients in receipt of wages.<sup>90</sup> In fact, on average such waged clients owed between five and six times more than those clients not in receipt of a wage. The following table summarises these findings:

<b>Percentage of MABS Clients and Balances of Outstanding Debt by First Income Source, 2006</b>		
<b>Balance of outstanding debt</b>	<b>Social Welfare Clients</b>	<b>Waged Clients</b>
€1 - €4,999	64.3%	27.4%
€5,000 - €9,999	13.4%	13.7%
€10,000 - €19,999	12.7%	22.5%
Average debt (median)	€2,301	€13,294

2.41 According to the analysis of the incomes and debts of the MABS clients, under ideal conditions it would take approximately two years for the average MABS client to repay his or her (non-mortgage) debts.<sup>91</sup> These “ideal conditions” would include that no interest or other charges accrue; the client’s entire disposable income is consistently applied every week towards servicing debts; the disposable income remains constant throughout the repayment period; and that no further credit or debts are incurred during the repayment period. The study noted however that it is unlikely that such ideal conditions would persist in most cases, and so it usually takes much longer than two years for clients to repay their debts. When the clients were categorised according to whether or not their incomes consisted of wages rather than social welfare receipts some noticeable differences emerged, particularly the fact that due to the higher level of debts owed by waged clients, the average length of time it would take for such clients to repay their (non-mortgage) debts under ideal conditions was three years.<sup>92</sup> The following table provides a summary of these findings:<sup>93</sup>

<sup>90</sup> Stamp *An Exploratory Analysis of Financial Difficulties among Those Living Below the Poverty Line in Ireland* (Combat Poverty Agency Working Paper Series 09/02 2009) at 57 to 58.

<sup>91</sup> *Ibid* at 56.

<sup>92</sup> Stamp *An Exploratory Analysis of Financial Difficulties among Those Living Below the Poverty Line in Ireland* (Combat Poverty Agency Working Paper Series 09/02 2009) at 58.

<sup>93</sup> *Ibid*.

<b>Disposable Incomes and Debt: Income Ratios of MABS Clients by First Income Source, 2006</b>		
	<b>Social Welfare Clients</b>	<b>Waged Clients</b>
Average (mean) weekly disposable income	€22.41	€83.61
Average debt (median)	€2301	€13,294
Average debt: annual disposable income ratio	2:1	3:1

It should be noted that all of these debts relate to 2006 statistics, and the levels of debt involved may have changed considerably since this time.<sup>94</sup> The statistics nonetheless provide a useful insight into the differences in debt difficulties among those debtors falling into different income categories.

2.42 Drawing on the results of a 2007 interview survey of MABS clients, the study further concluded that among this population money management or failure to budget is either a direct or compounding cause of debt difficulties in only approximately one third of cases.<sup>95</sup> The predominant causes of financial difficulty among the MABS clients surveyed was linked to life events largely outside their control, such as illness, unemployment, redundancy, bereavement or accidents.<sup>96</sup> Importantly, the study also found that low income led people to borrow for essential items in a significant number of cases, amounting to almost a third of those surveyed.<sup>97</sup>

2.43 Dr. Stamp's study concluded by summarising the above findings and making recommendations regarding policy responses to over-indebtedness and debt difficulties. While several of these recommendations lie outside the scope of the Commission's examination of the legal issues arising in this area, certain recommendations are relevant to the Commission's project. Thus the study recommended that a debt settlement system should be introduced in Ireland to address debt problems among the entire population.<sup>98</sup> The study nonetheless indicated that while personal insolvency law reforms are necessary to deal with general financial difficulties, specific measures may be required to address financial difficulties among those on lower incomes, including those in poverty.<sup>99</sup> While some of these specific measures are not legal in nature, these findings suggest that particular debt settlement and personal insolvency procedures may be necessary for debtors falling into the low income and poverty categories. This analysis of the differences between the varying categories of debtor therefore supports the introduction of specialised low-cost procedures for low income debtors without assets, and reflects the trend towards the introduction of such procedures in the countries discussed above.

## **C Conclusions and Recommendations on No Asset, No Income Procedures**

2.44 From the above discussion, the Commission has concluded that a trend has emerged in several legal systems according to which the primary mechanism for addressing the situation of insolvent

<sup>94</sup> For a discussion of the trends in the levels of borrowing, arrears and default in Irish society see (LRC CP 56-2009) at paragraphs 1.16 to 1.26; (LRC 96-2010) at paragraphs 1.17 to 1.30.

<sup>95</sup> Stamp *op cit.* at 73.

<sup>96</sup> These results mirror the conclusions drawn by the Commission in its Consultation Paper concerning the causes of over-indebtedness and debt difficulties: see (LRC CP 56-2009) at paragraphs 1.30 to 1.60.

<sup>97</sup> Stamp *op cit.* at 72 to 73.

<sup>98</sup> Stamp *An Exploratory Analysis of Financial Difficulties among Those Living Below the Poverty Line in Ireland* (Combat Poverty Agency Working Paper Series 09/02 2009) at 76 to 77.

<sup>99</sup> *Ibid* at 78.

debtors is through a repayment plan over a period of years, while either a “fast-track” or low-cost procedure exists for debtors who lack the means to provide a viable repayment proposal to creditors. The Commission has proposed in Chapter 1 that a similar system, the Debt Settlement Arrangement process, should be adopted in Ireland, with the completion of a repayment plan over a number of years as its primary mechanism. The Commission believes that a distinct “No Income, No Asset” procedure should exist for debtors possessing insufficient means to complete a repayment plan and insufficient assets to make bankruptcy proceedings worthwhile.

**(1) Recommendations: A “No Income, No Asset” Procedure**

2.45 Based on submissions received, comparative research and empirical evidence from Ireland, the Commission recommends that a specialised Debt Relief Order mechanism should be introduced in Ireland to resolve situations of insolvency and over-indebtedness among members of the population who possess very low levels of assets and income. The following paragraphs outline the elements of this proposed procedure.

2.46 *The Commission recommends that a low-cost “No Income, No Assets” procedure should be introduced to provide debtors with a Debt Relief Order, which would grant debt discharge after a short waiting period to individuals whose income and assets are so limited as to make bankruptcy proceedings or a repayment plan inappropriate.*

**(a) Eligibility, Application and Entry Conditions**

**(i) Financial Conditions**

2.47 The conditions for obtaining a Debt Relief Order should be strictly defined so that the procedure is only available to those debtors for whom it is designed. As noted above, under the legislation of England and Wales and New Zealand, and under the proposed scheme in Northern Ireland, access to the NINA debt discharge procedure is limited to insolvent debtors who possess either no realisable assets, or assets the value of which falls below a certain threshold.<sup>100</sup> Similarly, the regimes in these countries also limit access to the procedure to those debtors whose total liabilities fall below a threshold established in law. A further important condition for entry is that the debtor passes a means test, in order to ensure that his or her means are so limited as to make participation in a repayment plan under a Statutory Debt Settlement impossible. Furthermore, under New Zealand law a debtor may not access the “no asset” bankruptcy procedure if he or she has previously been admitted to the procedure, while the equivalent rule in England and Wales prevents a debtor from accessing the Debt Relief Order procedure where he or she has availed of it in the six previous years. Under the law of England and Wales, a debtor is further ineligible if he or she is an undischarged bankrupt; or has been subject to a voluntary arrangement;<sup>101</sup> or has been subject to a bankruptcy restrictions order or a debt relief restrictions order.<sup>102</sup> Similarly, if a creditor has applied for an adjudication of bankruptcy against the debtor,<sup>103</sup> or even if a creditor intends applying for such an adjudication,<sup>104</sup> the debtor may be prevented from accessing the procedure.

2.48 In continental European systems, the “fast-track” discharge mechanisms for debtors of very limited means are generally accessed through the same procedure as the “standard” debt settlement process. Access in these systems usually depends on a finding by the relevant supervisory body that the debtor is unable to make repayments under a payment plan of the type required under the “standard” procedure. In France, access to the “personal recovery” procedure is restricted to debtors whose financial affairs are “irremediably compromised”.<sup>105</sup> This requirement is defined as meaning a situation where it is manifestly impossible to put in place the less radical “ordinary” and “extraordinary” moratorium,

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<sup>100</sup> See Schedule 4ZA of the *Insolvency Act 1986* (UK); and sections 363-364 *Insolvency Act 2006* (NZ).

<sup>101</sup> See (LRC CP 56-2009) at paragraphs 5.26 to 5.29.

<sup>102</sup> See Chapter 3 below.

<sup>103</sup> Section 4 of Schedule 4ZA of the *Insolvency Act 1986* (UK).

<sup>104</sup> Section 364(c) of the *Insolvency Act 2006* (NZ).

<sup>105</sup> See Article L-332 of the *Code de la Consommation* and paragraph 2.26 above.

rescheduling and partial discharge remedies available to over-indebted individuals under French law. It should be noted that it appears that the French Commissions on Individual Indebtedness have interpreted this condition widely, and by 2006 nearly one half of all applications for relief were diverted into this “personal recovery” procedure rather than into the “ordinary” and “extraordinary” procedures (which do not involve immediate debt discharge).<sup>106</sup> Applications are adjudicated by the court, after a Commission on Individual Indebtedness has recommended a case for the personal recovery procedure. In the Netherlands, it is also the court which makes an order for an immediate debt discharge where a debtor’s means are so limited as to make the completion of a repayment plan impossible. The court makes such an order on the application of the court-appointed trustee of the debtor’s debt settlement plan, who may apply for such an order if after one year of the plan it becomes clear that the debtor cannot afford to make repayments.<sup>107</sup> Similarly in Sweden, the enforcement office, the body responsible for overseeing the “standard” debt settlement procedure, may present a plan providing for no repayment to creditors, where an assessment of the debtor’s means have shown him or her to be incapable of making any such payments.

2.49 The Commission recommends that similar entry conditions should apply to access to the proposed Debt Relief Order procedure. Access should be limited to insolvent debtors whose income falls below a certain threshold, which could be the same level as the protected reasonable income under the proposed Debt Settlement Arrangement procedure, as discussed above in Chapter 1.<sup>108</sup> This would mean that only those debtors who have no income above an amount necessary to maintain a reasonable standard of living, and so are unable to contribute to a repayment plan, could access the “fast-track” discharge procedure of the Debt Relief Order. Such a threshold could be established in secondary legislation, and linked to the Consumer Price Index to allow for inflation. Statistics relating to MABS client data and the publications of the Vincentian Partnership for Justice<sup>109</sup> could provide assistance in ascertaining at what level this threshold should be set. In addition, a debtor seeking to access the procedure must not possess assets valued at more than a threshold specified in legislation. Again, this threshold should take into account the asset exemptions introduced as part of the debt settlement system.<sup>110</sup> Finally, a limit should be placed on the amount of an applicant’s total debts, and if this limit is surpassed, an applicant should be ineligible for this procedure. When establishing this asset threshold for entry to the procedure, certain items necessary for a reasonable standard of living from this assessment.<sup>111</sup> Again, this limit should be set by secondary legislation and should be index-linked, and MABS client statistics may provide useful information for setting this threshold.

2.50 *The Commission recommends that access to the proposed Debt Relief Order procedure should be limited to insolvent debtors whose disposable income, non-essential assets and total debts fall below thresholds specified by law. Secondary legislation should provide for the precise amounts of these thresholds, which should be index-linked to allow for inflation.*

**(ii) Types of debts to be included within the procedure**

2.51 It is a common feature of personal insolvency laws that some categories of debts are incapable of being discharged, as is recognised in the Commission’s Consultation Paper.<sup>112</sup> Secured debts are generally not subject to discharge, with the exception that the unsecured portion of a debt, after the

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<sup>106</sup> See Kilborn *Comparative Consumer Bankruptcy* (Carolina Academic Press 2007) at 69.

<sup>107</sup> See paragraph 2.30 above.

<sup>108</sup> See (LRC CP 56-2009) at paragraphs 5.165 to 5.168.

<sup>109</sup> See Vincentian Partnership for Justice *Minimum Essential Budgets for Ireland 2008*, available at: [http://www.budgeting.ie/index.php?option=com\\_content&task=view&id=38&Itemid=1](http://www.budgeting.ie/index.php?option=com_content&task=view&id=38&Itemid=1)

<sup>110</sup> *Ibid* at paragraphs 5.153 to 5.158.

<sup>111</sup> See e.g. *Proposed Debt Relief Scheme for Northern Ireland: Consultation on Policy* (Northern Ireland Insolvency Service, Department of Enterprise, Trade and Investment 2009) at 18-19; (LRC CP 56-2009) at paragraphs 5.153 to 5.158.

<sup>112</sup> See (LRC CP 56-2009) at paragraphs 5.117 to 5.119.

security has been valued, may be included in an insolvency estate and subject to *pro rata* payment and discharge. In addition, family maintenance payments, fines imposed for criminal offences and some tort liabilities are also commonly exempt from discharge.

2.52 The Commission recommends that secured debts should be excluded from the Debt Relief Order procedure. The requirement that debtors hold no assets above the specified (low) threshold in effect means that debtors holding secured debts are very unlikely to be eligible for participation in the procedure in any case.

2.53 The Commission also recommends that family maintenance debts arising under the *Family Law (Maintenance of Spouses and Children) Act 1976* should also be excluded from the procedure, and should be incapable of being discharged. Fines for criminal offences<sup>113</sup> and tort liabilities should also be excluded from the procedure.

2.54 *The Commission recommends that secured debts should be excluded from the proposed Debt Relief Order procedure, and should be incapable of being discharged.*

2.55 *The Commission recommends that family maintenance debts, fines for criminal offences, and tort liabilities should be excluded from the proposed Debt Relief Order procedure, and should be incapable of being discharged.*

**(iii) Applications to be made through MABS money advisors**

2.56 A further condition on access to a Debt Relief Order under the legislation of England and Wales and under the proposed Northern Irish legislation is that an application for such an order must be made through an approved intermediary.<sup>114</sup> These intermediaries are to be taken from the face-to-face debt advice sector. The rationale behind the introduction of this requirement is to keep the costs of the process, both for the debtor and for the State, to a minimum; to “screen” the eligibility of applicants before an application is submitted; and to provide advice to debtors as to whether the procedure is the appropriate option for them, as well as assistance in applying if this is the case.<sup>115</sup> The individuals for whom this process is designed lack the means to pay a private sector operator for advice of this kind, and so it is more appropriate that they should be in a position to access advice from a non-fee-charging service. Furthermore, some individuals applying for the scheme may suffer from literacy and/or numeracy difficulties, and would be in need of assistance of the type provided by money advisors. Debt advisors have also been said to be well placed to obtain the relevant information about a debtor’s financial affairs, and to establish whether a debt relief order is the most appropriate course of action for a particular debtor.<sup>116</sup> Policy documents in Northern Ireland have also argued that the introduction of such a debt relief mechanism would allow money advisors to save time and resources. This is because at present money advisors make considerable efforts negotiating arrangements in situations where debtors have nothing to offer creditors, and so it is hoped that the availability of a debt relief order would reduce this workload.<sup>117</sup> Northern Irish authorities have however also noted that the new procedure might result in an increased workload and training for debt advisors while they become accustomed to the new procedure. For this reason it has been suggested that a portion of each application fee should be paid to the money advice centre dealing with the application.

2.57 The Commission accepts the strength of these arguments for involving money advisors in the debt relief order process, and recommends that a similar approach should be adopted under the proposed new mechanism. In addition to the rationales outlined above, the Commission notes that the

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<sup>113</sup> See *Fines Act 2010*.

<sup>114</sup> Section 251B(1) of the *Insolvency Act 1986* (UK); Section 208B(1) of the *Debt Relief Bill (Northern Ireland) 2010*.

<sup>115</sup> See *Proposed Debt Relief Scheme for Northern Ireland: Consultation on Policy* (Northern Ireland Insolvency Service, Department of Enterprise, Trade and Investment 2009) at 14; *The Insolvency Service Relief for the Indebted – An Alternative to Bankruptcy* (2005) at 23.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Proposed Debt Relief Scheme for Northern Ireland: Consultation on Policy op cit.* at 15.



debtors eligible for the proposed Debt Relief Order procedure would largely mirror the clientele of the MABS, so that the core function of the organisation would not be compromised and the service could continue to cater to the needs of the population for whom it was designed. In addition, the Commission believes that it is fundamental that debtors understand the nature and consequence of the Debt Relief Order procedure, and are fully advised as to whether it represents an appropriate method of addressing their debt difficulties. The duties of debtors under such an order should be explained, and the impact on a debtor's credit history should be considered. A money advisor is best placed to act as a debtor's advocate in this context, and to assist the debtor in making a decision. Furthermore, the Commission believes that the advice and counselling provided by money advisors is essential to the rehabilitation of a debtor, and that a debt discharge without such counselling may not provide a debtor with a true fresh start. This may be especially true in the case of a Debt Relief Order, which does not require the debtor to complete a repayment plan, and to learn the budgeting skills that such a plan entails, before a discharge is obtained. Therefore the Commission believes that money advice should be provided to debtors before and during the Debt Relief Order process in order to aid the rehabilitation of the debtor and to assist in preventing a recurrence of debt difficulties. A further advantage of involving money advisors in the process is that they have experience in analysing the income and expenditure of debtors and of preparing statements of debtors' financial circumstances. In particular, the Money Advice and Budgeting Service (MABS), in conjunction with the Irish Banking Federation, has developed a Standard Financial Statement for this purpose. MABS advisors have in this way gained the trust of creditor organisations as an unbiased and responsible assessor of the means of debtors, and thus are well-placed to present information concerning applicants' circumstances to the administrative body responsible for adjudicating on Debt Relief Order applications.

2.58 For these reasons, the Commission recommends that applications for Debt Relief Orders should only be made through money advisors of the Money Advice and Budgeting Service. The Commission also recommends that the Money Advice and Budgeting Service, in consultation with the debtor, is to prepare and complete a prescribed application form for a Debt Relief Order, based on the Standard Financial Statement, and must confirm that, having regard to the information supplied by the debtor, the debtor appears to comply with the conditions for a Debt Relief Order.

2.59 *The Commission recommends that applications for Debt Relief Orders should only be made through money advisors of the Money Advice and Budgeting Service. The Commission also recommends that the Money Advice and Budgeting Service, in consultation with the debtor, is to prepare and complete a prescribed application form for a Debt Relief Order, based on the Standard Financial Statement, and must confirm that, having regard to the information supplied by the debtor, the debtor appears to comply with the conditions for a Debt Relief Order.*

**(iv) Small application fee to be paid**

2.60 The Commission notes that varying approaches exist regarding the issue of whether debtor applicants for this process should be required to pay a fee. The procedure in England and Wales, as well as the proposals for a similar procedure in Northern Ireland, require the payment of a relatively small upfront fee (£90 in England and Wales). The purpose of this fee is to deter frivolous applications and to go towards covering the costs of the scheme.<sup>118</sup> In contrast, under the "no assets" bankruptcy scheme in New Zealand, no fee is payable by debtors. The Commission acknowledges that as the Debt Relief Order is designed to assist the poorest members of society, a fee must not operate as an obstacle to access to the procedure. Nonetheless, the Commission acknowledges that a small fee could serve to help meet the costs of the administrative body and money advisors incurred in operating the scheme. The Commission also believes that there is merit to the view that the requirement of a small fee may serve to prevent inappropriate applications from being made, although the requirement that an application be made through a MABS advisor should also prevent this problem from occurring. The Commission nonetheless recommends that a small fee should be payable by debtors seeking to avail of the Debt Relief Order procedure, provided that the fee is set at such a level as not to form an obstacle to access to

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<sup>118</sup> See *Proposed Debt Relief Scheme for Northern Ireland: Consultation on Policy* (Northern Ireland Insolvency Service, Department of Enterprise, Trade and Investment 2009) at 13; *The Insolvency Service Relief for the Indebted – An Alternative to Bankruptcy* (2005) at 22.

the procedure. Secondary legislation should set the amount of this fee, and it should be index-linked so as to take inflation rates into account. The Commission suggests that this might, initially, be set at something similar to the application fee for claimants applying to the Personal Injuries Assessment Board, which is currently (December 2010) €50.

2.61 *The Commission recommends that a small fee should be payable by debtors seeking to access the Debt Relief Order procedure, provided that this fee is set at such a level as not to operate as an obstacle to access to the procedure. The level of the fee should be specified in secondary legislation, and should be index-linked to take inflation rates into account.*

**(v) Order to be made administratively**

2.62 The Commission notes that the “no asset” debt discharge procedures in England and Wales (and in the Northern Irish proposals), New Zealand and Sweden are made administratively, in order to avoid the costs of court proceedings. In contrast, the fast-track discharge procedures in France and Netherlands depend on a court order granting the debtor’s discharge. A fundamental principle of the Commission’s Consultation Paper, which has been supported in the submissions received by the Commission, is that debt disputes and difficulties should be resolved outside of court proceedings wherever possible.<sup>119</sup> This is especially the case in situations of debtors of very limited resources, and where a simple inability to pay due to poverty is the clear cause of debt default. Therefore the Commission recommends that the Debt Relief Order process should be purely administrative in nature, and should only involve the court if a creditor objects to the making of such an order or the Debt Settlement Office deems the intervention of the court to be necessary. Applications should be made to the Debt Settlement Office, and this office should be empowered to adjudicate on these applications. Creditors should not be deprived of the right to access a court for the purposes of objecting to the making of an order, although the grounds for so objecting may need to be limited by legislation.

2.63 *The Commission recommends that the Debt Relief Order procedure should be purely administrative in nature, and should generally not involve court involvement. The Commission recommends that applications for Debt Relief Orders should be made to the Debt Settlement Office, and that such office should be empowered to adjudicate on these applications. Creditors should be given the right, on limited grounds, to petition the court to object to the making of a Debt Relief Order.*

**(vi) Applications to be made online**

2.64 Under the English debt relief order procedure, applications must be made online. This is in order to keep the costs of the procedure as low as possible.<sup>120</sup> The fee for participation in the scheme can be paid through an over-the-counter payment system, such as at the Post Office.<sup>121</sup> Safeguards exist to enable verification of the information submitted online, and so debtors may only apply through a debt advisor intermediary. The Commission believes that the restriction of applications to online means would help to reduce the costs of the procedure. The Commission also recognises that this would facilitate the efficiency of the Debt Settlement Office as the supervisory authority. Issues may arise as to whether all individuals for whom the Debt Relief Order procedure is designed have access to the internet, but the requirement to apply through a debt advisor may reduce the importance of this issue, as debt advice services would have access to the internet.

2.65 *The Commission recommends that applications for a Debt Relief Order should, in general, be made online.*

**(vii) Limitations on multiple entries into the Debt Relief Order procedure**

2.66 The Commission notes that an issue arises as to the extent to which debtors who have previously benefitted from a Debt Relief Order should be permitted to re-apply to enter the procedure. Varying approaches exist to this issue in the countries considered, ranging from rules limiting access to debt discharge to once in the debtor’s life, to rules limiting access to once every six years. A further

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<sup>119</sup> See (LRC CP 56-2009) at paragraphs 2.117 to 2.120; 5.73 to 5.76.

<sup>120</sup> The Insolvency Service *Relief for the Indebted – An Alternative to Bankruptcy* (2005) at 5, 66.

<sup>121</sup> The Insolvency Service *Guide to Debt Relief Orders* (2009) at 5.

approach would be to permit unlimited repeat access, but to extend the waiting period for discharge for each subsequent application.

2.67 A similar issue arose in the Commission's consultation process in relation to whether repeated access should be permitted to the proposed debt settlement system. Seven submissions received by the Commission addressed this point. Two argued that admission to the procedure should be limited to once in a lifetime, citing both the educative and rehabilitative functions of such debt discharge regimes and the need for abuse to be prevented and creditors rights to be respected. One submission suggested that a debtor should be permitted to apply to use the scheme only once every 10 years. The remaining submissions argued for more flexible approaches. One suggested that there should be no fixed rule prohibiting repeated access to the scheme, but that debtors should be required to make full disclosure of their financial histories, and creditors should be permitted to refuse an application where they suspect abuse. The final three submissions argued that a primary rule should exist to the effect that a debtor should only be permitted to access debt discharge mechanisms once, but that the system should be suitably flexible to allow access a second time in exceptional cases where external circumstances have caused a debtor to fall into debt difficulties a second time. Therefore the individual circumstances of an applicant should be considered, and if the debt difficulties have been caused by *social force majeure* factors such as ill health, long-term unemployment or relationship breakdown, access to the procedure for a second time may be permitted. One of these submissions argued that the length of time since the debtor's last application should also be considered when assessing whether the exceptional circumstances necessary for a second application have been met.

2.68 The Commission believes that this latter approach provides a sensible balance between the prevention of abuse and the protection of creditor rights, while allowing sufficient flexibility for the procedure to serve its intended purpose of providing relief to those debtors most in need of assistance. The Commission therefore recommends that a primary rule should exist to the effect that a debtor may only access the Debt Relief Order procedure once, subject to a proviso that a debtor may exceptionally access the procedure a second time if his or her debt difficulties have been caused by external factors. A presumption could be included to the effect that the debtor's circumstances will be presumed not to be sufficiently exceptional to warrant recourse to the procedure for a second time where less than six years have expired since a Debt Relief Order was granted in respect of the debtor.

2.69 *The Commission recommends that a primary rule should exist to the effect that a debtor may only access the Debt Relief Order procedure once, subject to a proviso that a debtor may exceptionally access the procedure a second time if his or her debt difficulties have been caused by external factors outside of the debtor's control. The Commission recommends that a presumption should exist to the effect that a debtor's circumstances are not sufficiently exceptional to warrant recourse to the procedure for a second time where less than six years have expired since a Debt Relief Order was granted in respect of the debtor.*

**(viii) Assessment of Application: Factors to be Considered and Disqualifying Factors**

2.70 The debtor's application for a debt relief order would necessarily be assessed by an official before such an order could be made. The Commission has expressed its view that in order to keep the costs of the process as low as possible, it is desirable that it is administrative in nature and conducted outside of court proceedings. As noted above, this is the philosophy lying behind the debt relief order procedure in England and Wales and the proposals for a similar regime in Northern Ireland. Therefore in England and Wales applications are considered and determined by the Official Receiver, taking into account conditions and presumptions set out in the relevant legislation. Similarly, under the almost identical Northern Irish proposals, the debtor's application is to be sent to the Official Receiver for adjudication.<sup>122</sup> The following paragraphs discuss the conditions that are to be considered by the Official Receiver when assessing a debtor's application. In England and Wales, the official receiver *may* refuse an application if the debtor has not answered all questions to the satisfaction of the receiver; if the debtor has made a false representation; if the debtor's application is incomplete; or if certain other conditions (as

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<sup>122</sup> See *Debt Relief Bill 2010*, purporting to amend 208C of the *Insolvency (Northern Ireland) Order 1989*.

contained in Part 2 of Schedule 4ZA of the *Insolvency Act 1986*) are not met.<sup>123</sup> These other conditions are:

- That the debtor has not entered into a transaction with any person at an undervalue during the period between the start of the period of two years ending with the application date; and the determination date.<sup>124</sup>
- That the debtor has not given a preference to any person during the period between the start of the period of two years ending with the application date; and the determination date.<sup>125</sup>

2.71 The official receiver *must* refuse an application if not satisfied that the debtor is unable to pay his or her debts; that at least one of the debts owed by the debtor is eligible for inclusion in a debt relief order; or if certain other conditions (as specified in Part 1 of Schedule 4ZA of the 1986 Act) are not met. These other conditions are:

- That the debtor is domiciled in England and Wales on the application date; or at any time during a three year period before the application date the debtor was ordinarily resident in England and Wales, or carried on a business there.
- The debtor is not an undischarged bankrupt; subject to an interim order or Individual Voluntary Arrangement; or subject to a Bankruptcy/Debt Relief Restrictions Order.
- A debtor's or creditor's petition for bankruptcy has not been presented against the debtor, or bankruptcy proceedings are not ongoing at the time of the determination date.
- A debt relief order has not been made in relation in the period of six years before the determination date.
- The debtor's overall indebtedness; monthly surplus income; and property do not exceed the prescribed amounts.

The legislation in England and Wales also provides a number of presumptions which are to be applied by the Official Receiver in adjudicating on a debtor's application.<sup>126</sup> Therefore the Official Receiver must presume that the above condition relating to the debtor's inability to pay his or her debts; and that a specified debt is a debt qualifying for entry to the debt relief procedure; if that appears to him or her to be the case from the information supplied in the application and he or she has no reason to believe that the information is incomplete or inaccurate. In the case of the assessment of the debtor's inability to pay, the Official Receiver must also consider whether he or she has any reason to believe that the debtor may be able to pay the debtors by virtue of a change in the debtor's circumstances since the application date. In relation to the conditions specified in Schedule 4ZA of the 1986 Act and listed above, the Official Receiver must also presume that they have been met if that appears to be the case from the information provided and he or she has no reason to believe that the information is incomplete or inaccurate, provided that the Official Receiver has also made any prescribed verification checks relating to the condition.

2.72 In New Zealand, a similar process exists as applications for entry to the "no asset" bankruptcy procedure are made to the Official Assignee, who then assesses the application and makes an adjudication.<sup>127</sup> In this case, the factors to be considered by the Official Assignee include the eligibility conditions described above, relating to the assets, debts and income of the debtor. If these eligibility conditions are met, the Official Assignee must admit the debtor to the procedure. If the Official Assignee is satisfied on reasonable grounds that any of the following conditions exist, however, he or she must refuse to admit the debtor:

- the debtor has concealed assets with the intention of defrauding creditors;

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<sup>123</sup> See section 251C(4) of the *Insolvency Act 1986* (UK)

<sup>124</sup> Section 9 of Part 2 of Schedule 4ZA of the *Insolvency Act 1986* (UK).

<sup>125</sup> Section 10 of Part 2 of Schedule 4ZA of the *Insolvency Act 1986* (UK).

<sup>126</sup> Section 251D of the *Insolvency Act 1986* (UK).

<sup>127</sup> See section 362 of the *Insolvency Act 2006* (NZ).

- the debtor has engaged in conduct that would, if the debtor were adjudicated bankrupt, constitute an offence;
- the debtor has incurred a debt or debts knowing that he or she does not have the means to repay them; or
- a creditor intends applying for the debtor's adjudication as a bankrupt and whether the outcome for the creditor would be materially better if the debtor is adjudicated bankrupt.<sup>128</sup>

In addition, under the New Zealand procedure, a debtor who has applied for entry to the no asset bankruptcy procedure must not obtain credit of more than NZ\$100 without first informing the credit provider of his or her application to the procedure.<sup>129</sup>

2.73 As noted above, under the systems of France, the Netherlands and Sweden, entry to the “fast-track” debt discharge procedure for debtors unable to afford to participate in a repayment plan is via the standard debt settlement procedure. Therefore the factors to be considered when assessing a debtor’s application are those conditions generally required for entry to the debt settlement system: good faith and insolvency. These conditions are discussed in more detail in the Commission’s Consultation Paper.<sup>130</sup> In addition, during the debt settlement procedure in these countries, the relevant authority (trustee, enforcement office or Commission on Individual Indebtedness) makes an assessment that the debtor is unable to make partial debt repayments under a payment plan, and so is an appropriate candidate for the “fast-track” system.

2.74 The Commission believes that similar factors should be considered by the Debt Settlement Office when assessing applications for the proposed Debt Relief Order procedure. The Office should check that the debtor’s application shows the debtor’s income, assets and debts to fall within the eligibility thresholds described above.<sup>131</sup> The application form should require debtors to provide information of any previous bankruptcy adjudications or Debt Relief Orders made against the debtor, or any pending bankruptcy petitions.<sup>132</sup> In addition, debtors should be required to indicate that they have not attempted to conceal assets from creditors and that they have not incurred debts knowing that they would not be able to repay them. The Commission suggests that debtors should therefore not be permitted to enter the procedure if they have sold assets at an undervalue within a specified period before applying to enter the procedure. The Commission suggests that this specified period could be one of three months’ duration, as under the *Bankruptcy Act 1988*.<sup>133</sup> The Commission however acknowledges that a longer period may be more appropriate, as is the case under the law of England and Wales (which looks to a period of two years prior to the application date).<sup>134</sup> The Commission notes that in England and Wales the Official Receiver is also provided with a discretionary power to refuse a debtor’s application where he or she has given a preference to any person during the period from two years prior to the application date, until the date of the determination of the application. The Commission is conscious that many debtors seeking to avail of this procedure may be quite vulnerable and are likely to become subject to considerable pressure from certain creditors to make repayment. As this may lead such debtors to prefer one creditor over others, the Commission believes that it is far from clear that a debtor should be denied access to the procedure for this reason. The Commission thus leaves open the issue as to whether the fact the debtor

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<sup>128</sup> Section 364 of the *Insolvency Act 2006* (NZ).

<sup>129</sup> Section 365 of the 2006 Act.

<sup>130</sup> See (LRC CP 56-2009) at 5.41 to 5.65; 5.121 to 5.133.

<sup>131</sup> See paragraph 2.50 above.

<sup>132</sup> When the Commission’s proposed register of judgments and pending enforcement proceedings is in place, this could be consulted by the Debt Settlement Office in order to verify the information provided: see (LRC CP 56-2009) at paragraphs 6.187 to 6.193 and paragraphs 4.76 to 4.81 below.

<sup>133</sup> See section 58 of the *Bankruptcy Act 1988*. It should be noted that under this provision, the sale of a property at a price substantially below its market value does not prevent the debtor from entering the bankruptcy process, but rather the transaction in question is void as against the Official Assignee.

<sup>134</sup> See paragraph 2.70 above.

has given a preference to any person should be considered in determining whether a debtor should be permitted to enter the Debt Relief Order procedure.

2.75 The debtor should also be required to indicate his or her residency in Ireland for the requisite period<sup>135</sup> or that his or her centre of main interests lies in Ireland.<sup>136</sup> The Debt Settlement Office should be empowered to request the debtor to answer any questions arising in relation to the information provided in the application, and a failure by the debtor to answer such questions should entitle the Office to refuse the debtor's application. The Office should however otherwise accept the information provided in the debtor's application at face value, unless there is reason to believe that the information is incomplete or inaccurate, or there is reason why the Office may see fit to make further enquiries.

2.76 *The Commission recommends that the Debt Settlement Office's adjudication of an application for a Debt Relief Order should involve assessing the debtor's application to ensure that the financial conditions relating to the debtor's assets, income and debts are met. The Debt Settlement Office should also assess whether the conditions concerning the debtor's previous use of the Debt Relief Order procedure are satisfied.*<sup>137</sup> *A further condition to be assessed should be that the debtor has resided in the State for a period of one year prior to the application for the Order, or that the debtor's centre of main interests is in Ireland. The Commission recommends that the Office must make a Debt Settlement Order if these conditions are met.*

2.77 *The Commission recommends that the Debt Settlement Office may however refuse to make a Debt Relief Order where the Office is of the opinion, based on reasonable grounds, that any of the following conditions exist:*

- *the debtor is an undischarged bankrupt;*
- *a bankruptcy petition is pending against the debtor, and the financial outcome for the petitioning creditor would be materially better if the debtor is adjudicated bankrupt than if the debtor is admitted to the Debt Relief Order procedure;*
- *the debtor has made any false representation in making the application or on supplying any information or documents in support of it;*
- *the debtor has entered into a transaction with any person at an undervalue during the period between the start of the period of three months ending with the application date; and the determination date;*
- *the debtor has concealed assets with the intention of defrauding creditors;*
- *the debtor has engaged in conduct that would, if the debtor were adjudicated bankrupt, constitute an offence; or*
- *the debtor has incurred a debt or debts knowing that he or she does not have the means to repay them.*

2.78 *The Commission recommends that if the Debt Settlement Office refuses an application, it should be required to give reasons for this refusal.*

2.79 *The Commission recommends that the Debt Settlement Office should be empowered to request further information from the debtor where the Office has reasonable grounds to believe that such information is necessary in order to reach a conclusion in relation to the existence of the above conditions. The Commission recommends that a failure of the debtor to provide such information when requested should entitle the Office to refuse to make a Debt Relief Order.*

2.80 *The Commission recommends that the Debt Settlement Office should presume that all of the relevant conditions are satisfied if that appears to be the case from the debtor's application and the Office has no reasonable grounds to believe that the information supplied is inaccurate or incomplete.*

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<sup>135</sup> This period is fixed at one year under section 11(1)(d) of the *Bankruptcy Act 1988*.

<sup>136</sup> See Article 3 of *Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings*.

<sup>137</sup> See paragraph 2.69 above.

**(ix) Making and Effect of Order**

2.81 The making of a Debt Relief Order should have two principal effects. First, an Order should impose a moratorium on the enforcement of debts included within the procedure for the duration of the Order. Creditors whose debts have been included in the Order should therefore be prevented from taking any action, through the legal process or by informal means, to recovery monies owed under a debt included in the Order. Secondly, a Debt Relief Order should provide for the automatic discharge of the debts included within the order at the end of the duration of the Order, subject to the possible extension or termination of the order in the circumstances outlined below.

2.82 It can be seen from the discussion of comparative systems above that the most common duration of the moratorium period in other legal systems is 12 months, with the debts included in the order being discharged after this time. This is the case under the law of England and Wales,<sup>138</sup> New Zealand,<sup>139</sup> and the Netherlands,<sup>140</sup> as well as under the proposed new procedure in Northern Ireland.<sup>141</sup> In contrast, under the French<sup>142</sup> and Swedish<sup>143</sup> systems, the debts of a debtor unable to afford a partial repayment plan are discharged immediately. One reason why a 12-month waiting period is chosen over an immediate discharge is to allow for alternative rearrangements to be made should the debtor's financial circumstances improve.<sup>144</sup>

2.83 The Commission takes the view that the most appropriate approach, as seen in the consensus that has emerged in several legal systems, is to provide that the Debt Relief Order should impose a moratorium on the enforcement of any of the debts included in the order<sup>145</sup> for a period of 12 months, after which the debts are discharged. The exceptions to this basic rule whereby a discharge can be denied or the waiting period can be extended are discussed below.<sup>146</sup> The moratorium should have the effect of preventing the creditor from commencing any legal proceedings for the recovery of an included debt except with the permission of the court and on such terms as the court sees fit.<sup>147</sup> The making of an Order should also allow a court in which proceedings for the recovery of an included debt are currently pending to make an order staying the proceedings or allowing them to continue on such terms as the court thinks fit. It is therefore the court's decision as to whether or not enforcement should be permitted where a Debt Relief Order has been granted, and the judicial function as protected by the Constitution of Ireland would not be subject to interference.<sup>148</sup>

2.84 As secured debts are excluded from the procedure, the moratorium should not prevent a secured creditor from enforcing its security (although the limits on the assets held by debtors entering the procedure mean that few debtors with secured debts will be eligible). The Commission further takes the

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<sup>138</sup> See paragraphs 2.16 to 2.17

<sup>139</sup> See paragraph 2.21 above.

<sup>140</sup> See paragraph 2.30 above.

<sup>141</sup> See paragraph 2.18 above.

<sup>142</sup> See paragraph 2.26 above.

<sup>143</sup> See paragraph 2.36 above.

<sup>144</sup> See e.g. The Insolvency Service *Relief for the Indebted – An Alternative to Bankruptcy* (2005) at 34.

<sup>145</sup> See in this regard section 136(1) of the *Bankruptcy Act 1988*, which provides that:

“On the making of an order of adjudication, a creditor to whom the bankrupt is indebted for any debt provable in bankruptcy shall not have any remedy against the property or person of the bankrupt in respect of the debt apart from his rights under this Act, and he shall not commence any proceedings in respect of such debt unless with the leave of the Court and on such terms as the Court may impose.”

<sup>146</sup> See paragraph 2.94 to 2.104 below.

<sup>147</sup> The existing procedure under the *Bankruptcy Act 1988* requires the court to grant permission to a creditor to issue a bankruptcy summons and so commence bankruptcy proceedings: see section 8 of the 1988 Act.

<sup>148</sup> See Articles 34.1 and 37.1 of the Constitution of Ireland.

view that it should be clarified in legislation that a creditor is prohibited from taking informal actions to recover a debt included within a Debt Relief Order, such as by employing a debt collection undertaking to collect the debt or otherwise seeking to obtain payment outside of the legal process. It should be noted in this regard that section 49 of the *Consumer Credit Act 1995* provides that it is a criminal offence to engage in certain debt recovery activities in respect of a debt that is unenforceable under the Act.<sup>149</sup>

2.85 *The Commission recommends that the effect of the Debt Relief Order should be to impose a moratorium on the enforcement or recovery of any debts included in the Order for a period of 12 months. During this time, creditors should be prevented from commencing any legal proceedings for the recovery of an included debt except with the permission of the court and on such terms as the court sees fit. If proceedings for the recovery of an included debt have already been commenced, the court should be permitted to make an order staying the proceedings or allowing them to continue only subject to such terms as the court thinks fit.*

2.86 *The Commission recommends that legislation should expressly state that creditors and their agents are prohibited from taking any action to collect, or undertake or attempt to collect, directly or indirectly, debts owed by a debtor which have been included in a Debt Relief Order.*

2.87 *The Commission recommends that legislation should expressly clarify that the moratorium on the recovery of debts included in a Debt Relief Order shall not affect the power of a secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if no Debt Relief Order had been made.*

2.88 *The Commission recommends that on the expiry of the 12 month moratorium period, the debts included in the Debt Relief Order should be discharged.*

**(x) Duties of Debtor**

2.89 In exchange for the discharge of debt granted, the debtor must be placed under certain duties that are necessary to ensure the effective operation of the procedure and to safeguard the rights of creditors. The procedure is designed to provide debt relief for those debtors who have no reasonable prospect of paying back their debts to any meaningful extent, and so discharges debts which responsible creditors would in any event write off.<sup>150</sup> This does not lessen the need to prevent abuse of the procedure and resultant harming of creditors' interests. To facilitate the integrity of the procedure and to prevent abuse, the debtor should be required - from the point of making an application to the Debt Relief Order procedure to the completion of the procedure - to cooperate fully in the process, and in particular to comply with any reasonable request of the Office to provide assistance, documents and information necessary for the application of the procedure to the debtor's case.<sup>151</sup> In addition, the debtor should be required to inform the Debt Settlement Office as soon as reasonably practicable of any material change in his or her circumstances, particularly an increase in the level of the debtor's assets or income, which would affect (or would have affected) the adjudication of the debtor's application and/or which influences the debtor's ability to repay an amount towards the debts included in the Debt Relief Order.<sup>152</sup>

2.90 In addition, most jurisdictions place restrictions on debtors participating in such procedures from obtaining credit above a certain amount without disclosing their status as a participant in the procedure, with a breach of this condition constituting a criminal offence.<sup>153</sup> In addition, in England and Wales a person in respect of whom a debt relief order is made is also guilty of an offence if he or she engages directly or indirectly in any business under a name other than that in which the order was made

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<sup>149</sup> See paragraphs 6.06 to 6.07 above.

<sup>150</sup> See e.g. *Proposed Debt Relief Scheme for Northern Ireland: Consultation on Policy* (Northern Ireland Insolvency Service, Department of Enterprise, Trade and Investment 2009) at 20.

<sup>151</sup> See section 370(1) of the *Insolvency Act 2006* (NZ); section 251J(1) to (2) of the *Insolvency Act 1986* (UK).

<sup>152</sup> Section 370(2) of the 2006 Act and section 251J(3) of the 1986 Act.

<sup>153</sup> See section 370(3) and 371 of the *Insolvency Act 2006* (NZ); section 251S(1)(a) of the *Insolvency Act 1986* (UK).



without disclosing the name in which the order was made to all persons with whom he or she enters into a business transaction.<sup>154</sup>

2.91 It is useful to note in this regard that the Commission received seven submissions in relation to the duties to which debtors should be subject under the Commission's proposed non-judicial debt settlement system. A large majority of submissions emphasised that debtors should provide full disclosure of their financial circumstances throughout the process, including specific references to the need for full cooperation throughout and the disclosure of income and expenditure levels at regular intervals. Several submissions took the view that debtors participating in the system should be prohibited from obtaining further credit during the term of the settlement, or even for a specified period after the completion of the settlement. Many submissions also suggested that debtors should be required to undertake a financial education programme as part of the debt settlement scheme, while one cautioned that the role of financial education in preventing over-indebtedness should not be overstated as problems such as inadequate income cannot be cured in this manner. One submission suggested that participating debtors should be required not to refuse or avoid available full-time employment.

2.92 The Commission accepts that the full and honest cooperation of the debtor in the Debt Relief Order procedure is fundamental to its effective operation and to the protection of the interests of creditors. In addition, the Commission accepts that restrictions on the debtor's ability to obtain credit throughout the duration of the procedure constitute a fair balance between the provision of relief to the debtor and the protection of creditors. The Commission accepts that there is merit in the suggestion that debtors should be required to participate in a financial education programme as part of the procedure, but takes the view that the requirement that debtors access the procedure through a MABS money advisor should provide sufficient opportunity for debt counselling and financial education for participants.<sup>155</sup> The Commission also recognises that measures are ongoing in the development of a national financial education programme, and does not propose to make any recommendations regarding the issue of the provision of financial education.<sup>156</sup> The Commission acknowledges that the debt relief order procedure should be designed with the aim of promoting and incentivising the entry into employment of debtors. The Commission therefore considers that there may be merit to the suggestion, drawn from the German debt settlement system,<sup>157</sup> that debtors must not voluntarily refuse available employment during the course of the procedure. The Commission however notes that the issue of the steps to be taken by debtors to seek or not to refuse available employment as part of the procedure raise issues of national employment and social welfare policy, which lie outside of the remit of law reform.

2.93 *The Commission recommends that the following duties should be imposed on debtors participating in the Debt Relief Order procedure, (from the time of applying for entry to the completion of the procedure):*

- *A duty to cooperate fully in the process, and in particular to comply with any reasonable request of the Office to provide assistance, documents and information necessary for the application of the procedure to the debtor's case;*
- *A duty to inform the Debt Settlement Office as soon as reasonably practicable of any material change in his or her circumstances, particularly an increase in the level of the debtor's assets or income, which would affect (or would have affected) the adjudication of the debtor's application and/or which influences the debtor's ability to repay an amount towards the debts included in the Debt Relief Order;*
- *A duty not to obtain credit above a certain amount without disclosing the fact that a Debt Relief Order or a Debt Relief Restrictions Order in respect of the debtor;*

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<sup>154</sup> See section 251S(1)(b) of the *Insolvency Act 1986* (UK).

<sup>155</sup> It should be noted in this regard that several legal systems have introduced a requirement of mandatory debt counselling in their consumer insolvency systems: see (LRC CP 56-2009) at paragraph 5.114.

<sup>156</sup> See (LRC CP 56-2009) at paragraphs 4.09 to 4.14.

<sup>157</sup> See (LRC CP 56-2009) at paragraph 5.114.

- *A duty not to engage directly or indirectly in any business under a name other than that in which the order was made without disclosing the name in which the order was made to all persons with whom the debtor enters into a business transaction.*

The appropriate sanctions for breaches of these duties are now presented.

**(xi) Variation of Order (including Creditor objections procedure)**

2.94 Where the debtor's circumstances have changed to the extent that the eligibility criteria for the relevant procedures are no longer met, or where the debtor has acted improperly, the systems discussed above provide mechanisms under which the supervisory authority may extend the moratorium period and so delay the debtor's discharge, or alternatively terminate the process before the debtor obtains a discharge.

2.95 In England and Wales, the Official Receiver is empowered to revoke or amend a debt relief order during the moratorium period in certain specified circumstances.<sup>158</sup> These grounds include the fact that information supplied by the debtor was incomplete, incorrect or misleading; that the debtor failed to comply with his or her duty to cooperate under the procedure; that a bankruptcy order has been made in relation to the debtor; or that the debtor has made a proposal for an Individual Voluntary Arrangement.<sup>159</sup> In addition, the order may be revoked where the Official Receiver should not have been satisfied that the conditions for obtaining an order were met,<sup>160</sup> or where the conditions relating to the debtor's assets and monthly surplus income cease to be met at any time after the order was made.<sup>161</sup> Where the Official Receiver decides to revoke the order, he may do so immediately or may revoke it with effect from a future date of up to three months after the date of the decision.<sup>162</sup> The reason for this power to delay the revocation is to provide a debtor whose income and/or assets have increased beyond the limits permitted in the debt relief order procedure with sufficient time to come to an alternative arrangement with his or her creditors, such as an Individual Voluntary Arrangement or statutory debt management plan.<sup>163</sup> This facility is linked to the duty on debtors to disclose any increase in their levels of assets or incomes, as discussed above.

2.96 In addition to these powers of revocation, it is of note that a system of objections and investigations also exists under the procedure operating in England and Wales. Any creditor included in a debt relief order may object to the making of the order, the inclusion of its debt in the list of the included debts, or the details of the debt specified in the order.<sup>164</sup> Such objections must be made during the moratorium period, in a prescribed form and based on a prescribed ground. The Official Receiver, in response to such an objection, or on his or her own initiative, may carry out an investigation of the any matter appearing to be relevant to the making of a decision regarding the revocation of the order or the application to court for a direction. The Official Receiver is empowered to require any person to provide such information and assistance as the Receiver may reasonably require in connection with the investigation.

2.97 In New Zealand, the Official Assignee is empowered to terminate the debtor's participation in the "no asset" bankruptcy procedure where the debtor was wrongly admitted to the procedure (for example, because the debtor concealed assets); or where the Official Assignee is satisfied that the debtor's financial circumstances have changed to the extent that the debtor is now able to repay an amount towards his or her debts.<sup>165</sup> The effect of the termination of the debtor's participation is that the

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<sup>158</sup> Section 251L of the *Insolvency Act 1986* (UK).

<sup>159</sup> Section 251L(2) of the 1986 Act.

<sup>160</sup> Section 251L(3) of the *Insolvency Act 1986* (UK).

<sup>161</sup> Section 251L(4) of the 1986 Act.

<sup>162</sup> Section 251L(5) of the 1986 Act.

<sup>163</sup> See section 251L(6) and The Insolvency Service *Relief for the Indebted – An Alternative to Bankruptcy* (2005) at 34.

<sup>164</sup> Section 251K of the *Insolvency Act 1986* (UK).

<sup>165</sup> Section 373 of the *Insolvency Act 2006* (NZ).

debts which became unenforceable on the debtor's entry into the procedure are rendered enforceable once more.<sup>166</sup> The debtor is also liable for any penalties and interest that may have accrued on the debts in the time since the entry to the procedure. In addition, a creditor who objects on specified grounds to the debtor's admission to the procedure may apply to the Official Assignee to have the debtor's participation terminated.<sup>167</sup> The limited grounds on which a creditor may object are that the debtor did not meet the criteria for entry into the procedure; or that there are reasonable grounds for the Assignee to conclude that the debtor was disqualified from entry on the basis of the disqualifying conditions listed above.<sup>168</sup> The making of a bankruptcy order, either on the petition of the debtor or on the petition of a creditor not included within the "no asset" procedure, also terminates the procedure.<sup>169</sup>

2.98 The Commission accepts that mechanisms need to be in place to terminate the Debt Relief Order procedure or to suspend the debtor's discharge where a debtor has not cooperated fully with the procedure or where the Debt Settlement Office becomes aware that a debtor should not have been admitted into the procedure. The Commission also believes that it is necessary for the protection of the rights of creditors that they should have the power to object, albeit on limited grounds, to the debtor's participation in the procedure. These limited grounds should be confined to complaints that the debtor does (or did) not meet the eligibility conditions for entry to the procedure;<sup>170</sup> that the disqualifying factors described above are present;<sup>171</sup> and/or that the debtor has failed to comply with the duties imposed on debtors under the procedure.<sup>172</sup> The Debt Settlement Office should therefore be empowered to act on such objections and investigate the affairs of the debtor to assess whether grounds for amending or terminating the Order exist. The debtor's discharge should be capable of being postponed for a short period of time while this investigation takes place. The effect of a termination of an Order should be that the moratorium on the enforcement of debts owed by the participating debtor should be lifted, with the debtor becoming liable once again to repay these debts, including any interest and arrears that have accrued.

2.99 *The Commission recommends that the Debt Settlement Office should be empowered to revoke or amend a Debt Relief Order where:*

- *The disqualifying factors described above are found to have come into existence (or are found to have always existed, i.e. the Order should never have been granted);*
- *The debtor has not complied with the duties imposed on debtors under the procedure;*

2.100 *The Commission recommends that creditors should be empowered to object to the debtor's participation in the Debt Relief Order procedure at any point throughout the 12-month duration of the procedure. The Debt Settlement Office should be empowered to carry out an investigation of the debtor's affairs in response to a complaint, and to amend or terminate the Order if sufficient grounds are found to exist. The Commission recommends that the Debt Settlement Office should be permitted to suspend the debtor's discharge for a reasonable period of time in order to conduct such an investigation.*

2.101 *The Commission recommends that the effect of the termination of a Debt Relief Order should be to lift the moratorium on the enforcement/recovery of debts owed by the participating debtor, and to make the debtor liable once again for these debts, including any arrears, charges and interest that have accrued.*

2.102 The Commission believes that cases where the financial conditions for eligibility to the procedure are no longer met due to a change in the debtor's circumstances are more complicated. To

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<sup>166</sup> Section 375 of the 2006 Act.

<sup>167</sup> Section 376 of the 2006 Act.

<sup>168</sup> See section 364 of the 2006 Act and paragraph 2.72 above.

<sup>169</sup> Section 372(c) and (d) of the 2006 Act.

<sup>170</sup> See paragraphs 2.50 and 2.69 above.

<sup>171</sup> See paragraphs 2.76 to 2.80 above.

<sup>172</sup> See paragraph 2.93 above.

ensure fairness to creditors, it would appear that any increase in the debtor's assets or income above the permitted level should prevent a debt discharge and instead allow these additional resources to be deployed towards making partial repayment to creditors. It is arguably uncontroversial that this should be the case where a debtor's assets rise above the permitted level due to the receipt of a "windfall", and this increase should be distributed among creditors. In contrast however, the situation is less clear where the debtor's income rises due to the debtor obtaining new employment. If entry into employment automatically means that the moratorium on enforcement and the subsequent debt discharge are removed, this could reduce incentives for debtors to find employment throughout the duration of the procedure. This could have serious implications for the debtor and for the public interest as it may lead to more individuals falling into long-term unemployment. The Commission acknowledges that one of the duties imposed on debtors entering the procedure is an obligation not to refuse or avoid available full-time employment, a provision which should help to address this problem. This measure may not oblige debtors to seek employment actively however.

2.103 The Commission takes the view that the obligations to be placed on debtors to seek actively, or not to refuse, available employment as part of the Debt Relief Order procedure raise issues of national social welfare and employment policy, which are not appropriate for determination by a law reform body. The Commission therefore makes no recommendation in relation to the impact that a rise in the income of the debtor should have on the debtor's continued participation in the Debt Relief Order procedure and ultimately on the discharge of the debts included under the Order. The Commission suggests that consideration should be given to balancing the aim of facilitating repayment of what is owed to creditors where possible with the need to ensure that the procedure provides incentives for debtors to seek employment actively where possible. The Commission recommends that if a decision is made to provide for termination of a Debt Relief Order on an increase in the debtor's income, such termination should not take effect until a debtor has been given reasonable time to come to an arrangement with his or her creditors.

2.104 *The Commission recommends that if the legislature decides to provide for the termination of a Debt Relief Order where a debtor's income has increased since the making of the Order, legislation should provide that such termination should not take effect until a debtor has been given reasonable time to come to an arrangement, including a Debt Settlement Arrangement, with his or her creditors.*

#### **(xii) Court Supervision**

2.105 While it is envisaged that the proposed Debt Relief Order procedure will be an administrative process, some court supervision of the process may be required in order to safeguard the rights of the parties involved.

2.106 In the debt relief order procedure applicable in England and Wales, any person may make an application to the court if he or she is dissatisfied by any act, omission or decision of the official receiver in connection with a debt relief order or an application for such an order.<sup>173</sup> The Official Receiver may also make an application to the court for directions in relation to any matter arising in connection with a debt relief order, an particularly in relation to the debtor's compliance with the duties imposed on debtors by such an order.<sup>174</sup> The court may extend the moratorium period for the purposes of determining such an application, and may take one or more of a range of actions, including revoking or amending the debt relief order; quashing in whole or in part any act or decision of the Official Receiver; making an order enforcing any duty of the debtor; and extending the moratorium period.

2.107 In addition, the Official Receiver may make an application to court for an order summoning the debtor; the debtor's spouse or civil partner; and/or any person capable of giving information concerning the debtor's affairs, to appear before the court for the purposes of conducting an inquiry into the affairs of the debtor.<sup>175</sup> Those summoned before the court may be required to provide a written account of their dealings with the debtor, or to produce any documents relating to the debtor's affairs. If a person

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<sup>173</sup> Section 251M(1) of the *Insolvency Act 1986* (UK).

<sup>174</sup> Section 251M(2) and(3) of the *Insolvency Act 1986* (UK).

<sup>175</sup> Section 251N of the *Insolvency Act 1986*.

summoned fails to appear before the court without reasonable excuse, the court may cause a warrant to be issued for the arrest of that person and for the seizure of any documents in that person's possession.

2.108 The Commission accepts that, in order to ensure the protection of the rights of creditors and debtors, the administrative Debt Relief Order procedure should be subject to some level of supervision by the courts. Parties involved should not be deprived of their rights of access to a court,<sup>176</sup> and the constitutional protection of the judicial function should be respected.<sup>177</sup> Therefore parties objecting to decisions of the Debt Settlement Office should have the power to challenge these decisions before a court. The Commission also notes that the High Court could quash an order made outside jurisdiction by judicial review.

2.109 *The Commission recommends that any affected party should be empowered to apply to court to challenge a decision of the Debt Settlement Office in relation to a Debt Relief Order or an application for such an order in a manner comparable to those applicable to Debt Settlement Arrangements.*

### **(xiii) Offences**

2.110 For the protection of creditors and the integrity of the Debt Relief Order procedure, it is essential that all debtors applying to enter the procedure act honestly and make a full disclosure of their circumstances. The Commission recommends above that a failure to provide full honest information will prevent a debtor from accessing the procedure.<sup>178</sup> It is a fundamental principle of personal insolvency law that fraud on the part of a debtor must be prevented, and that the commission of any such fraudulent conduct should constitute a criminal offence. The same principles should apply to the proposed Debt Relief Order procedure, and all debtors participating in this scheme should be subject to the same duties as a debtor participating in bankruptcy proceedings.

2.111 Therefore the Commission recommends that any debtor who knowingly makes a false representation or omission in applying for a Debt Relief Order or responding to a request for information from the Debt Settlement Office (during the application process or during the moratorium period) should be guilty of an offence.<sup>179</sup> Similarly, any debtor who knowingly conceals or refuses to produce documents, or produces falsified documents to the Debt Settlement Office when requested to provide relevant documents should be guilty of an offence.<sup>180</sup> In addition, offences should exist in relation to the fraudulent disposal of property by the debtor;<sup>181</sup> and in respect of the fraudulent dealing with property obtained on credit by the debtor.<sup>182</sup> The Commission recommends above that it should also be an offence for a debtor to obtain credit above a certain amount without disclosing that a Debt Relief Order or restriction order has been made against him or her. Similarly, the Commission has recommended that it should be a criminal offence for someone subject to such an order to carry on business in a name other than his or her own without disclosing the name under which the order has been made.

2.112 *The Commission recommends that it should be a criminal offence for a debtor participating in the Debt Relief Order procedure to engage in fraudulent or dishonest conduct, including, inter alia, engaging in the following activities:*

- *Knowingly concealing or refusing to produce documents, or producing falsified documents;*
- *Fraudulently disposing of property;*

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<sup>176</sup> These rights are protected by Article 40.3 of the Constitution of Ireland, and Article 6 of the European Convention on Human Rights (ECHR): see (LRC CP 56-2009) at paragraphs 2.07 to 2.15.

<sup>177</sup> See Articles 34.1 and 37.1 of the Constitution of Ireland, and Article 6 ECHR.

<sup>178</sup> See paragraph 2.77 above.

<sup>179</sup> See e.g. section 123(1)(a), (d) and (f) of the *Bankruptcy Act 1988*; section 251O of the *Insolvency Act 1986* (UK).

<sup>180</sup> See e.g. section 123(1)(c), (i)-(l) of the *Bankruptcy Act 1988*; section 251P of the *Insolvency Act 1986* (UK).

<sup>181</sup> See e.g. section 123(1)(e) of the *Bankruptcy Act 1988*; section 251Q of the *Insolvency Act 1986* (UK).

<sup>182</sup> See e.g. section 123(1)(n) and (o) of the *Bankruptcy Act 1988*; section 251S of the *Insolvency Act 1986* (UK).

- *Fraudulently dealing with property obtained on credit;*
- *Obtaining credit above a certain limit without disclosing that a Debt Relief Order or restriction order has been made in respect of him or her;*
- *Carrying on business in a name other than his or her own without disclosing the name under which the Debt Relief Order or restriction order has been made.*

**(xiv) Restrictions and Undertakings**

2.113 In addition to the criminal sanctions discussed above, it may be worth considering whether a system of restriction orders and undertakings similar to that discussed above in the context of bankruptcy law reform should be applicable to debtors participating in Debt Relief Order procedure. This would further ease concerns about moral hazard, while distinguishing between honest and dishonest debtors. It would also be consistent with the policy of subjecting debtors participating in the no asset procedure to similar duties and obligations as those debtors participating in bankruptcy proceedings, as has been the case in jurisdictions such as England and Wales and New Zealand. It must however be recognised that such restriction orders are largely focused on limiting the future business activities of those debtors who have been adjudicated bankrupt. As the Debt Relief Order procedure is largely designed for consumers and it is unlikely that debtors meeting the eligibility conditions for entry, such restriction orders may not be appropriate. The Commission therefore recommends that further consideration should be given to this matter.

**(xv) Register of Debt Relief Orders to be integrated into Personal Insolvency Register**

2.114 The Commission considers that a Register of Debt Relief Orders should be introduced. The register of Debt Relief Orders should be integrated with the register of Debt Settlement Arrangements into the Personal Insolvency Register. This will ensure that an accurate account of proceedings involving a particular individual are readily accessible to creditors, courts and officials such as those of the Debt Settlement Office and/or Debt Enforcement Office. The Commission recommends further consideration as to how access to this register should be controlled. A further issue to be considered is how the Debt Relief Order should be publicised, and whether it should be required to give notice of the Order in *Iris Oifigiúil* and a daily newspaper, as is the case in bankruptcy law.

2.115 *The Commission recommends that where a Debt Relief Order is made, it must be registered by the Debt Settlement Office in the Personal Insolvency Register (as with Debt Settlement Arrangements).*

## CHAPTER 3 REFORM OF THE BANKRUPTCY ACT 1988

### A Introduction

3.01 In the previous two Chapters, the Commission outlines its proposals for the introduction of two non-judicial personal insolvency procedures. The Commission views the Debt Settlement Arrangement procedure, as described in CHAPTER 1, as the standard procedure, which is applicable in cases of debtors who, while insolvent, are in a position to repay their obligations in part. CHAPTER 2 proposes the introduction of a Debt Relief Order procedure, which if introduced would be applicable in cases of debtors who are unable to make even partial repayments of their obligations. In accordance with its view that situations of personal insolvency should be resolved outside of the court process wherever possible, the Commission proposes that these two non-judicial procedures should be appropriate for resolving the majority of cases.

3.02 The Commission nonetheless recognises that cases arise which are not suitable to be resolved via non-judicial means, and therefore proposes that both debtors and creditors should have resort to bankruptcy proceedings as a last resort. In this Chapter, the Commission therefore presents the final stage of its recommendations for the reform of personal insolvency law, by proposing its key elements of judicial bankruptcy proceedings under the *Bankruptcy Act 1988* which should be reformed in order to produce a modern and effective personal insolvency law system, capable of meeting the needs of the credit society. While the Commission does not intend to make detailed recommendations for the comprehensive reform of the Act, it proposes to highlight certain key issues which could be reformed in order to modernise and improve Irish bankruptcy law.

### B Reform of the Bankruptcy Act 1988: Key Issues

3.03 As noted above, the Commission's Consultation Paper criticised the *Bankruptcy Act 1988* as being unable to provide an effective system of personal insolvency law capable of serving the needs of the credit society. The Consultation Paper also condemned the Act's failure on its own terms to achieve the much more modest aim it seeks to serve, the efficient liquidation of an individual insolvent debtor's assets to meet the debtor's liabilities to the greatest extent possible.<sup>1</sup> The failure of the 1988 Act was highlighted by reference to the extraordinarily low numbers of bankruptcies in Ireland when compared with similar legal systems, indicating that Irish bankruptcy mechanisms serve little if any purpose and do not provide any benefit to Irish society. This contrasts significantly with the economic, social and humanitarian purposes which personal insolvency laws serve in other countries, all of which provide strong justifications for the reform of Irish law.<sup>2</sup> In 2009, just 17 people were adjudicated bankrupt in Ireland (in the year up to 30 September 2010, the figure was 19), which contrasts hugely with the statistics for Northern Ireland, where there were 1,237 bankruptcies during the same period.<sup>3</sup>

3.04 The Consultation Paper identified particular features of the 1988 Act as limiting the effectiveness of the Act and so contributing to its failure. These included the excessive costs of bankruptcy proceedings, the highly onerous conditions for discharge and the severe restrictions placed on bankrupts during the period prior to discharge, rules which are antithetical to the internationally

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<sup>1</sup> See *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at 3.159 to 3.177.

<sup>2</sup> *Ibid* at paragraphs 5.06 to 5.15.

<sup>3</sup> See *Interim Report on Personal Debt Management and Debt Enforcement* (LRC 56-2010) at paragraph 2.78. See also paragraphs 3.116 to 3.118 below.

recognised rehabilitative function of modern bankruptcy laws.<sup>4</sup> In addition to these individual unsatisfactory provisions of the 1988 Act, the Commission also identified more comprehensive and endemic problems with the Act however. The Consultation Paper highlighted the outdated and unjustifiable philosophies informing the Act, including the rationales of punishment and deterrence, both of which have little place in modern insolvency laws designed to meet the needs of societies in which business failures and consumer over-indebtedness are recognised as unavoidable consequences of economic and social conditions in which credit is an essential commodity. For these reasons, the Commission took the view that a piecemeal reform of the 1988 Act would be of limited effect while the Act remained based on these outdated prevailing rationales, and so provisionally recommended that the Act should be comprehensively reformed.<sup>5</sup> The Commission wishes to reiterate this provisional recommendation, and takes the view that a comprehensive review of the 1988 Act should be undertaken, with the aim of producing wide-ranging reforms of Irish bankruptcy law. Thus while the Commission does not purport to present proposals for the comprehensive reform of the 1988 Act, in this Chapter it identifies the elements of the Act which are in most need of reform, and the potential amendments which the Commission considers would produce most benefit.

### **(1) Introduction**

3.05 The Commission does not propose to engage in a comprehensive discussion of how the *Bankruptcy Act 1988* should be reformed, but this Part nonetheless seeks to highlight certain key issues which should be examined as part of the process of reforming the Act. The following paragraphs establish certain key principles which should inform a review of the 1988 Act, while subsequent paragraphs discuss certain fundamental issues which the Commission has identified as being essential to the proposed review.

3.06 The principles for reform which the Commission has identified have already been highlighted above, and these are based upon the rationales lying behind, and the purposes fulfilled by, successful systems of personal insolvency law and debt discharge in other legal systems.<sup>6</sup> These rationales/functions of personal insolvency law and debt discharge include:

- Full participation of all members of society in the open credit economy as functional and productive economic actors;
- Efficient allocation of risk throughout society;
- Reduction of dependence on social welfare and the development of harmonious social welfare and personal insolvency policies;
- Humanitarian rehabilitation of over-indebted members of society;
- Consumer protection; and
- Promotion of entrepreneurship through the creation of a legal environment conducive to risk-taking.<sup>7</sup>

3.07 Therefore Irish personal insolvency law must aim to provide a system of debt discharge which is based upon these rationales and which serves to perform each of these social functions to the greatest extent possible. The Commission proposes that these aims can be achieved through a combination of the reform of judicial bankruptcy procedures and the introduction of a non-judicial debt settlement system.

3.08 Of these rationales for debt discharge, the recognition of the ability of bankruptcy law to operate as a tool for the promotion of entrepreneurship has been very influential in leading policymakers

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<sup>4</sup> See e.g. *Productivity and Enterprise: Insolvency – A Second Chance* (Insolvency Service 2001 Cm 5234); *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions* (COM(2007) 584 final).

<sup>5</sup> See *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at 269 to 270.

<sup>6</sup> See paragraph 1.05 above.

<sup>7</sup> (LRC CP 56-2009) at paragraphs 5.06 to 5.15.



to propose bankruptcy reforms. The potential for generous bankruptcy laws to provide a form of implicit wealth insurance or a “safety net” against the risks of business failure has led to the liberalisation of bankruptcy law in many countries as a means of promoting entrepreneurship and the growth of small and medium businesses.<sup>8</sup> Thus in the United Kingdom, the desire to create an environment favourable towards entrepreneurship was a key motivating factor behind the liberalising reforms introduced under the *Enterprise Act 2002*.<sup>9</sup> Similarly, in 2007, the European Commission, as part of its Lisbon Strategy for the promotion of economic growth and employment, published a Communication discussing how a “second chance” policy to business failure could be established in the European Union.<sup>10</sup> This document sought to provide recommendations as to how the stigma associated with business failure could be reduced as part of a policy to create a more supportive environment for businesses at risk and a more favourable societal climate in Europe towards entrepreneurship.<sup>11</sup> This idea of using bankruptcy law as a means of fostering entrepreneurship has been a policy of the European Commission for several years.<sup>12</sup> As noted in the Consultation Paper, an influential empirical study has found that bankruptcy laws have a hugely significant impact on the levels of self-employment in an economy, and are in fact the most important contributor to high levels of self-employment, more so than other factors such as real GDP growth.<sup>13</sup>

3.09 Small and medium-sized enterprises play a very important role in Ireland’s economy and society. A 2006 study found that there were approximately 250,000 small businesses in Ireland, employing 777,000 employees, a figure representing 54% of the total private sector non-agricultural workforce.<sup>14</sup> Very significantly, this study estimated that in 2005 approximately 70% of small businesses (175,000) took the legal form of sole traders. Individuals operating as sole traders do not benefit from limited liability, and so remain personally liable for all of the debts incurred by their businesses.<sup>15</sup> Therefore bankruptcy laws are important to such individuals in ensuring that in the event of business failure they are not burdened with debt indefinitely, which may prevent them from returning to business activity. The above arguments have been recognised in Ireland by the Innovation Taskforce, which supports the Commission’s view that Irish bankruptcy law should be reformed, stating that:

“[i]nnovation and entrepreneurship involve risk, and occasionally result in failure. If a venture is ultimately going to be unsuccessful, it is clearly better if this is recognised as early as possible and the venture closed down. The experience and learning from a failed business venture can often be an important ingredient of future success. If we are to succeed in building an economy with high levels of innovative companies we need to see a shift in societal attitudes which acknowledges this reality.

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<sup>8</sup> See e.g. Fan and White

<sup>9</sup> See *Productivity and Enterprise: Insolvency – A Second Chance* (The Insolvency Service Cm 5234 2001); *Bankruptcy: A Fresh Start* (The Insolvency Service 2000).

<sup>10</sup> *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Overcoming the Stigma of Business Failure – for a Second Chance Policy* (COM(2007) 584 final).

<sup>11</sup> *Ibid* at 3.

<sup>12</sup> See also European Commission *Best Project on Restructuring, Bankruptcy and a Fresh Start – Summary Report* (European Commission DG Enterprise 2003).

<sup>13</sup> See Armour “Bankruptcy Law and Entrepreneurship” *Am Law Econ Rev* 2008 10 (303); Armour and Cumming “Bankruptcy Law and Entrepreneurship” *University of Cambridge Centre for Business Research* (Working Paper No 300, 2005). This study is also relied upon by the European Commission in *Overcoming the Stigma of Business Failure – for a Second Chance Policy op cit.* at 7.

<sup>14</sup> See DKM Economic Consultants Ltd *The Economic Impact of Small Business in Ireland* (2006) at i-iii. It should be noted that in this study, which is now quite dated, 27% of those working in small enterprises were in the construction sector, which at the time had been the most quickly growing sector. This position is likely to have changed after the economic recession and negative growth in the construction sector which has taken place since 2008.

<sup>15</sup> See e.g. Courtney *The Law of Private Companies* (2<sup>nd</sup> ed. LexisNexis Butterworths 2004) at 6.

Importantly, legal arrangements for business failure need to avoid any sense of stigma from a failed business venture, while not facilitating reckless behaviour or inappropriate risk-taking. In particular, the Taskforce believes that Ireland's personal bankruptcy legislation needs to be reformed and the Law Reform Commission is currently completing a consultation process on measures which would modernise Ireland's legislation in this area, as has taken place in the UK and other countries."<sup>16</sup>

3.10 Therefore the promotion of entrepreneurship provides strong support for the liberalisation of Irish bankruptcy laws. The Commission however wishes to emphasise equally the importance of bankruptcy law reform in the context of consumer over-indebtedness. While the Commission believes that its proposed non-judicial debt settlement system should be the most appropriate method of addressing non-business personal insolvencies,<sup>17</sup> non-business debtors should be given the option of availing of judicial bankruptcy procedures also. Therefore the arguments relating to allocation of risk throughout society, social welfare provision, consumer protection and the rehabilitation of over-indebted members of society also support the liberalisation of Irish bankruptcy laws. In addition, from an economic point of view, a functional approach to bankruptcy reform argues that the liberalisation of the law is necessary to restore over-indebted individuals to positions of productive economic actors, whereby individuals may find productive employment and raise their consumption levels, thus contributing to economic growth.<sup>18</sup> An 2009 study by a leading international consultancy firm has for example suggested that high levels of indebtedness among consumers may impede economic recovery as consumption levels remain low.<sup>19</sup>

3.11 Therefore the Commission takes the view that there is a strong case for a comprehensive review of the *Bankruptcy Act 1988*. The Commission has indicated that the nature of such a review would be complex and that a comprehensive re-drafting of the 1988 Act falls outside of the scope of the current project. In the remainder of this chapter the Commission however next attempts to provide guidance for this proposed review, by identifying certain key areas that should be examined, and indicating the issues arising in these areas.

## **(2) Amount of Debt Required to Ground a Creditor's Petition for Bankruptcy**

3.12 Section 11(1) of the *Bankruptcy Act 1988* provides that a creditor shall be entitled to present a petition to adjudicate a debtor bankrupt where, *inter alia*, the liquidated sum owing to the creditor amounts to €1,900 or more.

3.13 The Commission has received submissions to the effect that this amount of €1900 is a very low threshold for the bringing of a creditor's petition of bankruptcy against a debtor. Considering the serious nature of an adjudication of bankruptcy for the debtor, including the costs involved in such proceedings, the sum of €1,900 appears to be too low a sum to justify bankruptcy proceedings.<sup>20</sup> It should be noted that a creditor bringing a petition for bankruptcy must also provide a deposit of €650 to the Official Assignee and give an undertaking to lodge subsequently such sums as the High Court directs to cover the costs and expenses of the Official Assignee.<sup>21</sup> These conditions, in addition to the considerable initial outlay of legal costs required to bring proceedings in the High Court, means that creditors may be

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<sup>16</sup> *Innovation Ireland – Report of the Innovation Taskforce* (The Stationary Office 2010) at 78.

<sup>17</sup> *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 5.73 to 5.90.

<sup>18</sup> *Ibid* at paragraph 5.06, citing Howard "A Theory of Discharge in Consumer Bankruptcy" 48 *Ohio St. LJ* 1047 (1987).

<sup>19</sup> McKinsey Global Institute *Will US Consumer Debt Reduction Cripple the Economy?* (MGI Perspective 2009), available at: [http://www.mckinsey.com/mgi/publications/us\\_consumers/](http://www.mckinsey.com/mgi/publications/us_consumers/).

<sup>20</sup> See also *The Irish Times*, 12 October 2010, in which the High Court (McGovern J) was reported as criticising the bringing of a bankruptcy application in respect of a sum of €17,000.

<sup>21</sup> See Order 76, Rule 29(1) of the *Rules of the Superior Courts 1986-2010*.

dissuaded from bringing bankruptcy proceedings lightly and may assist in preventing the use of bankruptcy proceedings as a mere debt collection device.

3.14 The issue of the appropriate level at which to set the threshold of debt which must be owed before a creditor petition for bankruptcy may be brought was considered by the Australian Law Reform Commission (ALRC) as part of its general insolvency inquiry in the late 1980s.<sup>22</sup> The ALRC noted that if the threshold for creditor petitions is set at too low a level, bankruptcy proceedings may be abused and used as a mere debt collection mechanism for trivial or minor debts. The ALRC also noted, however, that to impose a minimum debt level would be seen by some to be an artificial constraint on the bringing of proceedings, as a debtor who cannot pay a small debt owed by him or her is just as insolvent as a debtor who is unable to pay a debt of a much larger amount. Several submissions were received by the ALRC on this issue, and these were quite divided. Creditors tended to support the view that there should be no minimum debt threshold for bankruptcy proceedings, as an amount would be arbitrary and would serve to favour larger creditors over smaller ones. Creditors also argued that minimum debt levels do not prevent bankruptcy proceedings from being used as a debt collection device. Other submissions took the compromise view that a very low minimum threshold should exist, but that creditors should also be required to contribute a statutory deposit towards the bankruptcy administration costs. Further submissions suggested that a higher minimum threshold should exist, with the aims of preventing the harassment of debtors owing relatively small amounts, and of enabling debtors to consider appropriate alternatives to bankruptcy. The ALRC ultimately concluded that a minimum debt level was necessary and appropriate to deter the use of bankruptcy proceedings as a debt collection mechanism.<sup>23</sup> The ALRC also reasoned that the resources of a superior court should not be invoked for relatively small debts. Therefore the ALRC recommended that a minimum debt level should be introduced, which would be capable of being altered by secondary legislation in order to keep pace with changes in the value of currency. The amount chosen by the ALRC lay between the two extremes of the diverging views expressed in the submissions it received.

3.15 It is interesting to note that in 1972 the Budd Committee Report had recommended a substantial rise in this debt level, from £40 to £1000.<sup>24</sup> This report examined the amounts of the debts of petitioning creditors over the ten years prior to 1972, and found that 40% of the creditors adjudicating at that time were owed over £1000, a sum which would correspond to a considerably higher amount than the €1900 level which is now in place.

3.16 It should be noted in this regard that the level of debt required to be owed before proceedings may be commenced is quite low in several other countries. In England and Wales, this threshold lies at just £750 or approximately €889.<sup>25</sup> In Australia, until August 2010 the relevant threshold was just AUS\$2,000 or approximately €1,377,<sup>26</sup> although this level has now been raised to AUS\$5,000 or approximately €3,443.<sup>27</sup> Under the law of New Zealand, the equivalent threshold is only NZ\$1,000, or approximately €560.<sup>28</sup>

3.17 The Commission accepts the view that the €1900 threshold for bringing a creditor's petition of bankruptcy is relatively low, considering the impact of bankruptcy proceedings on the debtor. Also, as

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<sup>22</sup> See The Law Reform Commission of Australia *General Insolvency Inquiry Volume 1* (Report No. 45, 1988) at 173.

<sup>23</sup> *Ibid* at 174.

<sup>24</sup> *Bankruptcy Law Committee Report on the Law and Practice concerning Bankruptcy and the Administration of Insolvent Estates of Deceased Persons "the Budd Committee Report"* (Prl 2714, 1972) at 54.

<sup>25</sup> All currency conversion rates are as of mid-2010: see section 267(4) of the *Insolvency Act 1986*.

<sup>26</sup> See section 44(1) of the *Bankruptcy Act 1966* (Aus) (Cth.).

<sup>27</sup> See [http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/Bankruptcy->Fact+Sheet+Documents/\\$FILE/Notice+to+Creditors+applying+for+the+issue+of+a+Bankruptcy+Notice+for+a+Debt+of+less+than+5000.pdf](http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/Bankruptcy->Fact+Sheet+Documents/$FILE/Notice+to+Creditors+applying+for+the+issue+of+a+Bankruptcy+Notice+for+a+Debt+of+less+than+5000.pdf) (accessed 21 July 2010).

<sup>28</sup> See section 13(a) of the *Insolvency Act 2006*.

bankruptcy proceedings are currently held exclusively before the High Court, a debt of €1900 appears to be a very minor cause to invoke this jurisdiction, considering that access to the High Court in other proceedings is limited to claims valued at €38091 or more.<sup>29</sup> The Commission takes the view that bankruptcy should be a last resort after other solutions to debt disputes have been explored, and this will be especially the case if the Commission's recommendations for Debt Relief Order<sup>30</sup> and Debt Settlement Arrangement<sup>31</sup> procedures are introduced. While the Commission acknowledges the counter-arguments that such limits may be arbitrary and may favour larger creditors over smaller ones, the Commission believes that these arguments do not outweigh those in favour of raising the threshold for creditor petitions. Creditors who are owed smaller amounts can seek to recover such sums through enforcement mechanisms, or could receive part repayment at much less expense under a Debt Settlement Arrangement if the debtor is insolvent.

3.18 The Commission therefore recommends that the €1,900 threshold for bringing a creditor's bankruptcy petition should be raised significantly, and the Commission recommends that it should be raised to €50,000 (the general monetary level proposed in the *Court and Court Officers Act 2002* for the Circuit Court). In any event, assuming the introduction of the Commission's proposed non-judicial Debt Settlement Arrangement, this should become the first option considered to deal with personal insolvency, with judicial bankruptcy being considered where the non-judicial system is not appropriate.

3.19 *The Commission recommends that the minimum debt level of €1900 required to found a creditor's petition of bankruptcy under section 11(1) of the Bankruptcy Act 1988 should be raised to €50,000.*

### **(3) Removal of Asset Threshold for Debtor Petitions**

3.20 In contrast, the Commission is conscious that while it may be appropriate to impose reasonable limits on ability of creditors to petition for bankruptcy, it is important that debtors' access to bankruptcy proceedings is not unreasonably restricted.

3.21 Section 15 of the *Bankruptcy Act 1988* provides that for a debtor to petition for his or her own bankruptcy, he or she must prove that he or she is unable to meet his or her credit obligations and that he or she possesses assets capable of raising at least €1900. The significance of this provision is that consumer debtors of limited means may be excluded from access to bankruptcy proceedings on the basis that they do not possess sufficient assets.<sup>32</sup> This may be especially problematic in situations of consumer debt, as many consumers' few assets may have been acquired on a lease or hire purchase basis, and so may be incapable of being realised. This requirement may also be problematic in a situation where an individual who was in possession of more substantial assets has been struggling to meet his or her obligations and has previously sold assets in an attempt to repay his or her debts and so avoid bankruptcy.

3.22 It is interesting to note that when that in 1972 the Budd Committee Report recommended that the level of assets required - which then stood at £300 - should be reduced substantially to a sum of £100 because the figure of £300 was regarded as too high, and it was considered that very few people would be in a position to raise £300 at short notice.<sup>33</sup> This view was part of a policy of encouraging debtors in financial difficulties to consider bankruptcy as a means of ensuring that equal justice is done to all of their creditors and that assets are safeguarding so that the proceeds may be distributed among creditors.

3.23 The Commission acknowledges that its proposals to introduce a Debt Relief Order mechanism for "no income, no asset" debtors and a non-judicial debt settlement scheme for all other debtors,

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<sup>29</sup> See section 2 of the *Courts Act 1991* and (LRC CP 56-2009) at paragraph 3.206.

<sup>30</sup> See paragraphs 2.45 to 2.115 below.

<sup>31</sup> See Chapters 1 and 2.

<sup>32</sup> See (LRC CP 56-2009) at paragraph 3.162.

<sup>33</sup> Bankruptcy Law Committee *Report on the Law and Practice concerning Bankruptcy and the Administration of Insolvent Estates of Deceased Persons* "the Budd Committee Report" (Prl 2714, 1972) at

including consumers owing relatively small amounts, should assist in addressing the issue of access to insolvency procedures and debt relief for those debtors whose assets may fall below the €1900 threshold. The Commission nonetheless believes that for those small debtors who nonetheless fall outside the proposed narrow requirements for entry to the Debt Relief Order procedure, and who fail to reach a Debt Settlement Arrangement, access to bankruptcy may nonetheless be required. The Commission further notes that this requirement that the debtor's assets be of a certain value before he or she may petition for bankruptcy does not appear to exist in other legal systems studied.

3.24 The Commission therefore recommends that the requirement in section 15 of the *Bankruptcy Act 1988* that a debtor's available estate must be capable of realising at least €1900 before he or she may petition for his or her bankruptcy should be removed. The Commission recognises however that the value of the debtor's assets available for distribution to creditors is a relevant consideration when assessing whether formal bankruptcy proceedings are appropriate in a given case. The Commission therefore suggests that the realisable value of the debtor's assets should be one of the factors considered by the court when deciding whether it should stay proceedings to allow the parties to attempt to reach a Debt Settlement Arrangement.

3.25 *The Commission recommends that the pre-condition in section 15 of the Bankruptcy Act 1988 that a debtor's available estate must be capable of realising at least €1900 before he or she may petition for his or her bankruptcy should be removed. The Commission suggests that this condition should be replaced with a provision to the effect that the value of the debtor's assets available for distribution to creditors should be considered by the court when assessing whether it may be appropriate to stay proceedings for the purposes of allowing the debtor to attempt to reach a Debt Settlement Arrangement.*

#### **(4) Encouraging Non-Judicial Debt Settlement in Appropriate Cases**

3.26 The Commission's Consultation Paper put forward the principle that non-judicial debt settlement should be preferred over judicial bankruptcy proceedings in appropriate cases for a number of reasons.<sup>34</sup> The Consultation Paper also proposed several alternative options as to how debtors and creditors could be encouraged (or even compelled) to participate in non-judicial processes over judicial bankruptcy proceedings.<sup>35</sup> These options included either requiring parties to participate or at least to consider participating in a non-judicial debt settlement system as a condition to bringing judicial bankruptcy proceedings; creating incentives for participation in a non-judicial system; or creating disincentives for judicial bankruptcy proceedings. The Consultation Paper however also acknowledged that recourse to judicial proceedings would be necessary in order to protect the rights of the parties involved and to deal with cases where non-judicial processes would be inappropriate or ineffective.<sup>36</sup>

3.27 The Commission received several submissions on the question of how non-judicial debt settlement should be promoted over judicial bankruptcy. The majority of submissions suggested that individuals should be required to attempt to resolve matters through a non-judicial debt settlement system before they would be authorised to commence judicial bankruptcy proceedings. Two submissions therefore suggested that an individual seeking to commence bankruptcy proceedings should be obliged to provide evidence that attempts have been made to engage in non-judicial debt settlement. The need to ensure that the non-judicial debt settlement system is fair, efficient and robust if such a requirement was to be introduced was emphasised. The need to respect and protect individuals' right of access to the court was highlighted. One submission suggested that the lower costs of non-judicial proceedings and the consequent higher returns available to creditors when compared to expensive bankruptcy proceedings should be enough to encourage creditors to participate in a non-judicial system where possible. This submission also argued that there was a need for legislation to allow court intervention for creditors who seek redress for actions or transactions that have adversely impacted on creditors' interests however.

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<sup>34</sup> (LRC CP 56-2009) at paragraphs 5.73 to 5.78.

<sup>35</sup> (LRC CP 56-2009) at paragraphs 5.85 to 5.89.

<sup>36</sup> (LRC CP 56-2009) at paragraphs 5.79 to 5.83.

3.28 The Commission acknowledges the general support for the promotion of a non-judicial debt settlement process over judicial bankruptcy proceedings received from submissions. The Commission recognises also that the non-judicial debt settlement system should be structured in such a way as to make it an efficient and cost-effective system, and that this should facilitate participation by both creditors and debtors. An option for the further promotion of non-judicial processes over bankruptcy would be to introduce a Pre-Action Protocol for bankruptcy proceedings, which could oblige both creditors and debtors to consider attempting to reach a Debt Settlement Arrangement or to negotiate a voluntary debt management plan in advance of petitioning for bankruptcy. Such a pre-action protocol could be similar to that proposed in respect of consumer debt claims by the Commission's Interim Report.<sup>37</sup> A further option could be to introduce a provision empowering a judge to stay bankruptcy proceedings to allow the parties to consider how the debt situation in question could be resolved through alternative means. It should be noted in this regard that a similar procedure exists under the law of England and Wales where a debtor petitions for his or her own bankruptcy. In such a case under English law the decision of whether or not to adjudicate the debtor bankrupt is at the court's discretion. One step which the court must undertake before making a decision is to give active consideration to the circumstances of each debtor presenting a petition, in order to establish whether the possibility exists for the debtor to enter into an Individual Voluntary Arrangement with his or her creditors.<sup>38</sup>

3.29 Having considered these options, the Commission proposes that a combination of both a Pre-Action Protocol and a facility for allowing bankruptcy proceedings to be stayed would be an appropriate means of accomplishing the objective of encouraging the use of non-judicial debt settlement procedures in appropriate cases. The Commission therefore recommends that the Pre-Action Protocol in Consumer Debt Claims, as proposed in the Commission's Interim Report, should be extended to apply to creditor petitions for bankruptcy. In conjunction with this proposal, the Commission recommends that where a debtor petitions for bankruptcy, the court should be given discretion to stay proceedings to allow the debtor and his or her creditors to consider whether the case could be resolved by alternative means, and particularly through a Debt Settlement Arrangement.

3.30 *The Commission recommends that the Consumer Debt Claims Pre-Action Protocol proposed in the Interim Report should be extended to creditor petitions for bankruptcy.*

3.31 *The Commission recommends that where a debtor petitions for bankruptcy, the court should be given discretion to stay proceedings where it considers it appropriate that the debtor and his or her creditors should consider whether the case could be resolved by alternative means, and particularly through a Debt Settlement Arrangement.*

**(5) Discharge Provisions: Automatic Discharge after a Shortened Waiting Period**

**(a) The Commission's Consultation Paper and Interim Report and the case for Reform**

3.32 The discharge of a debtor's obligations at the end of the bankruptcy process is a fundamental feature of bankruptcy law. Historically the purpose of bankruptcy was to act as a form of debt collection, by providing a mechanism for obtaining the debtor's assets and distributing them amongst his or her creditors.<sup>39</sup> The granting of a discharge of the debtor's remaining obligations was developed as means of encouraging debtors to cooperate in the discovery and distribution of their assets.

3.33 As economic and social conditions evolved, however, the purpose of bankruptcy developed in other countries to include the promotion of universal economic participation and entrepreneurship; the economically efficient allocation of risks throughout society; the support of social welfare structures; the

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<sup>37</sup> See *Interim Report on Personal Debt Management and Debt Enforcement* (LRC 96-2010) at paragraphs 2.59 to 2.65; Appendix C.

<sup>38</sup> See sections 273 and 274 of the *Insolvency Act 1986* (UK); Fletcher *The Law of Insolvency* (4<sup>th</sup> ed. Sweet and Maxwell 2009) at 167.

<sup>39</sup> See e.g. Ramsay "Models of Consumer Bankruptcy: Implications for Policy and Research" *Journal of Consumer Policy* 20: 269, 1997 at 270.

rehabilitation of over-indebted members of society; and the protection of consumers.<sup>40</sup> The discharge of a debtor’s remaining obligations is fundamental to all of these purposes of modern bankruptcy law, and to the “fresh start” or “earned start” philosophies on which they are founded. The recognition of these principles and the creation of modern bankruptcy laws have had the effect of transforming bankruptcy in many other countries from being a creditor-initiated debt collection exercise to a debtor-initiated debt relief mechanism. For an example from a neighbouring jurisdiction, the number of bankruptcies initiated by debtors in Northern Ireland in the year 1999/2000 was just 11.6%, while by 2007/2008 this figure had risen to 41.8%.<sup>41</sup> The Northern Irish position may not be entirely representative however, as the proportions of debtor-initiated bankruptcies are much higher in certain other jurisdictions. For example, in Australia in 2000-01, almost 95% of bankruptcies were initiated by a debtor’s petition.<sup>42</sup> In the year 2008-2009, this figure stood at 92%.<sup>43</sup> In England and Wales, the percentage of debtor-initiated bankruptcies was 61.8% in 2000, but had risen to 85.4% by 2009.<sup>44</sup> Therefore the discharge of remaining liabilities after a bankruptcy developed from a peripheral element of the process of liquidating a debtor’s assets to the chief motivation behind applications by debtors for bankruptcy relief.

COUNTRY	% OF BANKRUPTCY PETITIONS BROUGHT BY DEBTORS 2001	% OF BANKRUPTCY PETITIONS BROUGHT BY DEBTORS 2009
Ireland	0%	53.33%
England and Wales	66.1%	85.4%
Northern Ireland	11.6% (figure for 1999/2000)	41.8% (figure for 2007/2008)
Australia	95% (2000/2001)	92% (2008/2009)

3.34 In addition to the full or partial discharge of obligations owed, the discharge of a bankruptcy also serves to remove the restrictions placed on the bankrupt during the course of the process.

3.35 Therefore one of the greatest failings of the *Bankruptcy Act 1988* is the hugely onerous and unrealistic conditions it sets for the discharge of the debtor from bankruptcy. Under the first method of obtaining a discharge, the debtor will be free of his or her obligations when the expenses, fees and costs due in bankruptcy have been paid, and either 100% of all debts owed to creditors have been paid, or if the creditors consent to the discharge.<sup>45</sup> The condition that a debtor pays all of his or her debts in full would appear to be impossible in the situation of insolvency which leads to a bankruptcy, and so that condition for discharge will almost never be met. Alternatively, if a bankrupt has reached a composition with creditors under section 41 of the 1988 Act,<sup>46</sup> he or she will be entitled to a discharge. Another route

<sup>40</sup> See *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 5.06 to 5.15.

<sup>41</sup> See *Proposed Debt Relief Scheme for Northern Ireland: Consultation on Policy* (Department of Enterprise, Trade and Investment Northern Ireland Insolvency Service 2009) at 11.

<sup>42</sup> Mason and Duns “Developments in Consumer Bankruptcy in Australia” in Niemi-Kiesilainen (ed), Ramsay (ed) and Whitford (Ed) *Consumer Bankruptcy in Global Perspective* (Hart Publishing 2003) 227 at 232, citing Insolvency and Trustee Service Australia, *Annual Report of the Inspector General in Bankruptcy on the Operation of the Bankruptcy Act 2000-2001* (2001) at ix.

<sup>43</sup> Insolvency and Trustee Service Australia, *Annual Report of the Inspector General in Bankruptcy on the Operation of the Bankruptcy Act 2008-2009* (2009) at 7.

<sup>44</sup> Insolvency Service *Statistics Release: Insolvencies in the Fourth Quarter 2009*, Table 2a.

<sup>45</sup> Section 85(3) of the *Bankruptcy Act 1988*.

<sup>46</sup> See *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at 114.

to discharge if the above conditions have not been met provides that where the court finds that the estate of the bankrupt has been fully realised, a bankrupt will be entitled to a discharge if all the expenses, fees and costs due in the bankruptcy, including preferential payments, have been paid; and either half of the debts owed to his or her creditors have been received, or 12 years have passed.<sup>47</sup> Where the bankrupt seeks to rely on the expiry of 12 years as a ground for discharge, the court will first examine whether all property acquired after bankruptcy has been realised and that it is “reasonable and proper” to grant the application. These conditions for discharge, and particularly the requirements that preferential payments and all fees due in the bankruptcy be paid, mean that it is quite possible that a bankrupt may never become eligible for discharge under Irish law. Anecdotal evidence indicates that some bankruptcies have lasted for up to 25 years or even for the remainder of a debtor’s life. As noted by Laffoy J in *Grace v Ireland and the Attorney General*,<sup>48</sup> the effect of section 84(4) of the 1988 Act:

“may be that, because of the requirement to discharge expenses and preferential payments as a precondition to being discharged from bankruptcy, the [bankrupt] has no prospect of being discharged and will remain a bankrupt for the remainder of [his or her] life unless... [the bankrupt] wins the lottery.”

3.36 Both the Commission’s Consultation Paper and Interim Report highlight as an unreasonably long period the 12 year waiting under section 85(4)(c) of the 1988 Act as being unreasonably long.<sup>49</sup> The Interim Report therefore recommended that this 12 year period should be reduced to a period of six years or less.<sup>50</sup> The Interim Report also noted that such a measure would have little practical impact on the effectiveness of the 1988 Act and the availability of discharge from bankruptcy while the condition of full payment of all preferential payments and costs and expenses of the bankruptcy remained. The Commission therefore believes that these conditions of discharge should be considered as part of the review of the *Bankruptcy Act 1988*.

3.37 Some of the reasons lying behind the restrictive discharge provisions currently existing, and the rationale for reforming these provisions, are now presented.

**(b) Concern for the Protection of the Public and the Business Community**

3.38 The Budd Report discussed the issue of the appropriate conditions applying to the bankruptcy discharge procedure. While the Report concluded that the discharge provisions existing at the time were in need of reform, it expressly rejected the possibility of introducing automatic annulment of bankruptcy after a number of years.<sup>51</sup> The Commission considers that the reasons for the rejection of such an approach may now be called into question due to the changes in economic and social conditions, and the changing role of bankruptcy law, in the years since the publication of that report in 1972. The report’s reasoning included the statement that “as many bankruptcies are brought about by either gross negligence, incompetence, sharp practice or petty fraud on the part of the bankrupt”, the introduction of automatic discharge “would release on the public a number of undesirable people who... could cause grave damage to the business community.” The report provided no empirical evidence to support this

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<sup>47</sup> Section 85(4) of the 1988 Act.

<sup>48</sup> [2007] IEHC 90.

<sup>49</sup> *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 3.166 to 3.168; *Interim Report on Personal Debt Management and Debt Enforcement* (LRC 96-2010) at paragraphs 2.78 to 2.87.

<sup>50</sup> *Interim Report on Personal Debt Management and Debt Enforcement* (LRC 96-2010) at paragraphs 2.80 to 2.81. This recommendation of the Interim Report has been included in section 21 of the *Civil Law (Miscellaneous Provisions) Bill 2010*: see paragraph 3.56 below. The Consultation Paper also provisionally recommended that in the Commission’s proposed non-judicial debt settlement system, a partial debt discharge should be granted after a debtor has completed a repayment plan of 3 to 5 years: See *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 5.171 to 5.177.

<sup>51</sup> *Bankruptcy Law Committee Report on the Law and Practice concerning Bankruptcy and the Administration of Insolvent Estates of Deceased Persons “the Budd Report”* (Prl 2714, 1972) at 170



assertion regarding the causes of bankruptcy. More recent statistical evidence drawn from European Union Member States suggests that the number of bankruptcies involving fraud is as low as 3-6%, and so this assumption may be called into question.<sup>52</sup> Furthermore, while the protection of the public is a valid goal, this could be better achieved through a nuanced approach which seeks to distinguish between culpable and non-culpable debtors, with strict civil and criminal law sanctions, restrictions and disqualifications applying to bankrupts found to have acted improperly.<sup>53</sup> In this manner it can be seen that a shorter discharge period raises few issues regarding the need to protect the public and in particular the business community.

**(c) Moral Hazard and Stigma**

3.39 The second major concern of the Budd Report in rejecting the introduction of an automatic discharge from bankruptcy was the fear of the negative consequences of “removing the odium of bankruptcy”.<sup>54</sup> The report feared that removing “the odium of bankruptcy too easily or too quickly by relaxing the conditions under which bankruptcies may be annulled or bankrupts discharged would not be in the interest of the community particularly those in business.” According to the report, the consequences of such a development would be to encourage a bankrupt to withhold information regarding his or her assets; to reduce the sums recovered by creditors; to mean that the incentive to pay debts would be lost as failure to pay would incur no lasting disability; possibly lead to an increase in the number of bankruptcies as a debtor’s obligations to his creditors would end on the expiration of a fixed period.

3.40 This reasoning of the report may also be called into question due to changes in economic and social conditions. The levels of credit in the Irish economy are unrecognisably larger than those existing at the time of the publication of the report. This has necessitated a change in how legal systems and social attitudes respond to the reality of personal indebtedness in the credit society. As noted elsewhere in this Report, the dominant trend in the reform of personal insolvency law is to remove the stigma attaching to personal financial failure, both as a means of fostering an entrepreneurial environment supportive of risk-taking, and as a means of rehabilitating individual non-business debtors.<sup>55</sup> The Commission’s Consultation Paper noted that the stigma relating to debt difficulties and the fear of being judged or of being subject to negative publicity and shame may prevent debtors in difficulty from seeking assistance and from cooperating in both legal and non-legal processes for the recovery and settlement of debt.<sup>56</sup> Therefore the report’s desire to retain this stigma may not be appropriate to today’s standards. It should also be noted that the stigma associated with financial difficulties appears to be quite difficult to remove. A study undertaken in England and Wales following the liberalising reforms (including the reduction of the discharge waiting period to one year), which were designed to help foster new attitudes to financial failure, showed that bankrupts continue to feel deeply stigmatised and ashamed, and receive negative treatment in their social interactions.<sup>57</sup> Similarly, a 2009 study conducted by the Insolvency

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<sup>52</sup> See paragraph 3.96 below, citing *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Overcoming the Stigma of Business Failure – for a Second Chance Policy* (COM(2007) 584 final) at 4.

<sup>53</sup> This issue is discussed at paragraphs 3.95 to 3.110 below.

<sup>54</sup> “*The Budd Report*” *op cit.* at 170.

<sup>55</sup> See e.g. *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Overcoming the Stigma of Business Failure – for a Second Chance Policy* (COM(2007) 584 final); *The Insolvency Service Productivity and Enterprise: Insolvency – A Second Chance* (Cm 5234 2001).

<sup>56</sup> See *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 3.328 to 3.331; 5.77; 5.148. a 2009 study by the Free Legal Advice Centres found that the fear of being judged was a significant reason why debtors in difficulty delayed in seeking money advice: *Free Legal Advice Centres (FLAC) To No One’s Credit: the Debtor’s Experience of Instalment and Committal Orders in the Irish Legal System* (FLAC 2009) at 46-48.

<sup>57</sup> See *Tribe Bankruptcy Courts Survey 2005 – A Pilot Study: Final Report* (Kingston Business School Occasional Paper No. 59, 2006) at 102-107.

Service (in England and Wales) found that the reforms may have had little impact on reducing the stigma associated with bankruptcy due to the fact that the main causes of stigma are factors unaffected by the reforms, such as the advertisement of a bankruptcy order, the requirement that a debtor attend court, problems in obtaining a bank account, and an adverse credit rating.<sup>58</sup> Therefore the difficulty of removing such a stigma should not be underestimated, and it should be recognised that a liberalisation of bankruptcy laws alone may not lead to a position where debt difficulties are not associated with such moral issues.

3.41 The Budd Report nevertheless raises an important point concerning the risk of moral hazard where a bankruptcy system is seen as too attractive or too lenient to debtors, and a balance must be struck between facilitating the goals of debt discharge while also ensuring that a bankruptcy system is not abused. As a report of Insol, an international association of insolvency practitioners, noted:

“A law offering a discharge should however not be seen as an easy way out. For the law to be respected, the legislators should seek to avoid a dichotomy between the debtor and society. The barriers to obtain a discharge should on the one hand not be so high that the debtor is discouraged from using the procedure. On the other hand, sufficient recognition of the system should be created so that society is willing to forgive and permit a fresh start.”<sup>59</sup>

It should be noted in this regard that other methods can be used to prevent abuse, protect creditors and ensure that bankruptcy does not become too “easy” even where an automatic discharge after a short period of time is provided for in law. Several controls exist under Irish law as it presently stands to prevent abuse of the bankruptcy system. These include the following:

- The court has considerable powers to investigate the affairs of a bankrupt, through court examinations of the bankrupt and other persons<sup>60</sup> backed by a power of committal where those being examined are uncooperative;<sup>61</sup> searches of the bankrupt’s premises<sup>62</sup> and seizure of any property of the bankrupt.<sup>63</sup>
- Fraudulent preferences given to creditors within a period of six months in advance of bankruptcy are deemed to be void as against the Official Assignee.<sup>64</sup>
- Sales of property of the debtor at an undervalue within a period of three months in advance of bankruptcy are void as against the Official Assignee.<sup>65</sup>
- The 1988 Act provides for an extensive range of criminal offences applicable in the case of misconduct on the part of a debtor who has been adjudicated bankrupt.<sup>66</sup> These include offences in situations such as where the debtor has failed to disclose and deliver up to the Official Assignee all of his or her property; where the debtor conceals or fraudulently removes any of his or her property; where the debtor produces false accounts or destroys books of account; where a debtor knowingly resists, hinders or obstructs the Bankruptcy Inspector or any of his or her assistants; or where a bankruptcy obtains credit above a certain amount or carries on a business without revealing his or her identity as a bankrupt.
- The general criminal and civil law provide sanctions against fraudulent and/or dishonest conduct.

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<sup>58</sup> See *Enterprise Act 2002: Attitudes to Bankruptcy 2009 Update* (Insolvency Service 2009) at 5, 16-19.

<sup>59</sup> *Insol Consumer Debt Report* (INSOL International 2001) at 6.

<sup>60</sup> Section 21 of the *Bankruptcy Act 1988*.

<sup>61</sup> Section 24 of the 1988 Act.

<sup>62</sup> Section 28 of the 1988 Act.

<sup>63</sup> Section 27 of the 1988 Act.

<sup>64</sup> Section 57 of the 1988 Act.

<sup>65</sup> Section 58 of the 1988 Act. See also section 59 of the 1988 Act concerning the avoidance of certain settlements.

<sup>66</sup> See sections 123 to 132 of the *Bankruptcy Act 1988*.

3.42 Further possible safeguards to address the moral hazard issue and prevent abusive recourse to bankruptcy can also be seen from examining the systems operating in other countries. These include mechanisms such as control over access to bankruptcy, as well as post-bankruptcy restrictions or income payment orders that are capable of persisting after a debtor has been discharged. For example in England and Wales, the making of a bankruptcy order under a debtor's petition is at the discretion of the court, allowing the court to refuse to make an adjudication of bankruptcy where it finds that the bringing of the petition is an abuse of process.<sup>67</sup> In addition, in England and Wales an automatic discharge after one year is accompanied by certain obligations which may persist after discharge.<sup>68</sup> Thus, a bankrupt may be required to pay a portion of his or her income to the bankruptcy trustee even after discharge.<sup>69</sup> Similarly, as is described in detail below, a debtor may become subject to a Bankruptcy Restriction Order or Bankruptcy Restriction Undertaking after discharge, which lasts for a period of 2 to 15 years.<sup>70</sup> Independently of these mechanisms, a debtor remains under a duty after discharge, under pain of being found in contempt of court, to give to the trustee such information as to his or her affairs and to do all such things as the trustee may reasonably require for the purpose of carrying out his or her statutory function.<sup>71</sup> Finally, after discharge the debtor remains liable to be required to undergo examination as to his or her conduct, dealings or property, a measure designed to allow assets or income which may have been illicitly concealed during the bankruptcy to be recovered.<sup>72</sup> In addition, where a an undischarged bankrupt fails to comply with a statutory obligation, the official receiver or bankruptcy trustee may apply to court for an order that the one-year discharge period be frozen, and the waiting period for discharge extended, until the end of a specified period or until the fulfilment of a specified condition.<sup>73</sup>

3.43 Therefore it can be seen that while there is a need to ensure that bankruptcy is not abused and that attitudes of abusive and irresponsible use of credit do not develop, methods can be enacted to ensure that bankruptcy is not an overly attractive or easy option, while also permitting honest debtors to be automatically discharged from their bankruptcy and from their remaining obligations after the expiry of a reasonable period of time. It should be noted that while the number of bankruptcies in England and Wales increased after the reduction of the waiting period for automatic discharge to one year, the results of the *Bankruptcy Courts Survey 2005* suggest that other factors may be causative of this increase, with survey evidence showing that generally bankrupts were not influenced to petition for bankruptcy by the reduced discharge period.<sup>74</sup> The author of this study concluded from the survey responses received that the majority of bankrupts were simply insolvent and were obliged to have recourse to bankruptcy procedures, irrespective of the terms of such a bankruptcy. Therefore this survey found no evidence of financial calculation among debtors in "choosing" to enter bankruptcy. For the majority of debtors surveyed their over-indebtedness meant that they had no choice but to petition for bankruptcy. Some respondents to the survey however were influenced by the reduced discharge period, although these were in the minority.

3.44 It should be noted also in this regard that the comprehensive empirical research on debtors entering the bankruptcy in the USA conducted by Sullivan, Warren and Westbrook illustrates that all

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<sup>67</sup> Section 264(") of the *Insolvency Act 1986* (UK); Fletcher *The Law of Insolvency* (4<sup>th</sup> ed. Sweet and Maxwell 2009) at 144.

<sup>68</sup> See Fletcher *The Law of Insolvency* (4<sup>th</sup> ed. Sweet and Maxwell 2009) at 369.

<sup>69</sup> Section 310 of the *Insolvency Act 1986*.

<sup>70</sup> See paragraphs 3.99 to 3.100 below.

<sup>71</sup> Section 333(3) of the *Insolvency Act 1986*.

<sup>72</sup> See section 366 of the *Insolvency Act 1986* and Fletcher *The Law of Insolvency* (4<sup>th</sup> ed. Sweet and Maxwell 2009) at 369.

<sup>73</sup> Section 279(3), (4) of the *Insolvency Act 1986*.

<sup>74</sup> Tribe *Bankruptcy Courts Survey 2005 – A Pilot Study: Final Report* (Kingston Business School Occasional Paper No. 59, 2006) at 71-75.

debtors were heavily indebted.<sup>75</sup> The authors suggest that the level of indebtedness observed in debtors suggests that debtors tend not to calculate rationally the benefits of bankruptcy, but rather are pushed into bankruptcy by the severity of their financial situations.

**(d) Time Taken to Administer the Bankruptcy Estate**

3.45 A further concern raised by the possibility of introducing an automatic discharge after a significantly reduced waiting period is that sufficient time must be permitted to allow for the comprehensive administration of the bankruptcy estate. It may take a long period of time, particularly in cases involving large and complex bankruptcy estates, for the Official Assignee to ascertain the full extent of a debtor's assets, and to get in and realise these assets and distribute the proceeds to creditors. In this regard it should be noted that section 85(4) of the *Bankruptcy Act 1988* provides that a debtor may be discharged on the expiry of a waiting period of 12 years (where all fees, costs and preferential debts have been paid) only where *the bankruptcy "estate has, in the opinion of the Court, been fully realised"*.

3.46 The Commission takes the view that this concern can be overcome by providing that the bankruptcy estate remains vested in the Official Assignee after the debtor has been discharged. The Official Assignee could then take the requisite time necessary to get in and realise all of the debtor's assets, without this process delaying the debtor's discharge. The debtor could be placed under a post-discharge duty to cooperate with the Official Assignee in relation to the carrying out of these functions. This would remove the link between the discharge of the debtor and the realisation of his or her assets, and so abolish a further fetter on the discharge of the debtor.

3.47 It should be noted that a similar position exists under the law of England and Wales, whereby the discharge has no effect on the functions of the trustee of the bankruptcy estate so far as they remain to be carried out.<sup>76</sup> Similarly, under English law discharge does not affect the right of any creditor of the bankrupt to prove in the bankruptcy for any debt from which the bankrupt is released. Therefore, further dividends may be distributed after discharge out of property realised or becoming available only after the bankrupt's discharge, and this include any sums payable after discharge under an income payments order.<sup>77</sup>

3.48 A similar position also exists under the law of New Zealand, which places a duty on a discharged bankrupt to assist the Official Assignee in the realisation and distribution of the bankrupt's property that is vested in the Official Assignee.<sup>78</sup> Likewise, under the Australian *Bankruptcy Act 1966*, as amended, a discharged bankrupt must, under pain of imprisonment for six months, give such assistance as the bankruptcy trustee reasonably requires in the realisation and distribution of such of his or her property as is vested in the trustee.<sup>79</sup>

3.49 Therefore it can be seen that comparative legal systems to that of Ireland provide for an automatic discharge without the debtor's estate having been fully realised, and the Commission's proposal in this regard appears to be consistent with international practice. The proposal to remove the requirement that a debtor's estate be fully realised as a pre-condition to discharge has also been supported by consultation exercises conducted by the Commission. The Commission therefore recommends that as part of its ultimate proposal for the introduction of an automatic bankruptcy discharge, the condition that a debtor's estate must be fully realised before a debtor may be discharged should be removed. The debtor's unrealised estate should remain vested in the Official Assignee after discharge, and the debtor should be placed under a duty after discharge to cooperate with the Official

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<sup>75</sup> Sullivan, Warren, and Westbrook, *The Fragile Middle Class: Americans in Debt* (Yale University Press, 2000); Sullivan, Warren, and Westbrook, *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America* (Beard Books, 1999).

<sup>76</sup> Section 281(1) of the *Insolvency Act 1986*.

<sup>77</sup> See Fletcher *The Law of Insolvency* (4<sup>th</sup> ed. 2009) at 366.

<sup>78</sup> See section 307 of the *Insolvency Act 2006* (NZ).

<sup>79</sup> Section 152 of the *Bankruptcy Act 1966*.

Assignee in the realisation and distribution of such of his or her property as is vested in the Official Assignee.

3.50 *The Commission recommends that, as part of the introduction of an automatic bankruptcy discharge, the condition that a debtor's estate must be fully realised before a debtor may be discharged should be abolished. The debtor's unrealised property should remain vested in the Official Assignee after discharge, and the debtor should be placed under a duty after discharge to cooperate with the Official Assignee in the realisation and distribution of such of his or her property as is vested in the Official Assignee.*

**(e) Conclusions**

3.51 Therefore it is the Commission's view that the waiting period for discharge under the *Bankruptcy Act 1988* should be shortened considerably. The Commission also takes the view that the proposed review of the 1988 Act should consider the option of introducing an automatic discharge after the expiry of this shortened period of time. Under the current law, a bankrupt must apply to the court to obtain an order of discharge.<sup>80</sup> This requirement has been abandoned in many legal systems similar to Ireland's, with an automatic discharge by operation of law introduced in England and Wales in 1986,<sup>81</sup> and in Australia in 1968.<sup>82</sup> The rationale behind the introduction of an automatic discharge period was that where discharge was by court order only, many bankrupts did not bring the required court proceedings due to factors such as the ignorance of their rights; the cost of bringing proceedings; fear of judicial proceedings and/or administrative complexities; or simply a lack of motivation.<sup>83</sup> Thus many debtors remained in a state of bankruptcy for decades, even where they were entitled to obtain a discharge. The view emerged among policymakers that non-culpable bankrupts should be entitled to discharge with minimum trouble and expense, and that prolonged and stringent procedures should be reserved for bankrupts found to have acted dishonestly. Therefore the concept of automatic discharge was introduced in order to expedite the discharge process in the case of such simple non-culpable bankruptcies. Similarly, it has been noted that the introduction of automatic discharge in New Zealand was motivated by the simple fact that the cost of bringing a court application for discharge "was beyond the resources of many bankrupts."<sup>84</sup>

3.52 The following table provides a summary illustration of the provisions relating to automatic discharge in a selection of similar legal systems to that of Ireland. It can be quickly seen that Irish law contrasts strongly with the approaches to discharge in these countries.

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<sup>80</sup> See sections 85(3)-(7) of the *Bankruptcy Act 1988* and Order 76 Rules 162-166 *Rules of the Superior Courts 1986 to 2010*.

<sup>81</sup> The original section 279(1) of the *Insolvency Act 1986* provided for an automatic discharge after three years. This section has been amended by section 256 of the *Enterprise Act 2002* to reduce the period to one year.

<sup>82</sup> The *Bankruptcy Act 1966* introduced automatic discharge after a period of five years. Reforms were introduced in 1981 to reduce this period to three years. See The Law Reform Commission of Australia *General Insolvency Inquiry Volume 1* (Report No. 45, 1988) at 226 to 227.

<sup>83</sup> See The Law Reform Commission of Australia *General Insolvency Inquiry Volume 1* (Report No. 45, 1988) at 226

<sup>84</sup> Hanson *Bankruptcy: In the Beginning: A Historical Survey of the Laws of Bankruptcy* (Wellington, New Zealand Institute of Credit and Financial Management, 1980) at 15, cited in Telfer "New Zealand Bankruptcy Law Reform: The New Role of the Official Assignee and the Prospects for a No-Asset Regime" in Niemi-Kiesilainen (ed), Ramsay (ed) and Whitford (Ed) *Consumer Bankruptcy in Global Perspective* (Hart Publishing 2003) 247 at 252.

Country	Legislation	Automatic Discharge	Shorter Discharge Possible	Other information
Ireland	S.85 <i>Bankruptcy Act 1988</i>	No: <b>conditional discharge only.</b>	Discharge available before expiry of 12 years if: All fees, costs, preferential payments and all debts paid in full (s.85(3)(a)) All creditors have consented to discharge (s.85(3)(a)) - Debtor reaches composition with creditors (s.41 and s.85(3)(b)) Bankruptcy can be annulled if: Debtor "shows cause" for annulment (s.16 and s.85(5)(a)) In any other case where the court is of opinion that debtor ought not to have been adjudicated bankrupt (s.85(5)(b)).	Stringent conditions include: - Court application - Realisation of all debtor's assets - Payment of all fees, costs. - Payment of preferential creditors - Expiry of 12 years; or - Payment of 50 cents in the €.
England and Wales	S.279 <i>Insolvency Act 1986</i> (as amended)	Yes: <b>12 months</b> after commencement of bankruptcy.	Yes: on Official Receiver filing notice to court that no investigation of the bankrupt's affairs required (s.279(2) of the 1986 Act)  It should be noted that a consultation process is being undertaken with a view to removing this early discharge mechanism. <sup>4</sup>	- The 12 month period can be stopped from running on official receiver or trustee application where debtor is uncooperative (s.279(3)-(4)). - Bankruptcy Restriction Orders can be imposed for up to 15 years after discharge (s.281A; Sched. 4). - Income payment orders may persist after discharge (s.310). - Discharged bankrupt must cooperate with trustee (s.333(3)) and is subject to examination (s.366).
Canada		Yes (s.168.1(1)): - 1 <sup>st</sup> time bankrupt with no excess income: <b>9 months</b> after date of bankruptcy - 1 <sup>st</sup> time bankrupt with excess income: <b>21 months</b> - 2 <sup>nd</sup> time bankrupt with no excess income: <b>24 months</b> - 2 <sup>nd</sup> time bankrupt with excess income	Yes (s.168.1(2)): Debtor may apply for early discharge  Court may refuse, suspend, or grant discharge (conditionally or unconditionally) (s.172)  Factors to be considered by court in deciding set out in s.173.	- Automatic discharge delayed where Superintendent in Bankruptcy, creditor or trustee opposes discharge (s.168.2). - Automatic discharge not available to a bankrupt who has \$200,000 or more of personal income tax debt which represents 75% or more of bankrupt's total unsecured proven claims (debtor must apply to court for discharge) (s.171.2) - Where bankrupt given conditional discharge, obligation remains after discharge to give information to trustee and to make statement to court of any acquired assets and income, on pain of revocation of discharge (s.176)
Australia	s.149 <i>Bankruptcy Act 1966</i>	Yes: <b>3 years</b> after filing statement of affairs	No early discharge. Debtor can be released from bankruptcy early through annulment only where: Debtor enters a composition with creditors within bankruptcy (s.74) Debtor pays debts in full (s.153A). Court satisfied that a sequestration order ought not to have been made; or where the debtor's own petition ought not to have been presented or accepted by the Official Receiver [s. 153B].	- Bankruptcy is extended if objections to discharge are made by trustee (to either 8 years or 5 years, depending on grounds for objection) (s.149A). - Discharged bankrupt must assist trustee, on pain of imprisonment (s.152). - Outstanding income contributions must be paid after discharge (s.139P-139R).
New Zealand	S290 <i>Insolvency Act 2006</i> (as amended)	Yes: <b>3 years</b> after filing statement of affairs.	Yes: bankrupt may at <b>any time</b> apply to court for order of discharge (s.294), and bankrupt is then subject to examination under oath. Court may then refuse or grant discharge (unconditionally or conditionally) (s.298).	- Automatic discharge unavailable where a creditor or the Official Assignee objects: - Creditors or Official Assignee may require bankrupt be publicly examined before discharge (s.173; s.295). - Court may prohibit the bankrupt from engaging in certain business activities after discharge (s.299). - Discharged bankrupt must assist Official Assignee in realisation and discharge of property (s.307).

3.53 Following the principles outlined above concerning the functions of debt discharge, the Commission suggests that the proposed review of the *Bankruptcy Act 1988* should consider the introduction of an automatic discharge after a shortened period of time, rather than requiring a court application to obtain a discharge. This reflects the Commission's belief that the fresh start policy should be advanced by the removal of obstacles to debt discharge, as discussed above in relation to the issue of the payment of preferential debts operating as a bar to discharge.

3.54 *The Commission recommends that an automatic discharge from bankruptcy should be introduced, which should come into effect to release a debtor from bankruptcy after a much shorter period of time than the 12 year waiting period for conditional discharge existing under the current law.*

#### **(6) Duration of the Discharge Waiting Period**

3.55 The Commission now considers the appropriate duration of the waiting period for automatic discharge from bankruptcy.

3.56 The Commission's Interim Report suggested that, as an interim measure pending more comprehensive reforms, the 12-year period under section 85(4)(c) of the *Bankruptcy Act 1988* should be considerably reduced, to a period of six years or less.<sup>86</sup> The Commission understands that the *Civil Law (Miscellaneous Provisions) Bill 2010* is due to implement this suggestion by reducing the 12-year period to one of 6 years. The Interim Report however indicated that the reduction in this period will have limited practical effect as long as the further onerous conditions that must be satisfied before a discharge may be granted remain (such as the payment of all costs and preferential payments, and the complete realisation of the debtor's estate).

3.57 The Commissions' proposals in this Report are much further reaching, as the Commission recommends that an automatic discharge should be introduced after short waiting period. The Commission acknowledges that a 6 year waiting period for discharge would still be very long by comparative international standards,<sup>87</sup> and that all of the rationales for debt discharge highlighted above suggest that the discharge waiting period should be shorter rather than longer.<sup>88</sup> Furthermore, the Commission has shown that the reasons often advanced for imposing a longer discharge period have been discredited.

3.58 The Commission therefore proposes as a default rule that a bankruptcy should be automatically discharged after the expiry of a period of three years from the adjudication of bankruptcy. The Commission however recommends that the court should be empowered to order the bankrupt debtor to make payments from his or her income to the Official Assignee/Personal Insolvency Trustee for a period of up to five years' duration.<sup>89</sup> When setting the amount of such income contributions, the court should have regard to the protected income guidelines under the Debt Settlement Arrangement procedure, as described in Chapter 1 above.<sup>90</sup>

3.59 The Commission, following the rationale that debtors who have acted dishonestly or irresponsibly should be distinguished from innocent debtors, proposes that the Official Assignee or Personal Insolvency Trustee should be empowered to apply to court for an order extending the waiting period for discharge where the debtor has not cooperated fully in the bankruptcy process or has

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<sup>86</sup> (LRC 96-2010) at paragraphs 2.78 to 2.84.

<sup>87</sup> See in particular the table at paragraph above.

<sup>88</sup> See paragraphs 3.06 and 3.07 above.

<sup>89</sup> Under section 65 of the *Bankruptcy Act 1988*, the court may, on the application of the Official Assignee make an order directing the bankruptcy to pay all or part of his or her income to the Official Assignee. This power however only applies throughout the duration of the bankruptcy proceedings under the present law, and does not extend to the time after the debtor has been discharged.

<sup>90</sup> See paragraphs 1.128 to 1.287 above.

otherwise acted dishonestly or wrongfully. A creditor should also be entitled to object to the debtor's discharge under such conditions, and to request the Official Assignee/Personal Insolvency Trustee to apply to court to have the discharge suspended.

3.60 Furthermore, the Commission notes that in some countries the waiting period for automatic discharge is extended where a bankrupt debtor has previously availed of discharge.<sup>91</sup> The Commission proposes that a slightly different rule should apply in such circumstances in Ireland where a debtor enters the bankruptcy process for a second time. Instead of making discharge after three years unavailable to the debtor, the Commission considers that a presumption of dishonesty or wrongdoing could exist in such cases, but that this presumption should be capable of being rebutted where the debtor proves to the court that he or she has acted honestly and responsibly, or where the Official Assignee/Personal Insolvency Trustee, having examined the debtor's affairs, provides the court with a certificate to that effect.

3.61 *The Commission recommends that bankrupt debtors should be automatically discharged on the expiry of a period of three years from the adjudication of bankruptcy.*

3.62 *The Commission recommends that the court should be given discretion to make an order requiring the bankrupt debtor to make payments from his or her income to the Official Assignee/Personal Insolvency Trustee for the benefit of his or her creditors for a period lasting up to five years.*

3.63 *The Commission recommends that the Official Assignee/Personal Insolvency Trustee should be empowered to apply to the court, on his/her own motion or under the request of a creditor, to object to the debtor's discharge on the grounds of the debtor's lack of cooperation, dishonesty or other wrongful conduct. The Commission recommends that under such circumstances the court should be empowered to suspend the discharge pending a further investigation of the debtor's affairs, or to extend the discharge waiting period for a period of a further two years. The Commission recommends that where a debtor entering the bankruptcy process has previously availed of bankruptcy discharge, a presumption of dishonesty or wrongdoing should exist, but that this presumption should be capable of being rebutted where the debtor proves to the court that he or she has acted honestly and responsibly, or where the Official Assignee/Personal Insolvency Trustee, having examined the debtor's affairs, provides the court with a certificate to that effect.*

## **(7) Discharge Provisions: Preferential Payments**

3.64 The following paragraphs discuss a particularly significant obstacle to discharge from bankruptcy under section 85(4) of the 1988 Act: the requirement that a debtor must pay all preferential debts before a discharge may be granted. The Commission discusses the treatment of preferential or priority debts in Ireland and in other countries, with a view to considering whether this onerous requirement should be removed.

### **(a) Preferential Payments under Irish Law.**

3.65 A fundamental principle of insolvency law is that of *pari passu* distribution, meaning that the assets of the insolvent debtor (whether individual or corporate) are to be shared among creditors in proportion to the size of each creditor's admitted claim.<sup>92</sup> This principle has however traditionally been subject to certain qualifications, with some categories of debts afforded preferential or priority status, and so the debtor's available assets are applied to pay these debts first before any remaining assets are used to pay other debts ranking lower in priority. The Irish bankruptcy regime exhibits many such exceptions to the principle of *pari passu*, as discussed in the following paragraphs.

3.66 Section 81 of the *Bankruptcy Act 1988* provides that certain specified categories of debts owed by the debtor shall be paid in priority to all other debts. In addition to these specified preferential debts, section 19(3) of the *Social Welfare Consolidation Act 2005* establishes certain debts as having a "super-preferential" status, ranking higher even than the preferential payments of section 81. Such debts have

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<sup>91</sup> See e.g. section 168 of the Canadian *Bankruptcy and Insolvency Act 1985*

<sup>92</sup> See e.g. *British Eagle International Airlines Limited v Compagnie Nationale Air France* [1975] 1 WLR 758, where the UK House of Lords held the *pari passu* principle to form a rule of public policy.



been described as being in a situation similar to being subject to a trust created by statute.<sup>93</sup> This provision states that sums equal to the amount owed in respect of such debts do not form part of the debtor's estate for the purpose of bankruptcy proceedings, and so are not available to the general fund for distribution to creditors. Rather these sums must be paid to the Social Insurance Fund in priority to the debts named in section 81. The debts given this "super-preferential" status under section 19(3) include "a sum equal in amount to any sum deducted by an employer from the remuneration of an employee of the employer in respect of an employment contribution due by the employer and unpaid by the employer in respect of the contribution before the date of the order of adjudication or the filing of the petition for arrangement". The employment contributions in question are commonly known as Pay As You Earn (PAYE) (income tax) and Pay-Related Social Insurance (PRSI) contributions. It has been suggested, in the context of equivalent rules relating to the distribution of assets in the winding-up of a private company, that the effect of this provision is to create a form of trust over the deducted sums of money and to deem the Revenue Commissioners to be the beneficiaries of this trust.<sup>94</sup> Case law considering equivalent statutory provisions in relation to the winding-up of private companies suggests that this effect is limited to sums of money actually deducted by an employer in respect of an employment contribution, and does not include sums due which were not deducted.<sup>95</sup> Thus in *Re Coombe Importers Ltd*,<sup>96</sup> Shanley J indicated in relation to the equivalent corporate insolvency legislative provisions that:

"... a condition precedent to the super-preferential status of any sum is that it be a sum *deducted* by the employer in respect of the employment contribution which remains due and owing by the employer... [It does not permit] a construction that super-preferential status can be afforded to sums which *ought* to have been deducted in respect of the employment contribution of an employee, but were not so deducted."<sup>97</sup>

3.67 Section 81 of the *Bankruptcy Act 1988* establishes certain debts as preferential payments which rank below the super-preferential debts described above, but which are to be paid in priority to all other debts. The debts given preferential status under this section include:

- All local rates due and payable within 12 months before the date of adjudication of bankruptcy;<sup>98</sup>
- all property or income tax assessed on the bankrupt up to the end of the tax year before the adjudication of bankruptcy, provided that this amount does not exceed one year's assessment;<sup>99</sup>
- all wages or salary of any clerk or servant in respect of services rendered to the bankrupt during the four months before the date of the order of adjudication not exceeding £2,500;<sup>100</sup>
- all wages not exceeding £2,500 of any labourer or workman in respect of services rendered to the bankrupt during the four months before the date of the adjudication of bankruptcy;<sup>101</sup>

<sup>93</sup> See e.g. Courtney *The Law of Private Companies* (2<sup>nd</sup> ed. LexisNexis Butterworths 2002) at 1572, describing provisions in relation to similar debts in the context of a winding up under the *Companies Acts 1963-2005*.

<sup>94</sup> *Ibid.*

<sup>95</sup> Alternatively, section 19(5) of the 2005 Act provides that the employment contributions payable by a bankrupt or arranging debtor during the 12 months before the date of the adjudication of bankruptcy or the filing of the petition of arrangement are to be included among the debts which are to be paid in priority to all other debts under section 81 of the 1988 Act.

<sup>96</sup> [1999] 1 IR 492.

<sup>97</sup> [1999] 1 IR 492, 500.

<sup>98</sup> Section 81(1)(a) of the 1988 Act.

<sup>99</sup> Section 81(1)(a) of the 1988 Act.

<sup>100</sup> Section 81(1)(b) of the 1988 Act.

<sup>101</sup> This priority status is afforded to such amounts provided that, where any farm labourer has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year or other shorter term of hiring, the priority under this section shall extend to the whole of such sum, or a part thereof, as the Court may

- all accrued holiday remuneration becoming payable to any clerk, servant, workman or labourer on the termination of his employment before or by the effect of the adjudication order;<sup>102</sup>
- all sums due to any employee pursuant to any sick leave scheme or arrangement;<sup>103</sup>
- any payments due by the bankrupt pursuant to any scheme or arrangement for the provision of superannuation benefits to or in respect of employees of the bankrupt;<sup>104</sup>
- any debt, payment or contribution which by virtue of any provision in any enactment in operation before the commencement of this Act was included in the debts to which section 4 of the Preferential Payments in Bankruptcy (Ireland) Act, 1889, gave priority; and any reference to the said section 4 in any such enactment shall be construed as a reference to this subsection.<sup>105</sup>

3.68 Section 81(2) of the 1988 Act provides that all of the above debts shall rank equally between themselves and must be paid in full unless the property of the bankrupt is insufficient to meet them, in which case they shall abate in equal proportions between themselves. Section 81(3) provides that the debts shall be discharged so far as the property of the bankrupt is sufficient to meet them. These statutory provisions apply in the case of a debtor entering into a Scheme of Arrangement in the same manner as in a case of bankruptcy,<sup>106</sup> with the proviso that any creditor in an arrangement or composition who votes for or against the acceptance of the debtor's proposal for arrangement or composition shall be deemed to have abandoned any rights to preferential payment under section 81(1) of the 1988 Act.<sup>107</sup> Section 81(9) provides that the rules of priority are to apply in the distribution of the estate of a person who has died insolvent in the same manner as a distribution of assets in a bankruptcy. Section 119 of the 1988 Act provides that in the administration of a deceased's estate, the proper funeral and testamentary expenses incurred are to be payable in full in priority to all other payments.

3.69 In addition to the provisions of section 81 of the 1988 Act, other statutory provisions add certain other debts to the list of preferential payments under section 81. Section 19(5) of the *Social Welfare Consolidation Act 2005* states that all employment contributions payable by a bankrupt or arranging debtor during the 12 months before the date of the order of adjudication or filing of petition of arrangement are to be included among the debts which are to be paid in priority to all other debts under section 81 of the 1988 Act. In a similar manner, section 994 of the *Taxes Consolidation Act 1997* provides that all sums which an employer was liable under Chapter 4 of Part 42 of the Act to deduct from emoluments to which that Chapter applies paid by the employer during the period of 12 months before the adjudication of bankruptcy or arrangement petition, reduced by any amounts which the employer was liable under that Chapter to repay during the same period, and subject to the addition of interest payable under section 991, shall be included as preferential payments under section 81 of the *Bankruptcy Act 1988*.

3.70 Section 5(11) and 5(12) of the *National Training Fund Act 2000* add all levies payable under the National Training Fund to the list of preferential debts under section 81 of the 1988 Act.<sup>108</sup> Section 36(2) of the *Maternity Protection Act 1994* similarly provides that all compensation payable under Part V of the Act by a bankrupt or arranging debtor to an employee shall be included among the preferential

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decide to be due under the contract proportionate to the time of service up to the date of the order of adjudication: section 81(1)(c) of the 1988 Act.

<sup>102</sup> Section 81(1)(d) of the 1988 Act.

<sup>103</sup> Section 81(1)(e) of the 1988 Act.

<sup>104</sup> Section 81(1)(f) of the 1988 Act.

<sup>105</sup> Section 81(1)(g) of the 1988 Act.

<sup>106</sup> Section 81(7) of the 1988 Act. Schemes of arrangements are discussed at (LRC CP 56-2009) at paragraphs 3.156 to 3.158.

<sup>107</sup> Section 81(8) of the 1988 Act.

<sup>108</sup> Section 2 of the 2000 Act establishes a National Training Fund, and section 3 provides that a levy shall be payable into this fund by every employer in respect of all employees.

debts of section 81 of the 1988 Act. Similar provisions exist in respect of compensation payable under the *Adoptive Leave Act 1995*<sup>109</sup>; arrears of pay payable under the *National Minimum Wage Act 2000*;<sup>110</sup> levies payable under the *National Training Fund Act 2000*;<sup>111</sup> and compensation payable under the *Carer's Leave Act 2001*.

3.71 From the above it can be seen that a very wide range of debts are classified as preferential payments, to be paid from the debtor's assets in priority to other payments. Provisions establishing such priority debts are contained not only in the *Bankruptcy Act 1988*, but in a wide range of legislation. The consequence of the establishment of these preferential debts is that the claims of other creditors of a debtor who do not benefit from this preferential status are subordinate to these priority debts, and so will only be repaid if sufficient assets of the debtor remain after the payment of the preferential debts. This has the effect of creating an unequal allocation of assets among creditors which is an exception to the fundamental principle of *pari passu*. The second major consequence of this situation is that, due to the conditions of section 85 of the 1988 Act described above, a wide range of debts must be paid by the debtor in full before he or she may be discharged from bankruptcy. Under Irish law, unlike the laws of most comparable legal systems, a debtor may not be discharged from bankruptcy until all preferential payments have been made. Thus while other countries may still retain classes of priority debts within their insolvency laws, the failure of a debtor's estate to satisfy these debts will not prevent a debtor from obtaining a discharge. This creates a considerable obstacle to discharge under Irish law, particularly in the case of business debtors who may owe large amounts of money in tax and employee contribution liabilities.

**(b) A Comparative Overview of the Treatment of Priority Debts**

3.72 A trend of reducing the number of debts given priority status can be observed in several countries sharing similar legal traditions to Ireland. The "Cork Report", which laid the foundations for the continual modernisation of English insolvency law in recent decades, stated the principle behind this trend as follows:

"Since the existence of any preferential debt militates against the principle of *pari passu* distribution and operates to the detriment of ordinary unsecured creditors, we have adopted the approach that no debt should be accorded priority unless this can be justified by reference to principles of fairness and equity which would be likely to command general public acceptance."<sup>112</sup>

The Australian Law Reform Commission expressed a similar view, stating that:

"It is the view of the Commission that, to the maximum extent possible, the principle of equality should be maintained by insolvency law subject to these qualifications:

- It should not intrude unnecessarily upon the law as it otherwise affects property rights and securities and
- It should encourage the effective administration of insolvent estates.

Any departure from this approach should only be countenanced by reference to clearly defined principles or policies which enjoy general community support.<sup>113</sup>

3.73 Based on reasoning of this kind, many countries have reduced considerably the number of categories of debts given priority status under their insolvency legislation, with tax and other debts owed to the State in particular losing their priority status. It should be noted that the priority status of such debts in these countries did not have the consequence that the debtor could not be discharged from bankruptcy

<sup>109</sup> Section 38(2) of the *Adoptive Leave Act 1995*.

<sup>110</sup> Section 49 of the *National Minimum Wage Act 2000*.

<sup>111</sup> Section 5(11) of the *National Training Fund Act 2000*.

<sup>112</sup> *Insolvency Law and Practice Report on the Review Committee (the "Cork Report")* (Cmnd 8558, 1982, HMSO) at paragraph 1398.

<sup>113</sup> Australian Law Reform Commission *General Insolvency Inquiry* (Report 45, 1988) at paragraph 33.

on failing to repay these debts in full, but instead merely requires these debts to be repaid in priority to other claims, where the debtor's assets and/or income are sufficient to satisfy the priority debts. As is shown below, some legal systems, such as the United States Bankruptcy Code, however provide a compromise situation in providing that certain debts are not capable of being discharged, while granting the debtor a discharge from bankruptcy and hence from his or her other remaining obligations on the completion of the bankruptcy process. The following paragraphs examine rules relating to priority debts in a selection of countries and the changes these rules have undergone in recent times.

**(i) England and Wales**

3.74 Following reforms to English insolvency law introduced by the *Enterprise Act 2002*, the remaining categories of preferential debts consist of claims for sums owed by the debtor in respect of contributions to occupational pension schemes and the state pension scheme, as well as claims for arrears for salary or wages owed to the bankrupt's present or former employees.<sup>114</sup> Previous reforms had been introduced in 1986 to abolish the Crown's privileged position as a preferential creditor for unpaid taxes assessed directly to the UK Inland Revenue, and to abolish the preferential status formerly accorded to local rates.<sup>115</sup> The rationale behind these initial reforms was that a disproportionate loss tantamount to injustice is inflicted on the general body of ordinary creditors in an insolvency as a direct consequence of the Crown's preferential status.<sup>116</sup> In addition, the Crown has been criticised as providing a "false credit" to a debtor by failing to claim and collect taxes when they fall due, or to take prompt steps to enforce payment of arrears. Since a person's tax liability must be treated confidentially, other lenders may become ordinary, unsecured creditors of a debtor who ostensibly appears to be solvent but may in fact already be irredeemable insolvent due to the extent of his or her tax liabilities.

3.75 Subsequent reforms in 2002 abolished the Crown preference entirely. Prior to these 2002 reforms, preferential status was given to a wide range of obligations in the nature of taxes, levies and employee contributions.<sup>117</sup> The 2002 reforms formed part of a policy of reforming insolvency law to provide more effective support to business enterprise and to reduce the stigma of failure associated with both individual and corporate insolvency.<sup>118</sup> Thus a Government White Paper proposed that all Crown preferences in all insolvencies (corporate and personal) should be abolished on the basis that this would lead to a more equitable treatment of all creditors and would better reflect international best practice.<sup>119</sup> Section 251 of the *Enterprise Act 2002* implemented these recommendations by abolishing Crown preference entirely from English insolvency law. Commentators have welcomed this provision as bringing about a closer conformity between the substance of the enacted law and the principle of equality among creditors which it aims to promote.<sup>120</sup> The preferential status of employees of the debtor in relation to claims for limited amounts of wages and holiday pay remains in existence, in addition to the rights of those subrogated to these claims.<sup>121</sup> Under the *Employment Rights Act 1996*, the UK Government must pay an employee out of the National Insurance Fund the amount to which it decides that employee is entitled in respect of a number of defined types of claims of the employer against the debtor.<sup>122</sup> When such a payment is made, the rights and remedies of the employee as against the employer debtor become vested in the Government, who may then be paid as a preferential creditor under the *Insolvency Act 1986*. Therefore it has been noted that the fact of this right of subrogation has the net effect that in

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<sup>114</sup> See Fletcher *The Law of Insolvency* (4<sup>th</sup> ed. 2009) at 343; Schedule 6 to the *Insolvency Act 1986*.

<sup>115</sup> Fletcher *The Law of Insolvency* (4<sup>th</sup> ed. 2009) at 346.

<sup>116</sup> *Ibid* at 347, citing the report of the "Blagden Committee" (Cmnd 221 1957) at paragraphs 88 to 93, 97.

<sup>117</sup> See Morgan "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" 74 *American Bankruptcy Law Journal* 462 (2000) at 476 to 477.

<sup>118</sup> Fletcher *The Law of Insolvency* (4<sup>th</sup> ed. 2009) at 347.

<sup>119</sup> *Productivity and Enterprise: Insolvency – A Second Chance* (The Insolvency Service Cm 5234 2001) at 12.

<sup>120</sup> Fletcher *op cit.* at 348.

<sup>121</sup> See Schedule 6 of the *Insolvency Act 1986*, paragraphs 9 to 15.

<sup>122</sup> See section 182 of the *Employment Rights Act 1996* and Fletcher *op cit.*

most instances the Crown will continue to have a preferential advantage, save where funds have been advanced from a source in the private sector to enable the employer to meet wages and salary liabilities shortly before the date on which the insolvency proceedings became effective.<sup>123</sup>

3.76 Nonetheless, the above discussion illustrates the reduction in the number of categories of preferential debts under English insolvency law, and in particular the substantial erosion of the preferential status of revenue claims of the State.

**(ii) Australia**

3.77 Australian law has exhibited a similar trend to that of English law over a series of decades as it reduced the number of categories of priority creditors under its insolvency legislation, and abolished the preferential status of tax debts.<sup>124</sup> This process began in 1978, when the Australian Senate Standing Committee on Constitutional and Legal Affairs recommended the total abolition of the priority status of Crown debts.<sup>125</sup> This recommendation was partly implemented by the *Crown Debts (Priority) Act 1981*, which removed the priority status of personal tax debts, although retaining priorities for tax debts relating to employers and other persons required to collect tax on behalf of the State. In 1988, the Australian Law Reform Commission recommended that the preferential status of these remaining debts should also be removed, and that similar priorities for state, territory and local government taxes should be abolished.<sup>126</sup> This recommendation was implemented in 1993 by the *Insolvency (Tax Priorities) Legislation Amendment Act 1993* under which the Commissioner for Taxation's preferential status over other creditors for unremitted tax payable after June 30, 1993 was abolished.<sup>127</sup> Certain measures exist to compensate the Commissioner for this loss of priority, including the potential for company directors to be held personally liable for unremitted tax; the introduction of the power of the Commissioner to initiate winding-up proceedings for an uncertain amount; and the statutory power for land tax and local rates to be converted into a charge or lien on specific property.<sup>128</sup>

3.78 The Australian Law Reform Commission (ALRC) proposed that only two broad categories of preferential debts should be retained: administration costs and employee benefits. It recommended that priority status should be retained for the costs incurred in administering an insolvency, and proposed a hierarchy of sub-categories of costs.<sup>129</sup> The preferential status of administration costs is now established by section 109(1) of the *Bankruptcy Act 1966* as amended. In relation to employee benefits, the ALRC considered that employee interests would be best protected by the creation of a wage-earner protection fund, but accepted that there was strong support for the retention of the priority status of employee benefits as it then existed.<sup>130</sup> The ALRC however made no recommendation on this matter, considering it a matter of policy more appropriate for determination by the Government as part of the design of the social welfare system. The existing priorities regarding employee benefits were retained under Australian law, as now contained in section 109(1) of the *Bankruptcy Act 1966* as amended.

3.79 As in the majority of legal systems surveyed by the Commission, in Australia the payment of preferential debts is not linked to the discharge of the debtor from bankruptcy. Section 149 of the *Bankruptcy Act 1966* as amended provides that a debtor is automatically discharged from bankruptcy at the end of the period of three years from the date on which the bankrupt filed his or her statement of affairs. Thus discharge from bankruptcy is automatic under Australian law, and is not contingent on conditions such as the payment of preferential debts. The duration of the bankruptcy may however be

<sup>123</sup> Fletcher *The Law of Insolvency* (4<sup>th</sup> ed. 2009) at 348.

<sup>124</sup> See Morgan "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" 74 *American Bankruptcy Law Journal* 462 (2000) at 479-480.

<sup>125</sup> *Priority of Crown Debts* (Report of the Senate Standing Committee on Constitutional and Legal Affairs 1978).

<sup>126</sup> Australian Law Reform Commission *General Insolvency Inquiry* (Report 45, 1988).

<sup>127</sup> See Morgan *op cit.* at 480.

<sup>128</sup> See Morgan *op cit.* at 480.

<sup>129</sup> Australian Law Reform Commission *General Insolvency Inquiry* (Report 45, 1988) at 292-294.

<sup>130</sup> *Ibid* at 296.

extended in certain cases where the trustee of a bankruptcy files an objection to the discharge of the debtor.<sup>131</sup> The effect of discharge is to release the debtor from all debts (including secured debts) provable in the bankruptcy, with certain exceptions such as family maintenance debts or debts incurred by means of fraud.<sup>132</sup>

**(iii) United States of America**

3.80 The United States Bankruptcy Code<sup>133</sup> contains a wider range of priority debts. The debts ranking highest include family maintenance claims; administrative costs of proceedings; certain employee earnings and benefits claims; certain claims of grain producers and fishermen; and consumer deposits.<sup>134</sup>

3.81 The category of priority debt ranked next is that of tax debts.<sup>135</sup> The US Bankruptcy Code provides for a doubly preferential treatment of tax claims, with such claims both given priority status and also made incapable of being discharged in bankruptcy. The tax debts given priority status in both individual and corporate insolvencies include arrears of periods of various durations in the categories of income/gross receipts tax; property tax; taxes required to be collected or withheld; employment tax on wages; salaries and commissions; excise tax; customs duties; penalties for the foregoing taxes.<sup>136</sup>

3.82 The second form of protection given to tax claims under the US Bankruptcy Code is through the exemption from discharge given to tax debts.<sup>137</sup> Claims for priority taxes and taxes for which no tax return was filed, for which a late return was filed, or for which a fraudulent return was filed, are not capable of being discharged through bankruptcy. The rationale behind this rule is to prevent bankruptcy processes from being abused as a form of tax avoidance. The tax priority and discharge provisions are designed to be complementary, with the priority status of tax debts maximising the chance that the taxes will be paid through the liquidation proceedings, so increasing the chances that the debtor's discharge will not be hampered by the persistence of non-dischargeable debts.

3.83 Certain other non-dischargeable debts are also provided for in the US legislation. Thus a debt which arose through the debtor obtaining money, property, service or credit by false pretences or fraud will not be capable of being discharged.<sup>138</sup> Similarly, consumer debts owed to a single creditor aggregating more than \$500 for luxury goods and service incurred by a debtor within 90 days before the bankruptcy order will be presumed to be incapable of being discharged.<sup>139</sup> Cash advances aggregating more than \$750 under an open end consumer credit plan obtained by a debtor within 70 days before the bankruptcy order are subject to the same status.<sup>140</sup> Family maintenance debts; debts arising from a wilful and malicious injury by the debtor to another; fines, penalties or forfeitures payable to the government, other than tax penalties; and student loans are also examples of some of the other categories of debts which are similarly incapable of being discharged.<sup>141</sup>

3.84 Therefore it can be seen that US bankruptcy law retains a wide range of priority debts, and also provides that certain of these priority debts are incapable of being discharged through bankruptcy.

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<sup>131</sup> Sections 149A-149Q of the *Bankruptcy Act 1966* (Aus) (Cth).

<sup>132</sup> Sections 153(1)-153(2) of the *Bankruptcy Act 1966* (Aus) (Cth).

<sup>133</sup> United States Code, Title 11 – Bankruptcy (11 USC).

<sup>134</sup> 11 USC §507(a)(1)-(7).

<sup>135</sup> 11 USC §507(a)(8).

<sup>136</sup> 11 USC §507(a)(8)(A)-(G). See also Morgan “Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy” 74 *American Bankruptcy Law Journal* 462 (2000) at 489-490.

<sup>137</sup> 11 USC §523(a)(1).

<sup>138</sup> 11 USC §523(a)(2)(A)-(B).

<sup>139</sup> 11 USC §523(a)(2)(C)(I).

<sup>140</sup> 11 USC §523(a)(2)(C)(II).

<sup>141</sup> 11 USC §523(a)(5)-(8).

**(c) Conclusions**

3.85 The above discussion illustrates that the position of preferential debts under the *Bankruptcy Act 1988* does not reflect international best practice. The above discussion demonstrates a trend towards a reduction in the number of categories of priority debts in insolvency laws. In addition to the countries discussed above, this trend may also be observed in other countries such as New Zealand, Canada, France and Germany.<sup>142</sup> Irish law is an outlier in respect of its treatment of preferential debts on two levels. First, the making of a debtor's discharge conditional on the full repayment of all preferential debts is a feature of Irish law which is not replicated in any of the countries examined. Secondly, the wide range of preferential debts and in particular the extensive priority position given to tax debts under Irish law appears outdated given the developments in comparable legal systems in recent times.

3.86 The linking of the payment of preferential debts to discharge appears to be an anomaly which arose in the time between the publication of the "Budd Report"<sup>143</sup> on which the *Bankruptcy Act 1988* was largely based, and the passage of the 1988 Act. The Budd Report recommended that a bankrupt should be entitled to a discharge on the payment of 50p in the £ to each of his or her creditors, but that where the debtor has insufficient means to make such a payment, a method should be open to him by which he or she can be relieved of his or her debts, particularly where no fault can be attributed to the debtor for the bankruptcy.<sup>144</sup> The Report therefore recommended that a bankrupt should be entitled to apply for a discharge after 12 years which would be granted at the discretion of the court provided that the bankrupt had not engaged in misconduct.<sup>145</sup> The Report made no mention of any requirement that a debtor first repay all preferential debts before a discharge may be granted. In fact, the Budd Report recommended that all preferential debts should be abolished.<sup>146</sup> This recommendation regarding the abolition of preferential payments was rejected by the Oireachtas, with the most commonly cited reason for this consisting of the fact that "a system of preferential payments, very often more extensive than ours, is an established characteristic of bankruptcy law in most jurisdictions".<sup>147</sup> As the above analysis has shown that this is no longer the position in other legal systems, the main rationale for the departure from the recommendations of the Budd Report is no longer valid. The implications of this point for the priority system under the *Bankruptcy Act 1988* are discussed below, but for present purposes it again highlights the anomalous position of Irish law in linking discharge to the repayment in full of all preferential debts.

3.87 As noted above, the availability of a debt discharge is a fundamental aspect of personal insolvency law, and encourages debtor participation in the orderly resolution of a situation of insolvency. Debt discharge also is the mechanism through which the law may serve the important public functions of promoting entrepreneurship; facilitating maximum participation in economic activity; allocating risk efficiently throughout the economy and society; complementing national social welfare policies; rehabilitating members of society suffering from debt difficulties; and protecting consumers.<sup>148</sup> The existence of an obligation to pay all fees, costs and expenses, as well as preferential payments, as a pre-condition to discharge places an undue fetter on the availability of discharge, to the extent that Irish bankruptcy law is unable to serve the functions provided by bankruptcy laws in other countries, and also fails on its own terms due to the lack of use made of the bankruptcy procedure in cases of personal

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<sup>142</sup> See Morgan "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" 74 *American Bankruptcy Law Journal* 462 (2000) at 481-495; New Zealand Law Commission *Priority of Debts in the Distribution of Insolvent Estates* (Study Paper 2, 1999).

<sup>143</sup> *Bankruptcy Law Committee Report on the Law and Practice concerning Bankruptcy and the Administration of Insolvent Estates of Deceased Persons "the Budd Report"* (Prl 2714).

<sup>144</sup> *Ibid* at 171.

<sup>145</sup> *The Budd Report op cit.* at 172.

<sup>146</sup> *The Budd Report op cit.* at 354.

<sup>147</sup> *Dáil Éireann Debates Volume 339 - 08 February, 1983 Bankruptcy Bill, 1982: Second Stage*, per Deputy Noonan.

<sup>148</sup> See *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at 254-258.

insolvency. The Commission therefore recommends that the review of the *Bankruptcy Act 1988* should consider seriously the abolition of the conditions for discharge that all the expenses, fees and costs due in the bankruptcy, including preferential payments, have been paid under section 85(4) of the 1988 Act. The review should consider closely the possibility of amending the 1988 Act to provide that an automatic discharge should be available on the expiration of a suitable period of time.

3.88 *The Commission recommends that, as part of the introduction of an automatic discharge from bankruptcy, the condition for discharge under section 85(4) of the 1988 Act that all the expenses, fees, costs and preferential payments must be paid before a debtor may be discharged, should be abolished.*

3.89 This is not to say, however, that all preferential payments should be abolished, as recommended in the Budd Report.<sup>149</sup> The Commission considers that the issue of preferential payments is one of policy which should be decided by the Oireachtas, but comments that even if a system of preferential or priority debts is maintained, there is no reason why the payment of such debts should be a pre-condition to discharge from bankruptcy. As has been noted above, in the other countries surveyed where priority debts exist, they are to be paid from the proceeds of the debtor's estate before all other debts, but where the debtor's estate is insufficient to meet such priority obligations the availability of a discharge is not affected. Another alternative approach is that described as prevailing under US bankruptcy law, where tax debts remain incapable of being discharged, and where a debtor has completed the bankruptcy process he or she is relieved from all other obligations except such debts.<sup>150</sup> Therefore it can be seen that there are many other methods by which priority or preferential status can be retained for certain types of debts without making the payment of such debts a condition for obtaining a discharge.

3.90 While not engaging in the wider debate as to the merit of retaining a system of priority or preferential debts in bankruptcy at all, the Commission wishes to provide some guidance in this regard. First, as noted above,<sup>151</sup> the principles of collectivity and equality among creditors are the foundations of modern insolvency law. As Professor Fletcher notes,

“In modern societies the desire to create a system of insolvent administration which offers some degree of fairness for all parties, and which operates in sympathy with the practical needs of the credit-based economy, has been conducive to the development of an insolvency regime embodying the concept of collectivity. At the heart of this collective approach stands a proposition to the effect that, in the final process of administering and distributing the debtor's property among his unpaid creditors, a uniform method shall be applied to calculate the degree of abatement which will be experienced by all claims of creditors who are ranked in common together – the so-called *pari passu* principle of distribution of an insolvent estate.”<sup>152</sup>

3.91 Therefore as priority debts conflict with the fundamental principle of *pari passu* distribution, strong arguments must exist in their favour to justify their continued priority status. Secondly, the strong international trend in the reduction of the number of types of preferential debts has been described above. As the fact that the reasoning given by legislators for the rejection of the Budd Report's recommendation that priority debts be abolished was to the effect that systems of priority debts exist in most other countries,<sup>153</sup> the fact that other countries have demonstrated an international trend towards the abolition or reduction in number of priority debts removes another important limb from the argument in favour of retaining such priority debts under Irish bankruptcy law.

3.92 Finally, the trend against priority debts has focussed most intently on the abolition or limitation of Crown Preference, that is, the prioritisation of tax debts in insolvency. The factors traditionally cited as

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<sup>149</sup> *Bankruptcy Law Committee Report on the Law and Practice concerning Bankruptcy and the Administration of Insolvent Estates of Deceased Persons “the Budd Report”* (Prl 2714) at 354.

<sup>150</sup> See paragraph 3.82 above.

<sup>151</sup> See paragraph 3.65 above.

<sup>152</sup> Fletcher *The Law of Insolvency* (4<sup>th</sup> ed. 2009) at 3.

<sup>153</sup> See paragraph 3.86 above.



justifying a priority status for tax debts have been called into question in various countries in recent decades. First, the origin of the priority of tax claims dates from feudal times and the concept of the Royal Prerogative<sup>154</sup> which was held to be inconsistent with the Constitution of Ireland in the Supreme Court decisions of *Byrne v Ireland*<sup>155</sup> and *Webb v Ireland*.<sup>156</sup> The position of the individual vis-à-vis the State is unrecognisably changed since the time when the Crown Preference was first created. Secondly, an argument has traditionally been made that tax claims are for the benefit of the entire community, unlike the claims of private creditors.<sup>157</sup> This argument however ignores certain important factors such as the fact that part of the loss suffered by tax authorities' lack of priority may be recovered through increased payment of tax by the other creditors receiving a share of the debtor's estate.<sup>158</sup> Also, if the effect of such priority is to prolong the debtor's bankruptcy or to cause small business creditors to enter financial difficulty, the State often must compensate for losses through its social welfare system. Furthermore, any limited benefit to the community gained from the priority may be grossly disproportionate to the loss caused to ordinary creditors of the insolvent debtor, particularly if these creditors are small businesses.<sup>159</sup> It has also been argued that the tax authorities are involuntary creditors, in that they are unable to choose their debtors or obtain security for debts owed.<sup>160</sup> This argument can be refuted on several levels however. Tax authorities tend to allow a certain degree of latitude to tax debtors when it comes to the recovery of sums due, and in practice tax authorities cannot expect a 100% collection rate and thus exercise a certain amount of business discretion in collection practices which is not dissimilar to the lending decisions made by commercial creditors.<sup>161</sup> Similarly, this practice of tax authorities of allowing tax liability to accrue can prejudice other creditors of a debtor, who may advance further credit to an already heavily leveraged debtor due to their lack of knowledge about the (confidential) tax circumstances of the debtor.<sup>162</sup> Furthermore, tax authorities are usually provided with debt collection and enforcement methods which are not available to general creditors,<sup>163</sup> which in Ireland include the ability of the Revenue Commissioners to collect a debt through the Revenue Sheriffs without first obtaining a court judgment;<sup>164</sup> and the power of the Commissioners to attach a debt owed to a taxpayer without obtaining a garnishee order from a court.<sup>165</sup> Tax authorities are in this manner given advantages over other creditors when it comes to collecting debts, and should not be required to rely on a priority position to recover amounts owed. In addition, the early collection of tax debts through these mechanisms is to be encouraged, so that delayed collection of such debts does not provide a debtor with an unofficial state subsidy, and does not allow a debtor to enter into financial difficulties which may prejudice the position of other creditors without their knowledge.<sup>166</sup> Based on these arguments, the traditionally privileged position of tax claims in insolvency has been curtailed greatly in many jurisdictions, as described above.

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<sup>154</sup> Morgan "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" 74 *American Bankruptcy Law Journal* 462 (2000) at 463.

<sup>155</sup> [1972] IR 241.

<sup>156</sup> [1988] IR 353.

<sup>157</sup> Morgan *op cit.*

<sup>158</sup> *Ibid* at 466.

<sup>159</sup> Australian Law Reform Commission *General Insolvency Inquiry* (Report 45, 1988) at 301.

<sup>160</sup> Morgan *op cit.* at 464.

<sup>161</sup> *Bankruptcy Law Committee Report on the Law and Practice concerning Bankruptcy and the Administration of Insolvent Estates of Deceased Persons "the Budd Report"* (Prl 2714 1972) at 348-349.

<sup>162</sup> Australian Law Reform Commission *General Insolvency Inquiry* (Report 45, 1988) at 300-301.

<sup>163</sup> See Morgan "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" 74 *American Bankruptcy Law Journal* 462 (2000) at 467.

<sup>164</sup> See section 962 of the *Taxes Consolidation Act 1997*.

<sup>165</sup> See section 1002(2)(e) of the *Taxes Consolidation Act 1997*.

<sup>166</sup> Morgan *op cit.* at 468.

3.93 The above analysis illustrates that if the fairness and appropriateness of the mere existence of priority status for certain debts in insolvency has fallen into doubt, the even more radical position under Irish law which requires full payment of preferential debts before discharge may be obtained must be questioned. The Commission has therefore concluded that, in line with virtually all modern bankruptcy regimes in other European states, the number of priority debts under the bankruptcy system should be considerably reduced. The Commission does not propose to enumerate the reduced list of preferential debts, but has concluded that, in line with the developments in most other states reviewed in this Report, Revenue debts should no longer be given preferential status. The Commission accepts that this will ultimately be a policy matter to be addressed by the Oireachtas when the essential elements of the Commission's proposals are being implemented.

3.94 *The Commission recommends that (while ultimately this a policy matter for the Oireachtas) the number of priority debts under the bankruptcy system should be significantly reduced, and that Revenue debts should no longer be given preferential status.*

#### **(8) Bankruptcy Restrictions**

3.95 A particular problem of the Irish bankruptcy regime is the extent to which it is punitive in nature and has the effect of stigmatising and almost criminalising financial difficulties.<sup>167</sup> Several incapacities and restrictions are placed on bankrupts under Irish law, which amount to particularly intrusive limitations on the rights of bankrupts, particularly due to the long duration for which the bankrupt remains subject to such restrictions. Most significantly from a practical point of view, among the restrictive provisions is the rule that a bankrupt is prohibited from acting as a company director for the duration of the bankruptcy, on pain of criminal sanction.<sup>168</sup> While this does not prevent a bankrupt from acting in a business capacity otherwise than in an incorporated company, he or she may not trade under his or her own name without informing the party with whom he or she trades of the status of a bankrupt,<sup>169</sup> and may not obtain credit of a value of €650 or more without informing the lender that he or she is a bankrupt.<sup>170</sup> As noted in the Commission's Consultation Paper, these and the several other restrictions placed on bankrupts exhibit the law's policy of viewing debtors as untrustworthy, dishonest and/or incapable. When the empirical evidence of the causes of over-indebtedness and personal insolvency are considered however, this view of debtors is exposed as being unrealistic.<sup>171</sup> It is of particular note that these sanctions and restrictions apply to all debtors adjudicated bankrupt, and not just those who have been found to have engaged in misconduct of some kind.

3.96 As noted above, a 2007 European Commission Communication called for the adoption of a Europe-wide "second chance" policy in order to reduce the stigma associated with business failure and to create a European environment supportive towards risk and entrepreneurship.<sup>172</sup> According to this philosophy, only fraudulent and criminal behaviour leading to non-payment of debt should be punished. The document states that the reality of bankruptcy and business failure as a normal part of economic life is not recognised generally in Europe, with public opinion continuing to make a strong link between business failure and incompetency or fraud.<sup>173</sup> This is despite Europe-wide evidence suggesting that only

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<sup>167</sup> See *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 3.163 to 3.171.

<sup>168</sup> See section 183 of the *Companies' Act 1963*.

<sup>169</sup> Section 129(b) of the *Bankruptcy Act 1988*.

<sup>170</sup> Section 129(a) of the *Bankruptcy Act 1988*.

<sup>171</sup> See e.g. *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 1.30 to 1.60; *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions* (COM(2007) 584 final) at 4.

<sup>172</sup> *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Overcoming the Stigma of Business Failure – for a Second Chance Policy* (COM(2007) 584 final).

<sup>173</sup> *Overcoming the Stigma of Business Failure – for a Second Chance Policy op cit.* at 4.

4-6% of bankruptcies are based on fraudulent conduct.<sup>174</sup> Thus the stigma present in the business environment, legal framework and social and cultural behaviour is unjustified and creates unnecessary obstacles for entrepreneurs seeking to restart after a failure.

3.97 The Communication criticised strongly current personal insolvency laws of EU Member States, calling for a radical shift in the rationale of these laws in the EU.<sup>175</sup> A primary criticism was that many bankruptcy laws treat all debtors in the same manner irrespective of whether the debtor has acted irresponsibly or dishonestly; or whether the insolvency arose through no fault of the debtor. The automaticity of an approach which imposes restrictions, prohibitions and disqualifications on all bankrupts solely on the basis of the existence of bankruptcy proceedings was identified as a particular source of criticism, as it implies a belief that all bankrupts are people in whom society cannot have trust or confidence. This view fails to recognise the reality of risk in the business environment. Therefore the Communication highlights as examples of best practice reforms in countries such as Greece and England and Wales which have aimed to differentiate between fraudulent and non-fraudulent bankrupts.<sup>176</sup> In Greece, reforms provided that non-fraudulent bankrupts are no longer subject to the restrictions that had been applicable to all bankrupts, such as the loss of the rights to vote and to stand for election. The approach taken to this issue in English reforms is now discussed.

3.98 Reforms were introduced in England and Wales in 2002 based on a policy of moving “away from the ‘one-size-fits-all’ approach that characterises the current regime in order to reduce the impact of financial failure on individuals and encourage a second chance.”<sup>177</sup> In explaining the proposals for reform, the Insolvency Service indicated that consultation responses had shown strong support from both the business community and the public for the proposal to make a distinction between bankrupts on the basis of their culpability, provided that the reasons for a bankrupt’s failure were rigorously examined.<sup>178</sup> Therefore as the first prong of the reforms, the *Enterprise Act 2002* reduced significantly, from three years to 12 months, the duration of the period which a bankrupt must wait before obtaining an automatic discharge, as noted above.<sup>179</sup> This waiting period may be shorter in a case where it is quickly apparent to the Official Receiver that the bankruptcy has arisen in circumstances where the debtor is not culpable.<sup>180</sup> The period can however also be extended by order of the court in circumstances such as where further time is required to investigate the debtor’s affairs. Here the Official Receiver may file a notice with a court stating that investigation of the affairs of the bankrupt is unnecessary or has already been concluded. When this notice is filed, the bankrupt is then discharged. It should be noted, however, that this mechanism for a shorter discharge has been the subject of a review and consultation process by the Insolvency Service, and as a result may be abolished in due course.<sup>181</sup> The effect of these reforms is to ensure that a bankrupt is subject to restrictions only for the length of time it takes to investigate his or her affairs and to examine whether he or she has acted culpably.

3.99 The second stage of the reforms to the restrictions system in England and Wales involved the introduction of new “Bankruptcy Restriction Order” (BRO) and “Bankruptcy Restriction Undertaking” (BRU) mechanisms, which were designed to provide protection for the public and the business

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<sup>174</sup> *Ibid.* In England and Wales during the five years to 2001 there were a total of over 100,000 bankruptcies while criminal prosecutions or the issuing of warning letters took place in only about 3% of these cases: The Insolvency Service *Productivity and Enterprise: Insolvency – A Second Chance* (Cm 5234 2001) at 5.

<sup>175</sup> *Overcoming the Stigma of Business Failure – for a Second Chance Policy* (COM(2007) 584 final) at 7.

<sup>176</sup> *Ibid.*

<sup>177</sup> The Insolvency Service *Productivity and Enterprise: Insolvency – A Second Chance* (Cm 5234 2001) at 1.

<sup>178</sup> *Ibid.*

<sup>179</sup> Section 256 of the *Enterprise Act 2002*, substituting section 279(1) of the *Insolvency Act 1986*. See Fletcher *The Law of Insolvency* (4<sup>th</sup> ed. Sweet and Maxwell 2009) at 361ff.

<sup>180</sup> Section 279(2) of the 1986 Act.

<sup>181</sup> See *Consultation: Reforming Debt Petition Bankruptcy and Early Discharge from Bankruptcy* (Insolvency Service 2009).

community against financially irresponsible or dishonest individuals.<sup>182</sup> Under these mechanisms, a discharged bankrupt may remain subject to restrictions for up to 15 years after his or her discharge.<sup>183</sup> The distinction between the two devices is that a BRO is imposed by a court order, while a BRU is based on an undertaking offered by a bankrupt to the Secretary of State, who must formally accept the undertaking for it to be given the status of a BRU. These mechanisms are modelled on the example of the procedures for the disqualification of company directors in corporate insolvencies. An application for a BRO may only be made by the Secretary of State, or the Official Receiver acting on a direction of the Secretary, a position reflecting the public interest at stake in such applications.<sup>184</sup> The court then must assess whether it is appropriate to make a BRO, and if it finds it to be appropriate, it must make such an order, with no judicial discretion existing in this regard. Judicial discretion however remains as to the appropriate duration of the BRO, but the period must be between two and 15 years.<sup>185</sup> When considering whether it is appropriate to make a BRO, the court must take into account whether the bankrupt has engaged in any of a long list of prescribed kinds of behaviour.<sup>186</sup>

3.100 As an alternative to the Secretary of State making an application for a BRO, under a BRU the bankrupt may instead enter into an undertaking with the Secretary on agreed terms, whereby the bankrupt accepts that for an agreed period he or she shall be subject to restrictions identical to those which would be imposed under a BRO made by the court.<sup>187</sup> In determining whether to accept a BRU, the Secretary of State is required to have regard to the matters specified above in respect of BROs. Any legislative provision in an enactment referring to a person who is subject to a BRO must be interpreted as including a reference to a person in respect of whom a BRU has effect, measure designed to ensure that a BRU cannot be used as a means of evading restrictions applicable to those subject to BROs.<sup>188</sup> The BRU mechanism was introduced due to the several advantages it holds over BROs. First, it may spare the bankrupt the expense and publicity of a court hearing.<sup>189</sup> Secondly, it may save resources of the State by avoiding the cost of running a contested court hearing.

3.101 The final method by which the system of bankruptcy restrictions in England and Wales was reformed was through the reduction in the number of restrictions applicable to bankrupts prior to discharge.<sup>190</sup> For example, automatic disqualification from membership of either House of the UK Parliament was removed in 2004, to be replaced by a rule prohibiting a person who is subject to a BRO from being a member of the House of Commons or from sitting in the House of Lords.<sup>191</sup> Therefore it can be seen from these reforms that the system of restrictions placed on bankrupts in England and Wales has been liberalised significantly in recent years, and efforts have been made to establish a system which distinguishes between bankrupts based on their culpability, rather than automatically punishing all bankrupts.

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<sup>182</sup> The Insolvency Service *Productivity and Enterprise: Insolvency – A Second Chance* (Cm 5234 2001) at 1. BROs and BRUs were introduced by section 257, Schedule 20 of the *Enterprise Act 2002*, inserting section 281A and Schedule 4A into the *Insolvency Act 1986*.

<sup>183</sup> See Fletcher *The Law of Insolvency* (4<sup>th</sup> ed. Sweet and Maxwell 2009) at 372ff.

<sup>184</sup> *Ibid* at 373.

<sup>185</sup> Paragraph 4(2) of Schedule 4A of the 1986 Act.

<sup>186</sup> Paragraph 2(2) of Schedule 4A of the 1986 Act.

<sup>187</sup> See Fletcher *The Law of Insolvency* (4<sup>th</sup> ed. Sweet and Maxwell 2009) at 375; Paragraph 7 of Schedule 4A to the *Insolvency Act 1986*.

<sup>188</sup> See Paragraph 8 of Schedule 4A to the *Insolvency Act 1986*; Fletcher *op cit.* at 376.

<sup>189</sup> Fletcher *op cit* at 376.

<sup>190</sup> The Insolvency Service *Productivity and Enterprise: Insolvency – A Second Chance* (Cm 5234 2001) at 4-5; 13.

<sup>191</sup> Section 426A of the *Insolvency Act 1986*. See also section 266(2) of the *Enterprise Act 2002*, which amended section 427(1) of the 1986 Act as originally enacted.

3.102 The European Commission Communication cited above, having identified examples of best practices and poor practices in Member State personal insolvency law, proposed the following lessons or recommendations of relevance to the present discussion.<sup>192</sup>

- “It is vital to create the right framework which, while protecting all parties’ interests appropriately, recognises the possibility for an entrepreneur to fail and start again. Bankruptcy law should include a clear distinction between the legal treatment for fraudulent and non-fraudulent bankrupts.
- Entrepreneurs who go bankrupt through no fault of their own should be entitled to receive a formal court decision declaring them non-fraudulent and excusable. The decision should be publicly accessible.
- An early discharge from remaining debts subject to certain criteria should be provided for in insolvency law.
- Legal restrictions, disqualifications or prohibitions should be reduced.”

3.103 These, or similar, ideas have been promoted at EU level for a number of years, with a 2003 document produced by the European Commission stating that:

“[t]o a certain extent, legal systems can be a real deterrent to a fresh start... The possibility of continuing or starting a new business is affected by both the general consequences of bankruptcy and [by] the disqualifications and restrictions imposed on those subject to bankruptcy proceedings. At present there is no distinction made between bankrupts who fail through no fault of their own and those who are culpable and little regard is given, in terms of their treatment, to the facts of an individual case. By treating each individual in a proportionate and appropriate manner, non-fraudulent debtors would not be stigmatised through association with fraudulent ones.”<sup>193</sup>

3.104 While the Commission foresees that reformed formal bankruptcy proceedings would be most appropriate for business debtors than the average consumer debtor, such proceedings should also be a realistic and accessible option for consumer debtors. Therefore while the restrictions and disqualifications applicable in bankruptcy perhaps have greater impact on business debtors than consumers, the case for the reduction of such restrictions applies also to consumer bankruptcies. As noted above, personal insolvency laws serve consumer protection functions and respond to the reality that over-indebtedness is an inevitable consequence of today’s credit society. Similarly, they can serve to rehabilitate over-indebted individuals and restore them to positions where they contribute to economic and social life, while also reducing reliance of such individuals on state assistance in the form of social welfare. All of these rehabilitative aims of personal insolvency law and the fresh start policy in the context of consumer over-indebtedness further point towards the need to reduce the restrictions and punishments of bankruptcy. Also, the reduction of the stigma associated with debt difficulties plays an important role in encouraging debtors to engage with their creditors and with the legal processes at an early stage.<sup>194</sup> The need to remove connotations of dishonesty or irresponsibility from personal insolvency procedures is therefore important in the case of consumer over-indebtedness as in the case of business failure.

3.105 In light of these considerations, a strong case exists for the reform of the systems of restrictions and disqualifications placed on bankrupts under Irish bankruptcy law. In the following paragraphs, the Commission seeks to provide some guidance to assist the consideration of how the system of restrictions and disqualifications could be reformed.

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<sup>192</sup> *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Overcoming the Stigma of Business Failure – for a Second Chance Policy* (COM(2007) 584 final) at 8.

<sup>193</sup> European Commission *Best Project on Restructuring, Bankruptcy and a Fresh Start – Summary Report* (European Commission DG Enterprise 2003) at 3.

<sup>194</sup> See e.g. *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 5.146 to 5.150.

3.106 The primary principle should be that Irish bankruptcy law should no longer adopt its punitive approach whereby all bankrupts are treated as presumptively dishonest and untrustworthy, and are subject to severe sanctions for a long period of time. The attitude of Irish law to personal debt contrasts strongly with the approach to corporate debt. One example of this contrast can be seen in the process for the enactment of the provisions of the *Companies Act 1990* relating to the restriction and disqualification of directors of insolvent companies.<sup>195</sup> These powers to restrict or disqualify such directors were introduced to protect the public and the business community from fraudulent conduct and in particular from the “phoenix syndrome”, whereby the culpable or fraudulent directors of an insolvent company immediately establish a new company carrying on the same business after their first company has been liquidated.<sup>196</sup> The original proposals for the introduction of these mechanisms had sought to provide for the automatic restriction of all directors of insolvent companies from becoming a director of another company for an unlimited period, unless the company fulfilled certain specified conditions.<sup>197</sup> According to the Working Group on Company Law and Enforcement, however:

“The outrage over those engaged in the practice of the *phoenix syndrome* was, ultimately, tempered by the realistic recognition that it is unjust to penalise “honest” business failure.”<sup>198</sup>

As a result of this approach, the regimes for the restriction and disqualification of directors apply only to culpable directors. Under section 150(2)(a) of the 1990 Act, one of the matters which the court can take into consideration in deciding whether or not to impose the otherwise mandatory restriction order is whether the director “acted honestly and responsibly in relation to the conduct of the affairs of the company”.<sup>199</sup> Similarly, a disqualification order may only be made under section 160 of the 1990 Act against a director where either the director has been convicted on indictment of any indictable offence relating to a company or involving fraud or dishonesty;<sup>200</sup> or where the following grounds exist:<sup>201</sup>

- (a) a person has been guilty, while a promoter, officer, auditor, receiver, liquidator or examiner of a company, of any fraud in relation to the company, its members or creditors; or
- (b) a person has been guilty, while a promoter, officer, auditor, receiver, liquidator or examiner of a company, of any breach of his duty as such promoter, officer, auditor, receiver, liquidator or examiner; or
- (c) a declaration has been granted under section 297A of the Principal Act (inserted by section 138 of this Act) in respect of a person; or
- (d) the conduct of any person as promoter, officer, auditor, receiver, liquidator or examiner of a company, makes him unfit to be concerned in the management of a company; or
- (e) in consequence of a report of inspectors appointed by the court or the Minister under the Companies Acts, the conduct of any person makes him unfit to be concerned in the management of a company; or
- (f) a person has been persistently in default in relation to the relevant requirements;
- (g) a person has been guilty of 2 or more offences under section 202(10) of the 1990 Act relating to failures to keep proper books of account; or
- (h) a person was a director of a company at the time of the sending, after the commencement of section 42 of the Company Law Enforcement Act, 2001, of a letter under subsection (1) of

<sup>195</sup> See sections 150 and 160 of the *Companies Act 1990*.

<sup>196</sup> See e.g. *Report of the Working Group on Company Law and Enforcement* (The Stationary Office 1998, Pn. 6697) at 71; Courtney *The Law of Private Companies* (2<sup>nd</sup> ed. 2002) at 667ff.

<sup>197</sup> These proposals were contained in the *Companies (No. 2) Bill 1987*.

<sup>198</sup> *Report of the Working Group on Company Law and Enforcement op cit.* at 72.

<sup>199</sup> See Courtney *op cit.* at 682ff.

<sup>200</sup> In such a case the director is question is “deemed” to be disqualified: see section 160(1) of the 1990 Act.

<sup>201</sup> See section 160(2) of the 1990 Act, as amended by section 42 of the *Company Law Enforcement Act 2001*.

section 12 of the Companies (Amendment) Act, 1982 , to the company and the name of which, following the taking of the other steps under that section consequent on the sending of that letter, was struck off the register under subsection (3) of that section; or

- (i) a person is disqualified under the law of another state (whether pursuant to an order of a judge or a tribunal or otherwise) from being appointed or acting as a director or secretary of a body corporate or an undertaking and the court is satisfied that, if the conduct of the person or the circumstances otherwise affecting him that gave rise to the said order being made against him had occurred or arisen in the State, it would have been proper to make a disqualification order otherwise under this subsection against him;”,

Therefore it can be seen that the procedures for the restriction and disqualification of directors of insolvent companies apply only where a director has been proven to have acted dishonestly or irresponsibly, which contrasts with the approach under the *Bankruptcy Act 1988* where all insolvent debtors are punished and made subject to restrictions.

3.107 While the introduction of an automatic discharge after a waiting period of much shorter duration than the current 12 year period<sup>202</sup> would be a large step towards the restrictions placed on bankrupts under Irish law, further reforms may also be necessary. If concerns arise as to the need to ensure the protection of the public and the business community from dishonest or irresponsible debtors, an approach similar to that adopted in England and Wales could provide a solution, whereby the system for the disqualification of directors in cases of corporate insolvency was effectively reproduced in personal insolvencies. Therefore the possible replication of the procedures for the restriction and disqualification of directors in the Irish bankruptcy system should be considered, in conjunction with the introduction of automatic discharge after a shorter waiting period, as a means of reducing the restrictions placed on honest unfortunate bankrupts under Irish law, so furthering the positive social and economic benefits of the fresh start policy. Such a system whereby dishonest and/or irresponsible bankrupts could be subject to restrictions and disqualifications after they have obtained an automatic discharge could then strike a balance between providing honest bankrupts with a fresh start, while protecting the public and the business community from dishonest or irresponsible bankrupts. This differential treatment for culpable and non-culpable debtors may also help to reduce the stigma associated with personal financial failure, and so further foster a fresh start culture and an environment supportive of entrepreneurship.

3.108 Counter-arguments also exist to the introduction of a system of bankruptcy restriction orders, however. It has been suggested to the Commission that it may be unfair and inappropriate to fetter the “fresh start” afforded to discharged bankrupts to impose further restrictions on them once the bankruptcy has come to an end. The view has been expressed that such debtors have “served their time”, and so do not deserve further restriction. Furthermore, it has been suggested that the protection of the public and the business community may be obtained in other ways, such as through enforcement of existing criminal law, company law and other civil law prohibitions on dishonest or irresponsible conduct. It has been argued that for these reasons there is no further need for a system of post-bankruptcy restrictions and disqualifications to be introduced.

3.109 In conclusion, the Commission therefore suggests that strong consideration should be given to methods by which the number and severity of the restrictions placed on bankrupts under Irish law should be reduced. The Commission further suggests that the possibility of introducing a system analogous to the procedures for the restriction and disqualification of culpable directors of insolvent companies should be considered as a means of sanctioning (for a significant period after discharge) debtors who have been found to have acted dishonestly and/or irresponsibly, while not subjecting honest and responsible debtors to such sanctions.

3.110 *The Commission recommends that, as a counterpoint to the introduction of an automatic discharge after a period of three years, procedures comparable to the restriction and disqualification of culpable directors of insolvent companies should be introduced into the bankruptcy regime as a means of sanctioning bankrupts who have been found to have acted dishonestly and/or irresponsibly, while not subjecting honest and responsible debtors to such sanctions.*

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<sup>202</sup> Under section 85(4)(c) of the *Bankruptcy Act 1988*.

### **(9) Costs of Bankruptcy Proceedings**

3.111 A primary criticism of Irish bankruptcy law made in the Commission's *Consultation Paper* is that proceedings under the 1988 Act are prohibitively expensive.<sup>203</sup> The Consultation Paper notes that all proceedings under the 1988 Act involve several court appearances and complicated procedural steps such as a requirement for creditors to obtain the permission of the High Court to serve a bankruptcy summons on a debtor. It is noted that a petitioning creditor must bear its own costs for a significant period of the proceedings, and must also provide an indemnity to cover the fees and expenses of the Official Assignee. Similarly, the costs of the procedures are an obstacle for the use of bankruptcy by over-indebted debtors also. The cost of commencing High Court proceedings and of paying for legal representation put bankruptcy beyond the reach of most debtors, as do the requirements to provide a deposit of €650 and to hold assets of €1900. Overall, the Consultation Paper describes bankruptcy proceedings as being excessively expensive and complicated, factors contributing to the extremely infrequent use made of the procedures under the 1988 Act.

3.112 The Commission's primary view on this matter, as expressed in its Consultation Paper, is that most situations of personal over-indebtedness and insolvency should be resolved outside of bankruptcy proceedings, through voluntary debt management plans or through the proposed non-judicial debt settlement system.<sup>204</sup> The Commission believes that such mechanisms for resolving debt disputes would be less expensive than court proceedings. Therefore, following the recommendation of the Council of Europe,<sup>205</sup> considers the principle of open access to insolvency procedures for those in need of debt relief to be fundamental to its proposed system, and the cost of proceedings should therefore not be an excluding factor.<sup>206</sup> In particular, the Commission's recommendations in relation to a proposed low-cost debt settlement stream for debtors demonstrating no income and/or assets beyond the minimum necessary for a reasonable standard of living should solve problems of access to debt relief for the debtors of lowest income levels.<sup>207</sup> In so far as non-judicial means of resolving cases of over-indebtedness are preferable over judicial bankruptcy proceedings, it may even be desirable that the costs of accessing bankruptcy are always higher than those incurred under the non-judicial procedures.

3.113 The Commission nonetheless recommends that the proposed review of the *Bankruptcy Act 1988* should establish as a priority the need to reduce the costs involved in bankruptcy proceedings and to make such proceedings as efficient and inexpensive as possible.

3.114 The Commission concludes that, consistently with the recommendations made by the Commission in its *Report on the Consolidation and Reform of the Courts Acts*<sup>208</sup> general principles of efficiency would apply in the context of the costs and fees structure applicable to bankruptcy proceedings, and this subject lies more appropriately within the competence and expertise of the Courts Service. The Commission however wishes to reiterate the view expressed above that it may be desirable for the non-judicial debt settlement system to operate in a comparatively inexpensive and cost-effective manner in order to encourage participation in the non-judicial system.

### **(10) Structural and Institutional Issues**

3.115 Another issue which the Commission wishes to highlight for consideration is that of the actors involved in administering and supervising bankruptcies in Ireland.

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<sup>203</sup> *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 3.161 to 3.162.

<sup>204</sup> (LRC CP 56-2009) at paragraph 5.76.

<sup>205</sup> *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* (Council of Europe CM/Rec(2007)8 at paragraph 4(a) and Explanatory Memorandum paragraph 31.

<sup>206</sup> See *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraph 5.120; 5.134-5.135.

<sup>207</sup> See paragraphs 2.44 to 2.115 below.

<sup>208</sup> LRC 97-2010, paragraphs 2.35-2.40.



**(a) Foreseeable Increases in Bankruptcy Filing Rates**

3.116 If the bankruptcy system is reformed and liberalised to the extent that the artificial obstacles to access are removed, the number of people availing of bankruptcy is likely to rise substantially. This can be illustrated by the following table, which indicates the number of bankruptcies and statutory insolvencies in a selection of countries with similar legal systems to that of Ireland.

Country	Household Debt/Disposable Income % 2005-2008 <sup>209</sup>	Population 2008	Number of Bankruptcies 2008	Total Number of Formal Statutory Personal Insolvencies	Total as % of Population
England and Wales	173 (UK figure)	54,455,000 <sup>210</sup>	67,428 <sup>211</sup>	106,544 <sup>212</sup>	0.196
Northern Ireland	173 (UK figure)	1,775,000 <sup>213</sup>	1,079 <sup>214</sup>	1,638 <sup>215</sup>	0.092

<sup>209</sup> See *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraph 1.16, citing *The Debt of the Nation: How we Fell in and Out of Love with Debt* (Amárach Research 2009) at 5, available at: [www.amarach.com](http://www.amarach.com).

<sup>210</sup> Office for National Statistics *Population Estimates Mid 2009 Statistical Bulletin* (Office for National Statistics 2009) at 4, available at: <http://www.statistics.gov.uk/pdfdir/pop0610.pdf>

<sup>211</sup> Insolvency Service *Statistics Release: Insolvencies in the Fourth Quarter 2008* (Insolvency Service 2009), available at: <http://www.insolvency.gov.uk/otherinformation/statistics/200902/index.htm>

<sup>212</sup> *Ibid.*

<sup>213</sup> Office for National Statistics *Population Estimates Mid 2009 Statistical Bulletin* (Office for National Statistics 2009) at 4, available at: <http://www.statistics.gov.uk/pdfdir/pop0610.pdf>

<sup>214</sup> Insolvency Service *Statistics Release: Insolvencies in the Fourth Quarter 2008* (Insolvency Service 2009), available at: <http://www.insolvency.gov.uk/otherinformation/statistics/200902/table6.pdf>

<sup>215</sup> *Ibid.*

Country	Household Debt/Disposable Income % 2005-2008 <sup>216</sup>	Population 2008	Number of Bankruptcies 2008	Total Number of Formal Statutory Personal Insolvencies	Total as % of Population
Australia	171	21,722,400 <sup>217</sup>	25,981 <sup>218</sup>	32,909 <sup>219</sup>	0.151
Canada	130	33,504,700 <sup>220</sup>	96,774 <sup>221</sup>	123,234 <sup>222</sup>	<b>0.368</b>
New Zealand	160	4,268,900 <sup>223</sup>	2,504 <sup>224</sup>	3,802 <sup>225</sup>	0.089
Ireland	<b>176</b>	4,422,100 <sup>226</sup>	8 <sup>227</sup>	8 <sup>228</sup>	0.0002

3.117 While the Commission must caution that this is an unscientific calculation, it can be seen that the number of bankruptcies in Ireland is extraordinarily low, particularly when it is considered that based on the 2008 figures used, Ireland has the highest level of household indebtedness of all of the countries listed. For example, while the levels of household indebtedness in Ireland and Northern Ireland are similar, the number of statutory insolvencies in Northern Ireland is approximately 460 times (46,000%) greater than the number of bankruptcies in Ireland. If the level of statutory insolvencies in Ireland were proportionately similar to that in Northern Ireland, it would be expected that the number of personal insolvencies in Ireland would be approximately 3,680 per year. If the level of statutory insolvencies was

<sup>216</sup> See *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraph 1.16, citing *The Debt of the Nation: How we Fell in and Out of Love with Debt* (Amárach Research 2009) at 5, available at: [www.amarach.com](http://www.amarach.com).

<sup>217</sup> Australian Bureau of Statistics *Australian Demographic Statistics* (ABS Cat. No. 3101.0), available at: <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0>

<sup>218</sup> Insolvency and Trustee Service Australia *Statistics for the Financial Year Ended 30 June 2008*, available at: [http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/Statistics->Annual+Statistics+Archive->Annual+Stats+Documents/\\$FILE/Jun0708\\_stats.pdf?OpenElement](http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/Statistics->Annual+Statistics+Archive->Annual+Stats+Documents/$FILE/Jun0708_stats.pdf?OpenElement).

<sup>219</sup> *Ibid.*

<sup>220</sup> Statistics Canada *Canada's Population Estimates*, available at: <http://www.statcan.gc.ca/daily-quotidien/090326/dq090326a-eng.htm>.

<sup>221</sup> Office of the Superintendent of Bankruptcy Canada *Annual Statistical Report 2008* at Table 1, available at: <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br02118.html>.

<sup>222</sup> *Ibid.*

<sup>223</sup> New Zealand Insolvency and Trustee Service *Insolvency Statistics July 2007 – June 2008* at 21, available at: <http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/statistics->annual+statistics+archive->annual+statistics+archive?opendocument>.

<sup>224</sup> *Ibid* at 3.

<sup>225</sup> *Ibid.* Importantly this figure does not include statistics for the number of compromises or proposals in New Zealand during the relevant period, and so is an incomplete representation of the true number of total insolvencies.

<sup>226</sup> Central Statistics Office Ireland *Estimated Population (Persons in April) and Year*, available at: <http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/statistics->annual+statistics+archive->annual+statistics+archive?opendocument>.

<sup>227</sup> *Courts Service Annual Report 2008 (Courts Service 2009)* at 23. In 2009, the number was 17, and, in 2010 (up to 30 September 2010), the number was 19. The Commission is grateful to the Courts Service for providing these figures.

<sup>228</sup> *Ibid.*

proportionately similar to that of England and Wales, this number would increase to approximately 7,840. The Commission must however issue caution when making these very basic calculations, and must for example indicate that the Money Advice and Budgeting Service (MABS) handled a further 19,041 clients in 2008, in the case of 13,924 of which negotiations with creditors took place, while a repayment plan through the Special Account service took place in 2,676 of these cases.<sup>229</sup> As many over-indebted individuals could resolve their situations in this manner through a voluntary debt management plan, this may mean that the level of individuals availing of appropriate statutory insolvency mechanisms if they existed in Ireland would be lower than the level estimated above, based on the use of such mechanisms in other countries.

3.118 The Commission believes that the majority of these personal insolvencies could be resolved outside of the bankruptcy process through voluntary debt management plans and the proposed statutory non-judicial debt settlement system. It is nonetheless foreseeable that a liberalisation of Irish bankruptcy law to make the procedure more accessible should lead to a hugely increased use of the system. The extremely low level of recourse to bankruptcy proceedings in Ireland is not indicative of low levels of over-indebtedness. In this regard it should be noted that Dr. Stuart Stamp of the Combat Poverty Agency has estimated the level of over-indebtedness in Irish households during the mid-to-late 2000s to lie between 7% and 10%.<sup>230</sup> As the 2006 census indicated that there were 1,462,296 private households in Ireland, which would correspond to between 102,361 and 146,230 households falling into the category of over-indebted. These figures have grown since the economic recession of 2008 to 2010, as available indicators suggest a large increase in personal over-indebtedness and debt default.<sup>231</sup>

3.119 While it is the Commission's view that problems of personal over-indebtedness are best resolved out of the bankruptcy process through a non-judicial debt settlement system, it is nonetheless likely that a liberalised bankruptcy regime would be used much more widely than the current system. A question then arises as to how the institutional framework of bankruptcy in Irish law could manage this increased use of the procedure.

**(b) Institutional Changes Required**

3.120 The Commission notes that the following paragraphs raise questions of institutional capacity and resource allocation policies, and so the Commission does not make recommendations in relation to all of the matters discussed. The Commission however raises certain issues that it considers may be appropriate for consideration by policymakers.

**(i) Adjudication by High Court**

3.121 All bankruptcy proceedings currently take place before the High Court. Assuming the introduction of the non-judicial debt regime recommended in this Report, the Commission considers that the High Court is likely to be in a position to accommodate some increase in the number of bankruptcy proceedings that are an almost inevitable feature of the current economic recession, even if the available figures for 2009 and 2010 do not yet indicate a major increase.

**(ii) Possible Removal of the Courts from the Debtor's Petition Procedure**

3.122 A more fundamental reform proposal would be to consider removing court involvement from debtors' applications entirely. This has occurred in countries such as Australia, New Zealand and Scotland, where a debtor's petition for bankruptcy can be made to an administrative official, who may then grant an order of bankruptcy without any court involvement. The UK Insolvency Service undertook a survey in England and Wales in late 2009 and early 2010 with a view to introducing a similar procedure into English law. Under systems adopting this approach, courts retain responsibility for adjudicating upon creditors' applications for bankruptcy orders, and for debtors' applications meeting certain exceptional

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<sup>229</sup> *Statistics for Q1, Q2, Q3, Q4 2008* (Money Advice and Budgeting Service), available at: <http://www.mabs.ie/publications/STATS/MABS%20stats%20Q1%20Q2%20Q3%20Q4%202008.pdf>.

<sup>230</sup> Stamp *A Policy Framework for Addressing Over-indebtedness* (2009 Combat Poverty Agency) at 10.

<sup>231</sup> See e.g. *Interim Report on Personal Debt Management and Debt Enforcement* (LRC 96-2010) at paragraphs 1.17 to 1.30.

conditions. The advantages of such a mechanism include its potential to reduce the considerable burden on court resources constituted by bankruptcy petitions; and to reduce the related problem of delays in the processing of bankruptcy applications of debtors, many of whom are in urgent need of debt relief.<sup>232</sup> In addition to these considerations, the removal of the court from the process of granting a bankruptcy order may serve to remove some of the stigma associated with bankruptcy, with research indicating that the requirement of the debtor to appear in court is a major contributor to bankruptcy stigma.<sup>233</sup> The following paragraphs present a brief outline of administrative, non-judicial procedures for applications and adjudications of bankruptcy in a range of countries possessing legal systems similar to that of Ireland.

(I) *Administrative petition procedures in other countries*

3.123 In Scotland, section 14 of the *Bankruptcy and Diligence etc (Scotland) Act 2007*, amending various provisions of the *Bankruptcy (Scotland) Act 1985*, provides that a debtor application for bankruptcy (“sequestration”) shall be made to the Accountant in Bankruptcy.<sup>234</sup> The Accountant in Bankruptcy may then determine a debtor application for the sequestration of the estate of the debtor, provided the debtor is habitually resident in Scotland or has an establishment there.<sup>235</sup> The Accountant in Bankruptcy is then empowered to make an order of bankruptcy/sequestration, and must do so if satisfied that the application has been made in accordance with the provisions of the Act, and that the debtor is eligible for bankruptcy/sequestration.

3.124 In Australia, section 54A of the *Bankruptcy Act 1966* (as amended), provides for the presentation by the debtor to the Official Receiver a declaration of the debtor’s intention to present a debtor’s petition for bankruptcy. The Official Receiver may then accept this declaration if it appears to the Official Receiver that the debtor is entitled to present it, and if the declaration is in accordance with the approved form.<sup>236</sup> Enforcement action against the debtor is then stayed by the Official Receiver’s acceptance of the declaration, where a copy of the declaration as accepted is presented to a creditor.<sup>237</sup> Section 55 of the 1966 Act as amended then provides that a debtor may present to the Official Receiver a petition for his or her bankruptcy. The debtor must present this petition in an approved form, and a statement of the debtor’s affairs must accompany the petition, which must be of such a standard as to be considered adequate by the Official Receiver. It must appear from this statement of affairs that the debtor is unlikely, either immediately or within a reasonable time, to be able to pay all of the debts specified in the statement of affairs.<sup>238</sup> The petition will be rejected if it appears that the debtor would be able to pay all the debts, and that he or she unwilling to pay one or all of the debts and/or has previously become a bankrupt at least three times, or at least once in the five years previous to the presentation of the petition.<sup>239</sup> If the requirements are met and these negative conditions are not present, the Official Receiver must accept a debtor’s petition.<sup>240</sup> The Official Receiver then endorses the petition and upon this endorsement, the debtor becomes a bankrupt.<sup>241</sup> It should be noted that under the Australian system it is the Official Trustee who becomes responsible for administering the debtor’s estate on the debtor

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<sup>232</sup> See *Consultation: Reforming Debtor Petition Bankruptcy and Early Discharge from Bankruptcy* (Insolvency Service 2009) at 10.

<sup>233</sup> See *Enterprise Act 2002: Attitudes to Bankruptcy 2009 Update* (Insolvency Service 2009) at 5, 16-19.

<sup>234</sup> See section 4B of the *Bankruptcy (Scotland) Act 1985* as amended. The Accountant in Bankruptcy is an officer of the court, appointed by the Scottish Ministers, and performs a role somewhat similar to the Official Assignee in Ireland or the Official Receiver in England and Wales: see section 1 of the 1985 Act as amended.

<sup>235</sup> Section 9(1A) of the 1985 Act, as amended.

<sup>236</sup> Section 54C of the *Bankruptcy Act 1966* as amended.

<sup>237</sup> Section 54E of the 1966 Act.

<sup>238</sup> Section 55(3AA) of the 1966 Act.

<sup>239</sup> *Ibid.*

<sup>240</sup> Section 55(4) of the 1966 Act.

<sup>241</sup> Section 55(4A) of the 1966 Act.

becoming bankrupt.<sup>242</sup> Therefore the office-holder who is responsible for making an adjudication of bankruptcy is distinct from the office-holder who becomes trustee of the debtor's estate.

3.125 Under the law of New Zealand, section 12 of the *Insolvency Act 2006* provides that a debtor may be adjudicated bankrupt by filing an application for adjudication with the Official Assignee for New Zealand. To do so, the debtor must have combined debts of NZ\$1000 or more,<sup>243</sup> and must provide the Official Assignee<sup>244</sup> with a completed application form and statement of affairs. The Official Assignee may then adjudicate the debtor bankrupt, at which point the property of the debtor vests in the Official Assignee.<sup>245</sup> The Official Assignee must advertise the adjudication,<sup>246</sup> and may call a meeting of the bankrupt's creditors.<sup>247</sup> Proceedings to recover debts provable in bankruptcy must be halted at this point.<sup>248</sup>

3.126 Noting the availability of this administrative procedure for the presentation of petitions for bankruptcy by debtors in these legal systems and others, the Insolvency Service of England and Wales has undertaken a consultation exercise with a view to introducing a similar mechanism in England and Wales.<sup>249</sup> Under present law, individual debtors who wish to become bankrupt must complete a bankruptcy petition and statement of affairs and present these in person to their local courts.<sup>250</sup> The Insolvency Service has therefore proposed that the court could be removed from the process of the adjudication of a debtor's petition and the making of a bankruptcy order in response to such a petition. Court involvement would be retained for other aspects of bankruptcy such as bankruptcy petitions presented by creditors, the making of orders requiring a bankrupt to contribute a portion of his/her income to creditors, and public examination hearings of debtors. The debtor's petition under this administrative process could be made online in order to reduce the costs involved in bankruptcy proceedings and to facilitate the provision of information concerning the nature and consequences of bankruptcy and alternative debt relief mechanisms to the debtor during the process of applying for bankruptcy. Paper applications would however also be permitted, so as not to exclude debtors who do not have access to the internet.<sup>251</sup> The Insolvency Service indicated that it intends the procedure to be self-financing, with debtors to be charged fees totalling £510 on applying for a bankruptcy order.

3.127 The consultation document indicated that a debtor's application for bankruptcy would be assessed by a suitably qualified person, appointed by the relevant Secretary of State (for Business, Innovation and Skills). One or more decision-makers would be given this task, and they would be new officeholders with appropriate experience.<sup>252</sup> The decision-makers may be part of the Insolvency Service, but are to be distinct from the Official Receiver, who is responsible for administering bankruptcies. These decision-makers would be given the power to accept or reject the petition, or to require the debtor to

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<sup>242</sup> See section 58 of the 1966 Act. Under section 156A, however, a registered trustee may become trustee of the estate of the bankrupt.

<sup>243</sup> Section 45 of the *Insolvency Act 2006* (NZ).

<sup>244</sup> The term "Official Assignee" as used in this paragraph refers to means the Official Assignee for New Zealand, the Deputy Official Assignee for New Zealand, and any other Official Assignee or Deputy Assignee appointed under the 2006 Act.

<sup>245</sup> Section 64 of the *Insolvency Act 2006* (NZ).

<sup>246</sup> Section 65 of the 2006 Act.

<sup>247</sup> See sections 71 to 73 of the 2006 Act.

<sup>248</sup> See sections 76 to 77 of the 2006 Act.

<sup>249</sup> See *Consultation: Reforming Debtor Petition Bankruptcy and Early Discharge from Bankruptcy* (Insolvency Service 2009).

<sup>250</sup> Section 264 of the *Insolvency Act 1986* (UK).

<sup>251</sup> See *Consultation: Reforming Debtor Petition Bankruptcy and Early Discharge from Bankruptcy* (Insolvency Service 2009) at 22 to 23.

<sup>252</sup> *Ibid* at 16.

provide more information.<sup>253</sup> If the debtor is insolvent and has his or her Centre of Main Interests<sup>254</sup> in England and Wales, the order will be made unless there is some reason why it should not be. Such a reason could include where the application for bankruptcy is an abuse of process, the information provided in the application is false, or where the debtor has failed to respond to the decision-maker's request for additional information. At present, a court hearing a bankruptcy petition has certain discretionary and general powers, such as to stay proceedings;<sup>255</sup> to appoint an interim receiver or manager;<sup>256</sup> and to appoint a trustee.<sup>257</sup> The consultative proposals did not intend that such discretionary powers should be given to the proposed administrative decision-maker, but these powers would however remain available to a court adjudicating on a creditor's petition for the bankruptcy of a debtor. The decisions made by the administrative decision-maker could be reviewable by the decision-maker itself, and ultimately by a court.<sup>258</sup> Certain safeguards would be included under the new procedure to ensure that debtors are made aware of the serious nature of bankruptcy proceedings and to protect creditor interests. Therefore the application process is to be designed so as to attempt to ensure that debtors have considered fully the consequences of applying for bankruptcy, and to encourage debtors to seek advice before making an application.<sup>259</sup> A telephone helpline would be established, and debtors would be provided with information on the availability of alternatives to bankruptcy. The online application process would provide useful information through "pop-ups", which would appear at significant steps during the preparation of an online application. Checks as to the debtor's eligibility for bankruptcy are to be carried out by the decision-maker before making an order of bankruptcy, and the proposed provisions would establish a criminal offence of providing false information in support of a bankruptcy application.<sup>260</sup>

## (II) Conclusions

3.128 The above paragraphs illustrate how several legal systems comparable to Ireland's have introduced mechanisms whereby a debtor's petition for bankruptcy can be processed administratively without recourse to court proceedings. The Commission takes the view that strong arguments exist in favour of introducing such a system, including the saved cost of holding unnecessary court proceedings where a bankruptcy is not challenged; reducing the stigma associated with bankruptcy by limiting court involvement to a minimum; and preventing delays in obtaining bankruptcy orders which might occur if Irish bankruptcy law is liberalised and more applications for bankruptcy are made. The Commission therefore recommends the introduction of a process whereby a debtor's petition for bankruptcy could be processed, and an order of bankruptcy could be made, administratively, without recourse to court proceedings. The administrative decision-making process could then be made subject to a review process in the courts, in order to reinforce the protection of the rights of debtors and creditors. Applications for bankruptcy could also be made electronically in order to lower the costs of bankruptcy proceedings.

3.129 *The Commission recommends the introduction of a process whereby a debtor's petition for bankruptcy could be processed, and an order of bankruptcy could be made, administratively, without recourse to court proceedings. The administrative decision-making process could then be made subject to a review process in the courts, in order to reinforce the protection of the rights of debtors and creditors.*

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<sup>253</sup> Insolvency Service *op cit.* at 24 to 27.

<sup>254</sup> See Article 3 of *Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings*; Fletcher *The Law of Insolvency* (4<sup>th</sup> ed. Sweet & Maxwell 2009) at 174.

<sup>255</sup> Section 266(3) of the *Insolvency Act 1986* (UK).

<sup>256</sup> Section 286 of the 1986 Act.

<sup>257</sup> Section 297 of the 1986 Act.

<sup>258</sup> See *Consultation: Reforming Debtor Petition Bankruptcy and Early Discharge from Bankruptcy* (Insolvency Service 2009) at 30 to 31.

<sup>259</sup> *Ibid* at 17 to 20.

<sup>260</sup> Insolvency Service *op cit.* at 29.

*Applications for bankruptcy could also be made electronically in order to lower the costs of bankruptcy proceedings.*

**(iii) Administration of Bankruptcies by Private Trustees: Regulatory Oversight**

3.130 Thirdly, if considerably larger numbers of individuals were to have recourse to bankruptcy proceedings, a serious issue would arise for consideration in relation to the administration of bankruptcies. Under the 1988 Act, a bankruptcy estate may be administered by:

- The Official Assignee in Bankruptcy;<sup>261</sup>
- A Trustee and Committee of Inspection (appointed by creditors with the approval of the court);<sup>262</sup>
- A Creditor's Assignee (acting in conjunction with the Official Assignee).<sup>263</sup>

The Commission understands that in practice the vast majority of (the few) bankruptcies which take place under the 1988 Act are administered by the Official Assignee in Bankruptcy. This raises a considerable question as to the capacity of the office of the Official Assignee to accommodate a significant increase in the number of bankruptcies. Therefore the Commission believes that under a reformed bankruptcy system, increased use should be made of the procedure for the administration of bankruptcies to be administered by private sector trustees under supervision of a creditor's committee. The use of a private sector trustee to administer bankruptcies would also make the personal insolvency system more similar to that of corporate insolvency, where a court-appointed private sector liquidator administers the winding-up of a company.<sup>264</sup>

3.131 The Commission takes the view, however, that it is essential that any private trustees administering bankruptcies should be properly regulated. The Commission has for this reason presented detailed proposals for the regulation of all Personal Insolvency Trustees in CHAPTER 1.<sup>265</sup>

**(c) Conclusion**

3.132 Therefore the Commission concludes this section by reiterating its view that the proposed review of the *Bankruptcy Act 1988* should consider carefully the institutional and structural changes that would be required under a reformed bankruptcy regime. In particular, the use of suitably regulated Private Insolvency Trustees, as proposed in this Report, to administer bankruptcies will be essential.

**(11) Exempt Assets**

3.133 The Consultation Paper took the view that section 45(1) of the *Bankruptcy Act 1988* should be amended in order to introduce a new exempted assets provision that would be more reflective of current standards of living.<sup>266</sup> The Commission invited submissions as to how this provision should be updated to achieve this aim.

3.134 The Commission recommends that the asset exemptions in section 45 of the 1988 Act should be updated to reflect modern reasonable living standards. The Commission has recommended that guidelines be prepared to establish asset exemption levels as part of minimum reasonable living standards under the Debt Settlement Arrangement procedure, and recommends that these guidelines should be considered when setting new asset exemptions for judicial bankruptcy proceedings also. Consideration should also be given however to the fact that it may be appropriate to make the exempt asset allowances under the Debt Settlement Arrangement procedure more generous than under the

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<sup>261</sup> See sections 60 to 72 of the 1988 Act for provisions relating to the office of the Official Assignee and its powers and functions.

<sup>262</sup> See sections 110 to 114 of the 1988 Act and Part XXV of Order 76 *Rules of the Superior Courts 1986-2010*.

<sup>263</sup> See section 18 of the 1988 Act.

<sup>264</sup> See e.g. Courtney *The Law of Private Companies* (2<sup>nd</sup> ed. LexisNexis Butterworths 2004) at 1415ff.

<sup>265</sup> See paragraphs 1.131 to 1.168 above.

<sup>266</sup> (LRC CP 56-2009) at paragraphs 5.157 to 5.158.

judicial bankruptcy procedure, in order to facilitate the use of the non-judicial procedure, and the part repayment of debt it involves.

3.135 *The Commission recommends that the provisions of section 45(1) of the Bankruptcy Act 1988 providing for the exemption of certain assets of the debtor from liquidation should be amended to reflect modern reasonable living standards, and should mirror those proposed in this Report for Debt Settlement Arrangements.*



**A Introduction: Consultation Paper and Interim Report**

4.01 In the following two Chapters the Commission considers the remaining major subject of this Report, the reform of the law on the enforcement of judgment debts. While Chapters 1, 2 and 3 consider the law of personal insolvency, and how the law should address the situations of multiply-indebted individuals who are unable to pay their debts, these Chapters focus primarily on how the law should provide for the enforcement of judgment debts in cases of individuals who have some means to pay. It must be noted that an important element of the law on the enforcement of judgments is the process of ascertaining the category into which the judgment debtor in a given case falls, and so there is some overlap between the “can’t pay” and “won’t pay” categories.<sup>1</sup>

4.02 The Commission divides the law on the enforcement of judgments into two discrete areas. In Chapter 4 the Commission presents its recommendations for the reform of the enforcement system as a whole, consisting of proposals for the establishment of new institutions and structures, while building upon the existing framework. In Chapter 5 the Commission recommends reforms of individual enforcement mechanisms.

4.03 The Commission therefore begins this Chapter by recalling the provisional recommendations of its Consultation Paper, before presenting its final recommendations.

**(1) Consultation Paper: Principles**

4.04 In its Consultation Paper, the Commission adopted a principles-based approach when considering the reform of the law on the enforcement of judgments. The Commission examined the results of research of an economic and sociological<sup>2</sup> nature, as well as considering the relevant human rights of debtors<sup>3</sup> and creditors<sup>4</sup> and the public interests<sup>5</sup> engaged when examining the law on the enforcement of judgments. From these considerations the Commission developed a framework of fundamental principles to guide the recommendations for reform. The following key principles for reform were therefore identified:

- The need for the law on the enforcement of judgments to provide a balance between the rights of creditors, the rights of debtors, and the interests of society.<sup>6</sup>
- In accordance with the reasoning of the Irish High Court in *McCann v The Judge of Monaghan District Court and Others*,<sup>7</sup> the law must ensure proportionate and appropriate enforcement in each individual case.<sup>8</sup>

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<sup>1</sup> See in particular paragraphs 4.93 to 4.100 below.

<sup>2</sup> (LRC CP 56-2009) at paragraphs 1.02 to 1.92.

<sup>3</sup> (LRC CP 56-2009) at paragraphs 2.25 to 2.62.

<sup>4</sup> (LRC CP 56-2009) at paragraphs 2.05 to 2.23.

<sup>5</sup> (LRC CP 56-2009) at paragraphs 2.63 to 2.86.

<sup>6</sup> (LRC CP 56-2009) at paragraphs 2.88 to 2.92.

<sup>7</sup> [2009] IEHC 276; [2009] 4 I.R. 20.

<sup>8</sup> (LRC CP 56-2009) at paragraphs 2.93 to 2,101.

- The law on the enforcement of judgments must play a role, alongside other measures, in establishing a holistic approach to addressing the problem of over-indebtedness.<sup>9</sup>
- Reforms must introduce mechanisms to provide for improved access to comprehensive and accurate information concerning the judgment debtor's financial circumstances and ability to pay the judgment debt.<sup>10</sup> This is essential both from the point of view of facilitating the effective enforcement of judgment debts and of permitting the law to differentiate between “can't pay” and “won't pay” debtors.
- Debt repayment issues should be resolved without recourse to litigation where possible.<sup>11</sup>
- The law on the enforcement of judgment debts should be consolidated, clarified and simplified.<sup>12</sup>

4.05 When recommending reforms throughout the next two Chapters, the Commission has regard to these fundamental principles.

**(2) Consultation Paper: Provisional Recommendations**

4.06 Chapter 6 of the Commission's Consultation Paper on Personal Debt Management and Debt Enforcement addressed the subject of the procedures for the enforcement of money judgments, and made several provisional recommendations and suggestions for consideration in this regard.<sup>13</sup> The following paragraphs highlight the key provisional recommendations made by the Commission in this subject area.

4.07 One of the Commission's key provisional recommendations for reform was that a centralised enforcement system under the control of a dedicated enforcement office should be introduced in Ireland.<sup>14</sup> The Commission however did not make a definitive decision as to how this office would be structured. The Consultation Paper rather provided three options as to how the office could be constituted, all of which would involve transferring current enforcement functions held by the courts and County Registrars to the office. The first option would involve the establishment of an entire new agency and the appointment of entirely new enforcement officers to staff this agency.<sup>15</sup> An alternative to this approach would be to transfer enforcement functions from courts and County Registrars to existing Sheriffs and Revenue Sheriffs, thus incorporating the current offices of these Sheriffs under the supervision and direction of a central enforcement agency.<sup>16</sup> This would involve a considerable expansion of the current roles of Sheriffs and Revenue Sheriffs. The third option presented would involve the introduction of private enforcement officers to carry out certain enforcement functions, specifically enforcement through execution against goods. These agents would be directed and supervised by a central debt enforcement office, which would also assume responsibility for maintaining high standards of conduct amongst such agents. Having outlined these three options, the Consultation Paper invited submissions as to the appropriate organisational structure of the proposed enforcement office, and as to how the roles of existing enforcement officers should be allocated under the proposed new system.<sup>17</sup>

4.08 Another issue of a structural or organisational nature is that of the framework of the enforcement procedure, and in particular how the proposed debt settlement and enforcement systems should interact. In the Commission's Consultation Paper, three alternative procedures were presented.<sup>18</sup>

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<sup>9</sup> (LRC CP 56-2009) at paragraphs 2.102 to 2.108.  
<sup>10</sup> (LRC CP 56-2009) at paragraphs 2.112 to 2.116.  
<sup>11</sup> (LRC CP 56-2009) at paragraphs 2.117 to 2.120.  
<sup>12</sup> (LRC CP 56-2009) at paragraphs 2.121 to 2.125.  
<sup>13</sup> See (LRC CP 56-2009) at paragraphs 6.01 to 6.445.  
<sup>14</sup> (LRC CP 56-2009) at paragraph 6.45.  
<sup>15</sup> (LRC CP 56-2009) at paragraph 6.52.  
<sup>16</sup> (LRC CP 56-2009) at paragraphs 6.53 to 6.58.  
<sup>17</sup> (LRC CP 56-2009) at paragraph 6.70.  
<sup>18</sup> See (LRC CP 56-2009) at paragraphs 6.129 to 6.140.

The first involved a court ordering a stay of proceedings (before a judgment has been obtained) to allow an assessment of whether a Debt Settlement Arrangement or voluntary debt management agreement between the debtor and all of his or her creditors would be more appropriate.<sup>19</sup> The second option would allow court proceedings to take place and a judgment in favour of the creditor to be obtained. Before enforcement could be ordered by the enforcement office, however, an examination of the debtor's assets would be conducted by the office to decide whether enforcement is appropriate. If enforcement was found to be impossible due to the limited means of the debtor, a finding of unenforceability would be made, at which point the appropriateness of alternative mechanisms such as a Debt Settlement Arrangement or voluntary debt management agreement would be considered.<sup>20</sup> The final option presented by the Commission would require a creditor to obtain the authorisation of the proposed enforcement office before court proceedings to obtain a judgment against a personal debtor could be commenced.<sup>21</sup> The Commission also included a potential model for how the Debt Settlement Arrangement system would interact with the enforcement system where a debtor initiates the arrangement procedure. Under this model, a debtor could apply to either a court or the enforcement office to obtain a stay of all enforcement activity while a debt settlement is being negotiated.<sup>22</sup> Once the Debt Settlement Arrangement procedure is in place, it would then be registered with the enforcement office, and either the enforcement office would stay all further enforcement activity, or an application could be made to court to have all enforcement proceedings against the debtor stayed.

4.09 The Consultation Paper identified the availability of information concerning a debtor's means and assets as essential to ensuring efficient, appropriate and proportionate enforcement.<sup>23</sup> The Paper noted the unavailability of such information as a fundamental failing of the current system, and as an issue which has caused problems in many legal systems. In particular, the Commission raised the possibility of allowing databases such as tax and social security records and credit reports to be accessed by the proposed enforcement office. The Commission ultimately did not make any provisional recommendation on this point, but rather invited submissions as to the most appropriate method of obtaining information about a debtor's financial circumstances.<sup>24</sup> The Commission did note however that information should be obtained voluntarily from the debtor where possible, while also acknowledging that other methods of data-sharing may be necessary as a last resort.<sup>25</sup>

4.10 A further issue of a structural or institutional nature discussed by the Consultation Paper was that of the establishment of a comprehensive register of judgments and enforcement proceedings.<sup>26</sup> This issue is discussed further below.<sup>27</sup>

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<sup>19</sup> See diagram contained in (LRC CP 56-2009) at page 330.

<sup>20</sup> Under this model, if the office found that the debtor had insufficient resources for enforcement to take place, a certificate of unenforceability could be issued and enforcement would be stayed.

<sup>21</sup> This approach would resemble the procedure under the *Personal Injuries Assessment Board Act 2003*, whereby permission of the PIAB is required before court proceedings may begin.

<sup>22</sup> This subject has been addressed by the Commission in paragraphs 1.207 to 1.210, where the Commission recommends that the protective order pending the negotiation of an arrangement should be issued by the Debt Settlement Office, which is to be part of the same body as the Debt Enforcement Office.

<sup>23</sup> (LRC CP 56-2009) at paragraphs 2.112 to 2.116; 6.71 to 6.97.

<sup>24</sup> (LRC CP 56-2009) at paragraph 6.97.

<sup>25</sup> It was also noted that measures to encourage greater participation in enforcement proceedings among debtors would assist in making more information available: see (LRC CP 56-2009) at paragraphs 6.143 to 6.178. In order to achieve this goal, the Commission provisionally recommended a variety of measures, including the introduction of mandatory requirements regarding the provision of easily understandable information to debtors in advance of litigation (paragraphs 6.161 to 6.178), and providing that an examination of a debtor's means could take place otherwise than in public (paragraph 6.178).

<sup>26</sup> (LRC CP 56-2009) at paragraph 6.187 to 6.193.

<sup>27</sup> See paragraphs 4.74ff.

### **(3) Interim Report**

4.11 The Commission's *Interim Report on Personal Debt Management and Debt Enforcement* noted specific actions addressing the problem of personal indebtedness that had already been put in place, or were in train, arising from discussions involving members of the Commission's Working Group.<sup>28</sup> While the Interim Report identified the reform of personal insolvency law and procedures for the enforcement of judgments as matters lying outside of its scope,<sup>29</sup> it nonetheless addressed some issues in these areas. In particular, in the area of the enforcement of judgments, the Consultation Paper had discussed the possible introduction of a requirement for a pre-litigation notice to be sent to the defendant debtor by all creditors seeking to commence legal proceedings against a consumer debtor.<sup>30</sup> The Commission did not specify the precise content of this pre-litigation notice, instead inviting submissions as to its contents, and even asking for views as to whether any contents of the notice should be specified in law.

4.12 The Interim Report effectively addressed this aspect of the Consultation Paper by proposed the introduction, through Rules of Court, of a Pre-Action Protocol in consumer debt cases.<sup>31</sup> Based on the submissions received in response to the Consultation Paper, and the deliberations of the Commission's Working Group, the Commission recommended the introduction of a Pre-Action Protocol, and in conjunction with members of the Courts Service management, drafted Model Rules of Court to give effect to this recommendation.<sup>32</sup> The Commission recommended that the Protocol should provide for the sending of a "warning letter" by a creditor to a debtor in advance of commencing legal proceedings for the recovery of a consumer debt, which would include information explaining the action being taken by the creditor; advise the debtor to consider availing of the assistance of the MABS or other debt advice service or of legal advice; and invite the debtor to use alternative dispute resolution mechanisms to settle the claim without the need for legal proceedings. The Commission recommended that the Model Rules of Court included in the Interim Report could be considered by the Superior Courts Rules Committee and could serve as a model for similar rules in the Circuit and District Courts (with the Commission recognising that most consumer debt proceedings are brought in these lower courts).

4.13 The Commission considers that these recommendations of the Interim Report suffice to address the subject of the proposed Pre-Litigation Notice as discussed in the Consultation Paper, and so does not return to this issue in this Report.

## **B Debt Enforcement Office: Structure**

### **(1) Consultation Paper**

4.14 As noted above, the Consultation Paper provisionally recommended that a centralised enforcement system under the control of a dedicated Enforcement Office should be introduced.<sup>33</sup> The Commission did not however make any recommendations regarding the organisational structure of the office, instead outlining alternative options and inviting submissions on this subject.<sup>34</sup> The first option involved the transfer of enforcement functions away from the courts and County Registrars to entirely new enforcement officers under the new office. The second option consisted of the transfer of enforcement functions to existing Sheriffs and Revenue Sheriffs under the coordination of the Debt Enforcement Office. If implemented, this option would involve the Deb Enforcement Office performing a similar role to that of the Office of the Collector General of the Revenue Commissioners under the current system for the collection of Revenue debts. Finally, the Commission suggested that a further option was to transfer responsibility for the enforcement system to the public Debt Enforcement Office, with individual

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<sup>28</sup> See (LRC 96-2010) at paragraphs 7-11.

<sup>29</sup> (LRC 96-2010) at paragraphs 3.07 to 3.20.

<sup>30</sup> (LRC CP 56-2009) at paragraphs 6.143 to 6.173.

<sup>31</sup> (LRC 96-2010) at paragraphs 2.59 to 2.65.

<sup>32</sup> (LRC 96-2010) at Appendix C.

<sup>33</sup> (LRC CP 56-2009) at paragraph 6.45.

<sup>34</sup> (LRC CP 56-2009) at paragraph 6.70.

enforcement tasks (namely the seizure and sale of debtors' goods) being assigned to private enforcement agents. If this option was chosen, the agents would be subject to a system of licensing and supervision. The Commission outlined the advantages and disadvantages of such an approach.

## **(2) Submissions Received**

4.15 Several submissions received by the Commission expressed views on these matters. Submissions generally supported the establishment of a centralised Debt Enforcement Office, with the support of some submissions identified as being subject to various conditions, primarily related to the efficiency of the office. These concerns included the need for such an office to be adequately resourced to allow it to perform its functions effectively and to ensure that enforcement proceedings were not subject to undue delays. Concerns were also raised as to the cost of enforcement proceedings to creditors under the proposed new centralised system. Submissions stressed the importance to the potential success of the proposed system of providing the enforcement office with the means to gain access to information concerning a debtor's financial position. Submissions also raised the issue of whether a public enforcement office would have sufficient incentives to operate in an effective manner.

4.16 Some submissions expressed preferences regarding the three options proposed by the Commission for the structure of the proposed enforcement office. Of the views expressed, one submission was strongly in favour of the second option of transferring enforcement functions to Sheriffs and Revenue Sheriffs under the coordination of the proposed enforcement office. This submission suggested that the office would then be responsible for coordinating and distributing enforcement work, maintaining centralised data records and supervising the overall enforcement regime. According to this submission, the office should be small in size, with few staff. Efficiency should be its primary goal. The office could also have an internal complaints procedure, with a process of appeal to courts also. The submission noted the Law Reform Commission's recommendation in a previous report in 1988 that responsibilities for the enforcement functions held by County Registrars should be assigned to Sheriffs by the Minister for Justice by exercising the powers contained in sections 12(2) and 12(3) of the *Court Officers Act 1945*.<sup>35</sup> The submission referred to the view that the present system of enforcement by County Registrars is unsatisfactory, and that enforcement duties distract these officers from their duties in respect of the management of Circuit Courts. Also, as County Registrars exercise judicial functions (to an increasing level in recent times), their responsibility for enforcement may conflate judicial and administrative functions. The option of giving this role to existing Sheriffs and County Registrars was also said to be preferable than transferring enforcement functions to private agents, due to the experience and knowledge of enforcement held by Sheriffs. In addition, the existing accountability of Sheriffs as officers of the court and under the Code of Practice operated by the Revenue Commissioners and Revenue Sheriffs is a further point in favour of transferring enforcement functions to these actors.

4.17 In contrast, two submissions were in favour of allocating enforcement functions to private agents. The chief argument in favour of giving this role to private actors is that they would be driven by profit incentives to carry out their functions in an efficient manner. Submissions suggested that these incentives could lead to greater recovery rates. The private agents should be licensed by the appropriate authority to carry out these functions. The enforcement office would be responsible for managing cases in a proactive manner, and would supervise the activities of these private agents.

4.18 One submission was strongly opposed to the idea of private agents carrying out enforcement functions. This submission raised concerns relating to the potential ill effects of competition between private agents, and fears that this could result in a process that is not sympathetic to the needs of debtors.

## **(3) Conclusions and Recommendations**

### **(a) Structure of Debt Enforcement Office and Enforcement Officers**

4.19 The Commission has considered in detail the submissions received on this issue and concludes that the Debt Enforcement Office should take the form of a small office that would be

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<sup>35</sup> See Law Reform Commission *Report on Debt Collection: (1) The Law Relating to Sheriffs* (LRC 27-1988) at paragraph 24.

responsible for the centralised oversight and management of the entire enforcement system nationwide. It should also provide mechanisms for resolving complaints arising in respect of enforcement activities. This small office should be modelled on the Office of the Collector General of the Revenue Commissioners, which engages in comprehensive supervision and management of the enforcement activities of the Revenue Sheriffs.

4.20 The Commission recommends that private sector actors should be responsible for performing the actual work of collecting sums owed from debtors through the various enforcement mechanisms such as execution against goods and garnishee orders. These private sector actors should be appointed through a tendering system, and should be managed and supervised by the Debt Enforcement Office. These enforcement officers should be remunerated on a poundage or commission basis, and so should retain a certain portion of any amounts collected. The Commission recommends that these positions of enforcement officers should be capable of being filled by existing Sheriffs and Revenue Sheriffs, but that the positions should not be confined to these parties and should be filled in accordance with usual public procurement principles. Therefore all Sheriffs seeking to carry out the functions of enforcing judgments should be obliged to meet criteria specified by the Debt Enforcement office, and to participate in the tendering process, competing with other private sector actors seeking to be awarded this position. Several positions as enforcement officers could then be allocated around the country based on need.

4.21 The reasoning of the Commission in selecting this option is similar to the considerations in relation to the allocation of responsibilities between the Debt Settlement Office and private sector Personal Insolvency Trustees discussed in Chapter 1 above. The Commission recognises that reforms in the procedures for the enforcement of judgments are required on an urgent basis. The Commission therefore believes that the first option of creating a comprehensive public system of enforcement, involving both the establishment of a centralised office and the employment of individual enforcement agents (mirroring the current system of County Registrars and court messengers) would be a considerable undertaking and could be expensive. It would involve creating administrative structures and hiring and training of substantial numbers of staff. Therefore, even if the costs of operating the office are to come from fees charged to creditors rather than State funds,<sup>36</sup> significant costs would still be incurred in the initial outlay on establishing such a large administrative framework. In contrast, the proposed limitation of the role of the public Debt Enforcement Office to the making decisions regarding appropriate enforcement mechanisms (under the advice of local enforcement officers)<sup>37</sup> and the oversight and supervision of enforcement officers would involve less contribution from public resources. It would also avail of the expertise and experience available in the private sector, whether from existing Sheriffs or from other private actors possessing knowledge of enforcement proceedings and debt recovery. The Commission accepts the submissions to the effect that Sheriffs and Revenue Sheriffs have considerable experience and knowledge of enforcement, and have established accountability and best practice systems. The Commission nonetheless takes the view that if new officers are to be given responsibility for enforcing judgments a tendering system should be introduced to ensure that the work of enforcement will be carried out as efficiently and effectively as possible, and at the least cost to the State. If responsibility for the enforcement of judgments in Dublin and Cork are to include the relevant County and City Sheriffs, these Sheriffs would, equally with the licensed Personal Insolvency Trustees, be subject to the standards-based supervisory regime of the Debt Enforcement Office.

4.22 The Commission considers that the appointments process would mirror the proposed tendering system for Personal Insolvency Trustees, and therefore applicant practitioners would be required, through a tendering system, to satisfy similar conditions for the position of Enforcement Officer. As with Personal Insolvency Trustees, the performance levels of Enforcement Officers on the panel would be monitored by the Debt Enforcement Office in accordance a Code of Practice, and such performance standards would be considered when applications for membership of the panel are being considered initially and also at

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<sup>36</sup> See the discussion of the funding of the Enforcement of Judgments Office in Northern Ireland: (LRC CP 56-2009 at paragraph 6.06) and Capper *The Enforcement of Judgments in Northern Ireland* (SLS Legal Publications (NI) 2004) at 29.

<sup>37</sup> See paragraphs 4.68 to 4.71 below.

renewal. In this manner further supervisory oversight of the system would be provided, and any fears of misconduct would be allayed.

4.23 Importantly, the Commission was also influenced by the consideration that enforcement officers who are remunerated on a commission basis will possess greater incentives to carry out their functions in an efficient and timely manner than would be the case if such functions were to be assigned to public service employees. The different effects of varying forms of remuneration were noted in the Commission's Consultation Paper,<sup>38</sup> and considerable emphasis was placed on this issue by the submissions received in response.

4.24 The Commission wishes to emphasise that the system of enforcement officers under the Debt Enforcement Office should be distinguished from the system for the regulation of debt collection undertakings discussed in CHAPTER 6. Debt collection undertakings of the type discussed in that chapter would be licensed only to collect debts outside of the legal process before court proceedings have begun and before a court judgment has been made and is available to be enforced. In contrast, enforcement officers as managed and supervised by the Debt Enforcement Office should be assigned responsibility for carrying out the function of enforcing the judgments of the State's courts. In addition, the Commission proposes that enforcement officers should be given much broader powers than debt collection undertakings, such as exercising the power to attach the bank account or the earnings of a debtor, or to seize and sell a debtor's goods.

4.25 While it is not the role of the Commission to engage in an economic analysis of its recommendations, the Commission is nonetheless aware that both on a level of principle and as a practical matter, the cost to the State of running an enforcement system must be limited as much as possible. A system for the enforcement of judgments serves important public interest goals such as safeguarding the rule of law, ensuring the efficient flow of credit in the economy, and protecting fundamental principles such as the honouring of promises.<sup>39</sup> Nonetheless, in some situations, and particularly in the recovery of consumer debt, the legal system for the enforcement of judgments could be described as providing a business service to creditors and could potentially be used by creditors as a substitute for sound arrears management and debt recovery practices.<sup>40</sup> For this reason the system for the enforcement of judgments must be at least partly funded by the private sector, and the costs to the State should be limited.

4.26 The Commission therefore recommends that, in a similar manner to the Enforcement of Judgments Office in Northern Ireland,<sup>41</sup> the operating costs of the proposed Debt Enforcement Office should be funded by fees payable by judgment creditors when applying to have a judgment enforced. These fees could be specified in secondary legislation, and could be index-linked or capable of being readily amended in order to ensure the consistency of their real value over time. The Commission makes no recommendations regarding the appropriate means of calculating these fees, but suggests that certain considerations should be taken into account. First, the fee structure existing in England and Wales, whereby judgment debtors were liable to pay all of the costs of enforcement, were criticised as creating undesirable incentives, with judgment creditors encouraged to apply for enforcement without knowing the likelihood of success.<sup>42</sup> A review of this fee structure therefore proposed that judgment creditors should be required to pay an upfront fee when applying for enforcement, in order to cause creditors to undertake

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<sup>38</sup> (LRC CP 56-2009) at paragraphs 3.343 to 3.345; 6.64.

<sup>39</sup> (LRC CP 56-2009) at paragraphs 2.63 to 2.86.

<sup>40</sup> As was noted in the enforcement review carried out by the Lord Chancellor's Department (now the Ministry of Justice) in the United Kingdom, "the enforcement system should not become a means by which creditors can remedy the deficiencies in their own management and information systems." Lord Chancellor's Department *Enforcement Review Report of the First Phase of the Enforcement Review* (2000) at paragraph 22.

<sup>41</sup> See (LRC CP 56-2009) at paragraph 6.06.

<sup>42</sup> See (LRC CP 56-2009) and Andenas —England and Wales|| in Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 152.

due consideration before applying for enforcement.<sup>43</sup> Secondly, a 1987 review of the fee structure in Northern Ireland suggested that the fees in operation at that time might be prohibitively expensive in the case of small debts.<sup>44</sup> It should be borne in mind in this regard that the European Court of Human Rights held in the decision of *Apostol v Georgia*<sup>45</sup> that enforcement fees should not be so high as restrict a judgment creditor's right of access to a court.<sup>46</sup> This review of enforcement in Northern Ireland also suggested that the level of fees should be more closely related to the results obtained by enforcement officers. Therefore the Commission suggests that these considerations should be taken into account when setting fees for enforcement applications.

4.27 The Commission suggests that, in establishing the Debt Enforcement Office it is essential that the relevant members of staff are sufficiently skilled and qualified to perform the supervisory and case management functions required. The Commission also envisages that the establishment of the Debt Enforcement Office, including the Debt Settlement Office, is likely to lead to savings in terms of court time and a reduction in the present expense of processing enforcement proceedings through the courts. The Consultation Paper notes that the flaws of the current enforcement system mean that futile enforcement proceedings are often brought at present, including multiple enforcement proceedings against a single debtor who may be unable to satisfy even one of his or her obligations.<sup>47</sup> The Commission therefore considers that savings will be achieved by removing such proceedings from the courts.

4.28 *The Commission recommends that the Debt Enforcement Office should be modelled on the Office of the Collector General of the Revenue Commissioners, which engages in comprehensive supervision and management of the enforcement activities of the Revenue Sheriffs. The Commission recommends that the office should be responsible for the centralised oversight and management of the entire enforcement system nationwide, as well as providing mechanisms for resolving complaints arising in respect of enforcement activities.*

4.29 *The Commission recommends that private sector actors should be responsible, under the supervision and management of the Debt Enforcement Office, for performing the actual work of collecting sums owed from debtors through the various enforcement mechanisms such as execution against goods and garnishee orders. The Commission recommends that these private sector actors, provided they meet conditions specified by the Debt Enforcement Office, should be appointed through an open and competitive tendering system and should be remunerated on a poundage or commission basis, retaining a certain portion of any amounts collected. The Commission recommends that a single position of Enforcement Officer should be established in each of a specified number of geographical areas. The Commission recommends that these positions of enforcement officers should be capable of being filled by existing Sheriffs and Revenue Sheriffs, but that the positions should not necessarily be limited to these existing officers.*

4.30 *The Commission recommends that fees should be payable by judgment creditors when applying for the enforcement of a court judgment, and that these fees should be used to contribute to funding the operating costs of the proposed Debt Enforcement Office.*

## **C Debt Enforcement Office: Functions**

4.31 *The Commission recommends that the functions of the proposed Debt Enforcement Office should consist of the following:*

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<sup>43</sup> Lord Chancellor's Department *Effective Enforcement – Improved Methods for Recovery for Civil Court Debt and Commercial Rent and a Single Regulatory Regime for Warrant Enforcement Agents* (Cm5744 2003) at 48-49.

<sup>44</sup> See (LRC CP 56-2009) at paragraph 6.48 and Report of the Joint Working Party on the Enforcement of Judgments, Orders and Decrees of the Courts in Northern Ireland (1987).

<sup>45</sup> Application No. 40765/02.

<sup>46</sup> See (LRC CP 56-2009) at paragraphs 2.12 to 2.13.

<sup>47</sup> See (LRC CP 56-2009) at paragraphs 3.319.



- Oversight of the tendering process and the appointment of enforcement officers
- Establishment of conditions that must be met by applicants for the position of enforcement officer
  - Regard could be had to the conditions applicable to debt collection undertakings<sup>48</sup> and insolvency trustees<sup>49</sup>
- Management and supervision of enforcement officers
  - Monitoring of performance
  - Complaints handling (including enforcement of conduct of business rules of enforcement officers)
  - Preparation of code of practice<sup>50</sup>
- Obtaining information on the debtor's means: Enforcement Information Disclosure Orders<sup>51</sup>
- Deciding whether enforcement is possible in a given case and choosing the most appropriate enforcement mechanism.<sup>52</sup>
- Establish and maintain an internal appeals mechanism for dealing with challenges to its decisions.
- Ensure that an enforcement order is adequately implemented (monitoring performance of enforcement officer in a given case).
- Maintain register of judgments and enforcement proceedings.<sup>53</sup>

## **D Information on debtors' means**

4.32 The following paragraphs discuss the Commission's proposals for improving access to the means of judgment debtors for the purposes of facilitating appropriate, effective and proportionate enforcement.

### **(1) Consultation Paper and Interim Report**

4.33 The Consultation Paper identified the need to make more information available about debtors' financial circumstances to both creditors and the relevant authorities as a fundamental principle for the reform of the system for the enforcement of judgments.<sup>54</sup> This principle has been recognised by the Council of Europe as a necessary requirement for effective and efficient enforcement mechanisms,<sup>55</sup> and has also been the subject of a policy document of the European Commission.<sup>56</sup> The Commission based the importance of this principle on the potential for greater access to information to prevent the bringing of futile enforcement proceedings against debtors who are unable to repay their obligations; and to enable effective, appropriate and proportionate enforcement mechanisms to be brought in cases where a debtor possesses the means to repay a judgment debt. While emphasising the importance of greater access to

<sup>48</sup> See paragraphs 6.96 to 6.107 below.

<sup>49</sup> See paragraphs 1.145 to 1.149 above.

<sup>50</sup> Regard could be had to the guidance of the Commission in relation to codes of practice for debt collection undertakings (6.123 to 6.135) and insolvency trustees (1.158).

<sup>51</sup> See paragraphs 4.48 to 4.64 below.

<sup>52</sup> See paragraphs 4.68 to 4.73 below.

<sup>53</sup> See paragraphs 4.76 to 4.81 below.

<sup>54</sup> (LRC CP 56-2009) at paragraphs 2.112 to 2.116.

<sup>55</sup> *Recommendation of the Committee of Ministers to member states on enforcement* (Council of Europe Rec(2003)17, 2003).

<sup>56</sup> Commission of the European Communities *Green Paper: Effective Enforcement of Judgments in the European Union: the Transparency of Debtors' Assets* (COM(2008) 128 final).

information on the debtor's means, the Commission also noted the importance of respecting debtors' right to privacy and the requirements of the *Data Protection Acts 1988 and 2003*. When discussing problems arising in the current system for the enforcement of judgment debts, the Consultation Paper identified the lack of information concerning a debtor's financial circumstances and (in)ability to repay as being a fundamental flaw.<sup>57</sup>

4.34 Having established the need for improved access to information on debtors' means, the Consultation Paper considered how such a goal could be achieved.<sup>58</sup> The Commission discussed the various means used to obtain information in Ireland at present, both outside the legal system in advance of the commencement of proceedings and in the legal process. A discussion of approaches used in other European legal systems to obtain such information was also included in the Consultation Paper, with particular emphasis placed on pan-European studies identifying best practices in mechanisms for obtaining information on a debtor's assets.<sup>59</sup> The Commission noted that methods for obtaining information about a debtor generally take two forms. These are declarations by the debtor as to his or her means, accompanied by sanctions applicable in the event of non-cooperation by the debtor; and data-sharing mechanisms whereby enforcement officials are provided with access to information held on databases such as social security and employment records. Conclusions were drawn by the Commission to the effect that a comprehensive register of judgments would provide some assistance in allowing information about a debtor's assets to be obtained; the debtor declaration system in Ireland could be improved; and access to tax and social security records could be made available to enforcement officials, subject to appropriate safeguards, in order to facilitate enforcement.

## **(2) Submissions Received**

4.35 The submissions received by the Commission demonstrated unanimous support for the crucial status of the principle that an effective enforcement system requires effective access to information on the means of debtors. The availability of information on the debtor's circumstances was considered to be a key requirement for the effective operation of the new enforcement system, and the current lack of availability of such information was considered by the submissions to be the primary flaw of the current system of enforcement. It was suggested that debtors may occasionally conceal assets or income for the purposes of frustrating the enforcement of a judgment, and that mechanisms must exist to prevent this from occurring. The importance of comprehensive and accurate information in allowing the most appropriate, efficient and proportionate method of enforcement to be chosen in a given case was also highlighted.

4.36 Submissions received were generally in favour of introducing significant reforms to allow more information relating to a debtor's means to be accessed. One submission argued that debtor disclosure mechanisms should be enhanced, in combination with the introduction of data-sharing procedures. Debtor declaration mechanisms could be improved by empowering the proposed enforcement office to compel the provision of information by a debtor, for example through requiring uncooperative debtors to attend for interview at the enforcement office under pain of arrest, and allowing debtors to be interviewed under oath. Submissions were generally in favour of allowing the enforcement office and enforcement officers to access databases containing information on the debtor's means. It was suggested that access should be granted, on a qualified basis, to tax and social welfare records, bank and credit union accounts, and credit history reports. The need to ensure that the privacy rights of debtors are adequately respected and that the requirements of the *Data Protection Acts 1988 and 2003* are observed was emphasised in numerous submissions. It was noted in particular that information contained in credit histories, bank records and tax and social security databases has not been collected for the purpose of facilitating

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<sup>57</sup> (LRC CP 56-2009) at paragraphs 3.332 to 3.335.

<sup>58</sup> (LRC CP 56-2009) at paragraphs 6.74 to 6.97.

<sup>59</sup> See e.g. Andenas, Hess and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005); Hess *Making more efficient the enforcement of judicial decisions within the European Union* (Study No. JAI/A3/2002/02 European Commission 2004); Commission of the European Communities *Green Paper: Effective Enforcement of Judgments in the European Union: the Transparency of Debtors' Assets* (COM(2008) 128 final).

enforcement, and so the use of the information in this manner may not be compatible with data protection legislation. The merits of improving credit reporting practices in Ireland as a method of making more information about debtors available to creditors were also discussed. Some submissions also emphasised the role of money advisors, particularly those of the MABS, in assisting in ascertaining a comprehensive picture of the financial circumstances of the debtor. It was suggested that with the assistance of money advisors, the information collected and contained in the debtor's Standard Financial Statement could be communicated to the enforcement office for the purposes of facilitating appropriate and proportionate enforcement.

### **(3) Conclusions and Recommendations**

#### **(a) Interim Report**

4.37 First, the Commission notes that some measures discussed in the *Interim Report on Personal Debt Management and Debt Enforcement*<sup>60</sup> are relevant to the present discussion. The proposed Pre-Action Protocol in consumer debt claims, as discussed above, should facilitate debtors in availing of the assistance of money advisors such as those of the MABS.<sup>61</sup> The protocol provides that before commencing legal proceedings, creditors should advise debtors to consider obtaining the assistance of a money advisor and/or legal advice. It is hoped that in this manner debtors will engage in preparing a full statement of their financial affairs, which could be useful in avoiding legal proceedings, or at least in ensuring that enforcement is proportionate and appropriate in cases where proceedings are to continue. A related subject discussed in the Interim Report is that of the Standard Financial Statement that has been produced as part of the *IBF-MABS Operational Protocol*.<sup>62</sup> The Commission notes that the development of the Statement should enable the ability of a debtor to repay his or her obligations to be ascertained outside of legal proceedings and in this manner should again prevent futile legal proceedings from taking place. The availability of information in this manner should also allow appropriate and proportionate enforcement action in cases where the enforcement of a judgment is to proceed. Finally, submissions have noted that changes to the credit reporting systems in Ireland may be useful in permitting improved access to debtors' financial circumstances. While the Commission has raised the subject of credit reporting in its Consultation Paper<sup>63</sup> and Interim Report,<sup>64</sup> the Commission does not propose to discuss the matter further in this Report. It should be noted that the Department of Finance has indicated that it is examining the credit reporting system in Ireland so as to inform the Minister for Finance of any issues that need to be addressed and of what measures are required to regulate this area.<sup>65</sup> The Central Bank of Ireland has also indicated that it is examining the subject of credit reporting and will conduct a consultation process before making recommendations for regulatory reform in this area.<sup>66</sup> Therefore the Commission considers that the subject of credit reporting is already being addressed by bodies within whose competence the issue more properly lies, and so does not address the issue in this report.

#### **(b) Register of Judgments**

4.38 The potential of a comprehensive register of judgments and enforcement proceedings to inform creditors, courts and the enforcement office of existing obligations of a debtor, and so act as a limited means of obtaining information on the debtor's financial position, was recognised in the Commission's

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<sup>60</sup> (LRC 96-2010).

<sup>61</sup> See above paragraphs 4.12 and (LRC 96-2010) at paragraphs 2.59 to 2.65.

<sup>62</sup> See (LRC 96-2010) at paragraphs 2.36 to 2.47.

<sup>63</sup> (LRC CP 56-2009) at paragraphs 3.57 to 3.70; 3.92 to 3.96; 4.41 to 4.97.

<sup>64</sup> (LRC 96-2010) at paragraphs 2.31 to 2.34.

<sup>65</sup> (LRC 96-2010) at paragraph 2.33.

<sup>66</sup> See Central Bank and Financial Services Authority of Ireland *Banking Supervision: Our New Approach* (June 2010) at 60-62. Available at: <http://www.financialregulator.ie/press-area/press-releases/Documents/21%20June%202010%20-%20Banking%20Supervision%20-%20Our%20New%20Approach.pdf>

Consultation Paper.<sup>67</sup> While the Commission views the introduction of such a register as being relevant to the current discussion of methods of obtaining information for the purposes of enforcement, the Commission's proposals for the introduction of a judgments' register are discussed below.<sup>68</sup>

**(c) International Best Practice**

4.39 The Commission reiterates the finding noted in its Consultation Paper that a comparative study of European enforcement systems stated that best practice in enforcement is achieved by bodies who are dedicated to the enforcement of judgments and who rely on databases containing up-to-date information about the debtor's assets and/or employment.<sup>69</sup> This study stated that systems relying on debtor declarations are considered to be inefficient as the examination or declaration procedure is often cumbersome and liable to be frustrated by non-compliance by uncooperative debtors. The access to State-held databases containing tax records or details of the debtor's employment afforded to enforcement officials in countries such as Sweden and Austria was found to be conducive to efficient enforcement. As noted in the Commission's Consultation Paper, this suggests that for best practice in enforcement to be achieved in Ireland, it may be necessary to empower the Debt Enforcement Office or enforcement officers to access data collected for purposes other than enforcement, subject to the requirements of data protection legislation.<sup>70</sup> The Consultation Paper however also noted that in order to uphold the principles of proportionate enforcement<sup>71</sup> and the protection of the privacy rights of debtors,<sup>72</sup> information should be obtained voluntarily from the debtor wherever possible, and recourse should only be had to data-sharing mechanisms where other less restrictive mechanisms are inappropriate or have failed.<sup>73</sup>

4.40 Therefore the Commission takes the view, supported by submissions and comparative analysis, that data-sharing mechanisms should be introduced to facilitate access to information about the debtor's financial circumstances. The Commission however recommends that such mechanisms should only be used in cases where less restrictive means of obtaining information are impossible or inappropriate, and so debtor declaration procedures for obtaining information should also be improved so that greater access to information may be facilitated in such cases without recourse to data-sharing.

**(d) Recommendations: Debtor Declaration Procedures**

4.41 One of the primary advantages identified by the Commission in establishing a centralised system of enforcement under the proposed Debt Enforcement Office is that such a system would facilitate obtaining information about a debtor's means in a less expensive, and more comprehensive, manner than the current system of enforcement which is spread throughout the different courts in the State.<sup>74</sup> As noted by a leading commentator in this field, the attribution of enforcement functions to a dedicated and centralised body will permit a holistic view to be taken to a debtor's ability to repay, a task which may be impossible for an individual court to undertake as:

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<sup>67</sup> (LRC CP 56-2009) at paragraph 6.93.

<sup>68</sup> See paragraphs 4.74 to 4.81 below.

<sup>69</sup> Andenas and Nazzini "Market Integration, the Harmonisation Process, and Enforcement Practices in the EU Member States" in Andenas, Hesss and Oberhammer *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) at 98.

<sup>70</sup> (LRC CP 56-2009) at paragraph 6.92.

<sup>71</sup> (LRC CP 56-2009) at paragraphs 2.93 to 2.99.

<sup>72</sup> (LRC CP 56-2009) at paragraphs 2.36 to 2.41.

<sup>73</sup> (LRC CP 56-2009) at paragraphs 6.95 to 6.96.

<sup>74</sup> (LRC CP 56-2009) at paragraphs 6.38 to 6.41.

“[a] court deciding whether to grant a creditor’s application for enforcement orders simply cannot take this holistic view of the case at hand. It will inevitably see the application inaccurately as a bilateral dispute between creditor and debtor.”<sup>75</sup>

As well as being in a position to take a holistic view of the debtor’s indebtedness, a centralised enforcement office would also benefit from its dedication to enforcement activities and resultant specialisation. This would enable it develop knowledge and skills of the means of best obtaining information concerning a debtor’s circumstances.

4.42 The Commission notes that comparative analysis and submissions received by the Commission provide possible options for the improvement of debtor declarations as means of obtaining information concerning debtors’ financial circumstances. The Commission notes that at present the procedure of discovery in aid of execution and High Court examination are rarely used, partly due to the procedural complications involved.<sup>76</sup> The Commission recommends that under the proposed new enforcement system, under the supervision and management of the Debt Enforcement Office, debtor declaration procedures should exist outside of the court environment. The Commission proposed in its Consultation Paper that the examination of a debtor’s means should be conducted otherwise than in public in order to encourage debtors to be forthcoming in providing information of their financial circumstances, and invited submissions as to how this could best be achieved. This proposal was widely supported in the submissions received by the Commission. Both creditor and debtor representatives advocated such an approach. It was noted that public examination hearings act as a strong deterrent for debtor participation, with the result that debtors do not engage in the process. Data-sharing mechanisms could be used to obtain information without a public examination, and the possibility of debtors providing a sworn statement of means was also suggested. Private examinations were also preferred to public hearings.

4.43 The Commission therefore recommends that debtor declaration procedures should be reformed to remove a public court examination from the process. Instead the procedure should be based in the first instance on the voluntary disclosure of information by the debtor, coupled with private examinations of the debtor and strong sanctions in cases where the debtor is uncooperative. The Commission recommends that a first step in obtaining information about a debtor should be a communication from the Debt Enforcement Office to the debtor and to the local enforcement officer that an enforcement application has been made, accompanied by an order that the debtor should complete and return, within a specified time limit, a copy of the Standard Financial Statement outlining his or her financial circumstances. If the debtor does not comply with this step, enforcement officers should be permitted (and directed by the Debt Enforcement Office) to visit the home of an individual debtor for the purposes of an examination or interview of the debtor. The debtor’s Standard Financial Statement should be completed by the enforcement officer based on the responses provided by the debtor to his or her questions. Any additional information not addressed in the Statement but which is reasonably relevant should also be ascertained by the enforcement officer.

4.44 If a debtor refuses to be interviewed at his or her home, or if a debtor when interviewed refuses to answer the questions of the enforcement officer, a power should exist to summon the debtor to make a statutory declaration of means in the office of the enforcement officer.<sup>77</sup> This examination should be conducted in private, unless objections to a private hearing, and a request for a public hearing, are made by the debtor or creditor. The judgment creditor should be permitted to attend this hearing in order to question the debtor, and enforcement officers should be empowered to compel the attendance of a creditor where it appears to the enforcement officer that the attendance of the creditor is necessary or expedient for the proper disposal of an application for enforcement.<sup>78</sup> The Commission recommends that criminal offences should be created to cover cases where a debtor makes a statement that he or she

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<sup>75</sup> Capper “A Debt Enforcement Office?” Paper presented at *Reforming the Law on Personal Debt*, Law Reform Commission Annual Conference 2009, 18<sup>th</sup> November 2009, Dublin Castle.

<sup>76</sup> (LRC CP 56-2009) at paragraphs 6.76 to 6.77.

<sup>77</sup> See Article 27 of the *Judgments Enforcement (Northern Ireland) Order 1981*.

<sup>78</sup> See Article 136 of the *Judgments Enforcement (Northern Ireland) Order 1981*.

knows to be untrue, where he or she knowingly conceals information or documents; or where he or she knowingly produces false documents.<sup>79</sup> The Commission considers that, due to the resource intensive nature of visiting a debtor's home for the purposes of interviewing the debtor, an enforcement officer should be empowered to dispense with this step where he or she has reasonable grounds to believe that the process would be unsuccessful or unjustified, for example due to impracticalities or a lack of debtor cooperation.<sup>80</sup> The reasons for the enforcement officer's belief should be included in the report presented by the enforcement officer to the Debt Enforcement Office, as now described.

4.45 The Commission recommends that following this initial interview/examination process, the enforcement officer should make a report of the information gathered to the Debt Enforcement Office for the purposes of facilitating the office in making a decision as to the appropriate method of enforcement.<sup>81</sup> This report should contain a recommendation of the officer regarding the most appropriate method of enforcement, if any, in the particular case. The report should also indicate whether the enforcement officer is of the opinion that further information is required, and whether the enforcement officer has reasonable grounds to be of the opinion that further relevant information may be obtained through accessing tax or social welfare databases, credit history or bank records. Copies of the enforcement officer's report should be supplied to the debtor and creditor in question, and these parties should be provided with the opportunity to make representations as to the appropriate method of enforcement, or to challenge any of the findings of the enforcement officer. A copy of the debtor's completed Standard Financial Statement should be appended to the report.

4.46 Detailed procedural rules regarding the interview and/or examination of debtors by enforcement officers, and the contents of the enforcement officer's report, should be specified in legislation.

4.47 *The Commission recommends that the procedures for obtaining information concerning the debtor's financial circumstances via declarations of the debtor should be comprehensively reformed. The Commission recommends that the reformed procedure should include the following elements:*

- *The Debt Enforcement Office should communicate with the debtor, indicating that an enforcement application has been made, and requiring the debtor to complete a Standard Financial Statement within a specified period;*
- *If the debtor does not comply with this obligation, the local enforcement officer should be permitted/directed to visit the home of the debtor for the purposes of interviewing the debtor as to his or her means, and completing the Standard Financial Statement. The enforcement officer should be permitted to dispense with this visit where reasonable grounds to believe that the process would be unsuccessful or unjustified, for example due to impracticalities, unjustifiable cost, or a lack of debtor cooperation;*
- *If this procedure is unsuccessful, the local enforcement officer should be empowered to summon the debtor to make a statutory declaration of means in the office of the enforcement officer. This examination should be held in private, but the judgment creditor should be entitled to attend in order to question the debtor.*
- *It should be a criminal offence for the debtor to make a statement that he or she knows to be untrue, to conceal knowingly information or documents, or to produce false documents knowingly.*
- *The Commission recommends that following this initial interview/examination process, the enforcement officer should make a report of the information gathered to the Debt Enforcement Office for the purposes of facilitating the office in making a decision as to the appropriate method of enforcement. This report should contain a recommendation of the officer regarding the most*

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<sup>79</sup> See Article 120 of the *Judgments Enforcement (Northern Ireland) Order 1981*.

<sup>80</sup> As noted in the Consultation Paper, under the Northern Irish system it is not possible to examine the debtor at his or her home in approximately 35% of cases: (LRC CP 56-2009) at paragraph 6.82.

<sup>81</sup> See paragraphs 4.65 to 4.71 below.

*appropriate method of enforcement, if any, in the particular case. The report should also indicate whether the enforcement officer is of the opinion that further information is required, and whether the enforcement officer has reasonable grounds to be of the opinion that further relevant information may be obtained through accessing tax or social welfare databases, credit history or bank records. Creditors and debtors should be empowered to challenge any factual statements made in the enforcement officer's report, and to make representations as to the most appropriate method of enforcement.*

- *The Commission recommends that detailed procedural rules regarding the interview and/or examination of debtors by enforcement officers, and the contents of the enforcement officer's report, should be specified in a Code of Practice prepared and published by the Debt Enforcement Office.*

**(e) Recommendations: Information-Sharing**

4.48 Once the Debt Enforcement Office has received the relevant documentation, it should make a decision as to whether or not the debtor possesses sufficient means for the judgment to be enforced or whether further information is required in order to make a decision. If no further information is required, the office should stay enforcement, issue a certificate of unenforceability or make an appropriate enforcement order. If further information is required, the Debt Enforcement Office should be empowered to obtain such information through data-sharing mechanisms by making an Enforcement Information Disclosure Order. This procedure should resemble, albeit with significant differences, the Data Disclosure Order procedure introduced in England and Wales by the *Tribunals, Courts and Enforcement Act 2007*.<sup>82</sup>

4.49 Under this procedure, a court is empowered to make an information request to a Government department or an information order to a specified private body requiring the body to disclose information regarding the debtor to the office. The procedure provides that the debtor must be given notice that the court intends to make a request or order, thus providing the debtor with an opportunity to avoid the disclosure of information by cooperating at this stage.<sup>83</sup> The court provides such information to the recipient of an order so as to enable the debtor to be identified.<sup>84</sup> The English legislation provides that a disclosure of information of this kind is not to be taken to breach any restriction on the disclosure of information. This provision apparently is designed to ensure that the procedure does not violate any data protection legislation.

4.50 The 2007 Act lists certain types of information that can be obtained from a Government department through a departmental information request, including the following categories:

- the full name of the debtor;
- the address of the debtor;
- the date of birth of the debtor;
- the national insurance number of the debtor;
- other prescribed information.<sup>85</sup>

The following types of information can be requested from the Revenue Commissioners:

- whether or not the debtor is employed;
- the name and address of the employer (if the debtor is employed);
- the national insurance number of the debtor;
- prescribed information.<sup>86</sup>

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<sup>82</sup> See (LRC CP 56-2009) at paragraph 6.85.

<sup>83</sup> See section 96(4) of the *Tribunals, Court and Enforcement Act 2007*.

<sup>84</sup> Section 96(6) of the 2007 Act.

<sup>85</sup> Section 97(3) of the 2007 Act.

The recipient of a departmental information request may then disclose to the relevant court any information that the recipient considers is necessary to comply with the request, with this disclosure again not to be taken to breach any restriction on the disclosure of information.<sup>87</sup>

4.51 The procedure is slightly different in respect of an “information order” issued to another party other than a Government department. Such an order specifies a prescribed person and prescribed information, and orders the person to disclose the information to the court.<sup>88</sup> Much of the detail in respect of these orders is to be contained in secondary legislation, which is to ensure that an information order made against a particular person may only be made against a particular person, and may order that person to disclose only particular information or information of a particular description.<sup>89</sup> The recipient of the information order is obliged to provide the specified information, but the legislation provides that such a person will not be in breach of the order under specified circumstances, such as: where the recipient does not hold the information; where the recipient is unable to ascertain whether the information is held because of the way in which the information order identifies the debtor; or where the disclosure of the information would involve the recipient in unreasonable effort or expense.<sup>90</sup> The court is to presume that the failure to disclose the information is for one of these permitted reasons if the recipient of the order provides the relevant court with a certificate indicating that one of the reasons has led to the failure, and no evidence exists that the failure is not for a permitted reason.<sup>91</sup>

4.52 Once information has been obtained in this manner, the court may use it for the purpose of making a further information request or order, or may provide the creditor with information about what kind of action (if any) it would be appropriate to take in court to recover the judgment debt.<sup>92</sup> The relevant court may use the information in carrying out any functions in relation to any such action, if the creditor takes such an action in that court.<sup>93</sup> Similarly, if the creditor takes an action in another court, the first court may disclose the data with that second court.<sup>94</sup> Secondary legislation must be introduced to permit the sharing of information under these processes, and information disclosed by Commissioners for Her Majesty’s Revenue and Customs may only be disclosed with the consent of the Commissioners. Again, the sharing of information in this manner is not to be taken to breach any restrictions on the disclosure of information.<sup>95</sup>

4.53 The 2007 English Act also provides for a series of criminal offences in the case of the unauthorised use or disclosure of information.<sup>96</sup>

4.54 It should be noted however that it appears that all of these provisions of the 2007 Act relating to information disclosure do not appear to have yet been commenced.

4.55 The Commission recommends that a similar procedure should be introduced in Ireland, with the role of the court under the English procedure instead held by the Debt Enforcement Office. The report to be provided to the Debt Enforcement Office by a local enforcement officer should contain the enforcement officer’s opinion as to whether further information should be supplied by an Enforcement Information Disclosure Request. As creditors are to be given the opportunity to make submissions to the

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<sup>86</sup> Section 97(4) of the 2007 Act.

<sup>87</sup> Section 99(2) and (3) of the 2007 Act.

<sup>88</sup> Section 98(1) of the 2007 Act.

<sup>89</sup> Section 98(4) of the 2007 Act.

<sup>90</sup> Section 100(1) and (2) of the 2007 Act.

<sup>91</sup> Section 100(3) and (4) of the 2007 Act.

<sup>92</sup> Section 101(2) and (3) of the 2007 Act.

<sup>93</sup> Section 101(4) of the 2007 Act.

<sup>94</sup> Section 101(5) of the 2007 Act.

<sup>95</sup> Section 101(9) of the 2007 Act.

<sup>96</sup> Section 102 of the 2007 Act.



office in response to the enforcement officer's report, creditors should also be permitted to request that the office seek to obtain further information through such a request or order. The Debt Enforcement Office should also be empowered to make a request where it considers it necessary in order to make a decision as to the appropriate method of enforcement, if any, in a given case.

4.56 The office should be empowered to make an Enforcement Information Disclosure Request for specified data to Government departments such as the Department of Social Protection and the Revenue Commissioners. The information capable of being obtained in this manner should be limited to categories such as the following:

- the full name of the debtor;
- the address of the debtor;
- the date of birth of the debtor;
- the PPS number of the debtor;
- whether or not the debtor is employed;
- the name and address of the employer (if the debtor is employed);

Other residual categories of information, such as the amount of income being received by the debtor from his or her employment or in social welfare benefits, should be specified in secondary legislation. Secondary legislation should in this regard follow the principles of proportionate enforcement and the least invasive interference with the privacy rights of debtors as is necessary in order to achieve the aim of effective enforcement of court judgments.<sup>97</sup>

4.57 The office should also be empowered to make Enforcement Information Disclosure Request requiring other bodies such as banks, credit unions and credit reporting companies to disclose specified information concerning the debtor's means. Secondary legislation should be enacted to specify the details of the information capable of being disclosed under such an order, along similar lines to the categories listed in the preceding paragraph. The recipient of such a Request should be obliged to obey, except where circumstances mean that it would be impossible or unreasonable for the recipient of the order to do so.

4.58 The information received in response to a Request should not be passed by the Debt Enforcement Office to a creditor, but should be used by the Debt Enforcement Office to decide what method of enforcement, if any, is appropriate in the given case. Information should only be disclosed to an enforcement officer to the extent that it is necessary for the implementation of the enforcement order made by the office. This would for example involve the disclosure to the enforcement officer of the debtor's employment details in order to facilitate an attachment of earnings, or the disclosure of the debtor's bank account details in order to facilitate an attachment of the debtor's bank account. Secondary legislation should be introduced to specify the details of the procedures for information sharing. Primary legislation should provide for a criminal offence of the unauthorised use or disclosure of information obtained under an Enforcement Information Disclosure Request.

4.59 The Commission recognises that the introduction of such a power to disclose information raises issues of data protection law<sup>98</sup> and the need to safeguard debtors' right to privacy under the Constitution of Ireland and the European Convention on Human Rights.<sup>99</sup> While a detailed discussion of the law on data protection and privacy lies outside of the scope of this Report, the Commission suggests that its recommendations on this subject of information sharing should be subject to the need for a comprehensive consideration of their compatibility with these requirements.

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<sup>97</sup> See (LRC CP 56-2009) at paragraphs 2.36 to 2.41; 2.87 to 2.125.

<sup>98</sup> See *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data*; the *Data Protection Acts 1988-2003*; and (LRC CP 56-2009) at paragraph 4.72 to 4.74.

<sup>99</sup> See (LRC CP 56-2009) at paragraphs 2.36 to 2.41.

4.60 *The Commission recommends that, subject to a consideration of the requirements of data protection legislation and the protection of debtors' right to privacy, the Debt Enforcement Office should be permitted under certain conditions to make an Enforcement Information Disclosure Request requesting a Government department (and/or the Revenue Commissioners) or requiring another specified person, to disclose specified information concerning the debtor necessary for the effective enforcement of a judgment. The conditions under which such an order could be made should include a finding by the Debt Enforcement Office that it is reasonably necessary for the effective enforcement of a judgment and that other less restrictive mechanisms have failed or are inappropriate. The Commission recommends that local enforcement officers should include in their reports their opinions as to whether such a Request is necessary. The Commission recommends that creditors should be permitted to make submissions to the Debt Enforcement Officer requesting that such a Request should be made.*

4.61 *The office should be empowered to make an Enforcement Information Disclosure Request for specified data to Government departments such as the Department of Social Protection and the Revenue Commissioners. The information capable of being obtained in this manner should be limited to categories such as the following:*

- *the full name of the debtor;*
- *the address of the debtor;*
- *the date of birth of the debtor;*
- *the PPS number of the debtor;*
- *whether or not the debtor is employed;*
- *the name and address of the employer (if the debtor is employed);*

*The Commission recommends that other residual categories of information, such as the amount of income being received by the debtor from his or her employment or in social welfare benefits, should be specified in secondary legislation. Secondary legislation should in this regard follow the principles of proportionate enforcement and the least invasive interference with the privacy rights of debtors as is necessary in order to achieve the aim of effective enforcement of court judgments.*

4.62 *The Commission recommends that the Debt Enforcement Office should also be empowered to make Enforcement Information Disclosure Requests requiring other bodies such as banks, credit unions and credit reporting companies to disclose specified information concerning the debtor's means. Secondary legislation should be enacted to specify the details of the information capable of being disclosed under such a Request, along similar lines to the categories listed in the preceding paragraph. The recipient of such an order should be obliged to obey, except where circumstances mean that it would be impossible to do so, or that it would be unreasonable to require the recipient to do so.*

4.63 *The Commission recommends that the information received in response to a Request should not be passed by the Debt Enforcement Office to a creditor, but should be used by the Debt Enforcement Office to decide what method of enforcement, if any, is appropriate in the given case. Information should only be disclosed to an enforcement officer to the extent that it is necessary for the implementation of the enforcement order made by the office. This would for example involve the disclosure to the enforcement officer of the debtor's employment details in order to facilitate an attachment of earnings, or the disclosure of the debtor's bank account details in order to facilitate an attachment of the debtor's bank account.*

4.64 *The Commission recommends that secondary legislation should be introduced to specify the details of the procedures for information sharing. The Commission recommends that primary legislation should provide for a criminal offence of the unauthorised use or disclosure of information obtained under an Enforcement Information Disclosure Request.*

## **E Decision as to the appropriate enforcement mechanism**

### **(1) Consultation Paper and submissions**

4.65 The Commission's Consultation Paper invited submissions as to whether the choice of the enforcement mechanism to be used in a given case should remain with the judgment creditor or whether this choice should be the responsibility of the proposed enforcement office.<sup>100</sup> The Consultation Paper noted that the new enforcement system should be informed by the principles of balanced and proportionate enforcement, as supported by the reasoning of the Irish High Court in *McCann v The Judge of Monaghan District Court and Ors.*<sup>101</sup> The Commission raised the question of how the goal of balanced, proportionate and appropriate enforcement should best be achieved. While noting that recommendations for greater access to information concerning a debtor's means is a fundamental step towards achieving this aim, it must also be considered whether the aim could best be achieved by allocating responsibility for the enforcement mechanism to be used in a particular case to the neutral and independent enforcement office, rather than to the judgment creditor. The Consultation Paper outlined the various approaches taken to this question in other countries. The Commission outlined the arguments in favour of both retaining creditor choice and in assigning the decision as to the method of enforcement to an independent body.

4.66 The Commission received several submissions on this issue, which were divided in the opinions expressed. One submission argued that the Debt Enforcement Office and enforcement officers are best placed to choose the most appropriate method of enforcement. Enforcement officers would develop experience and expertise in identifying the most appropriate enforcement mechanisms in a given case, and would be sufficiently independent to strike a balance between the interests of creditors and debtors. The principle of proportionality would therefore be best protected by this approach. This would especially be the case where the Debt Enforcement Office is given greater access to information about debtors' means. Another submission suggested that consideration should be given to the views of all interested parties, including debtors, creditors and enforcement officers. Where there is disagreement between these parties as to the appropriate enforcement mechanism, however, an independent body should have the final say. This submission therefore in effect called for the choice of enforcement method of lie with the Debt Enforcement Office also. Another submission from a creditor representative body argued that creditors should continue to have an input into the choice of enforcement method used. This submission however was willing to contemplate the exercise of this choice by the Debt Enforcement Office, subject to two conditions. First, the decision of the office should be capable of being challenged by means of an appeal to the office, and secondly it must be guaranteed that the information on debtors' means available to the office is significantly better than that available to creditors.

4.67 Other submissions from creditor organisations were in favour of retained creditor choice. Two submissions expressed this view without providing any justification for this conclusion. A final submission suggested that creditors should be entitled to have a significant role in the enforcement process, and should retain the choice of mechanism. This submission argued that creditors should be entitled to notify the office if they believe that there are any circumstances that could assist in the recovery of the debt. In addition, creditors should be given the opportunity to have recourse to the courts where they believe that appropriate measures for effective enforcement have not been taken by the office.

### **(2) Conclusions and recommendations**

4.68 Having considered the submissions received and the positions in other comparable countries, the Commission considers that the principle of balanced, appropriate and proportionate enforcement can best be promoted by allocating the decision as to the enforcement mechanism to be adopted in a given case to the Debt Enforcement Office. The Commission has noted the objections to removing the choice of enforcement method from creditors in the submissions received, and in policy documents produced in other countries, but considers that the allocation of the choice of enforcement mechanism to an independent party best serves the aim of appropriate, balanced and proportionate enforcement. The

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<sup>100</sup> (LRC CP 56-2009) at paragraphs 6.179 to 6.186,

<sup>101</sup> [2009] IEHC 276; [2009] 4 I.R. 20. See also (LRC CP 56-2009) at paragraphs 2.25 to 2.34; 2.93 to 2.99.

Commission also takes the view that such an approach, which would ensure that the most proportionate enforcement method is chosen in each case, reflects better the *McCann* decision's interpretation of the standards demanded in enforcement by the Constitution of Ireland. The Commission notes that the rejection of the removal of this choice from creditors in England and Wales occurred in the context of a system where enforcement decisions are made by courts, rather than by a centralised enforcement body with expertise and specialisation in the area of enforcement. A court-based system of this kind does not separate adjudication and enforcement in the same manner as the Commission's proposed new system, and so different considerations may apply in such a situation.<sup>102</sup> In addition, as the methods for obtaining information concerning a debtor's assets, and in particular the data-sharing procedure envisaged above, should allow the office to obtain comprehensive information about the debtor's circumstances, the office should be in a better position than creditors to choose an appropriate and effective enforcement mechanism. Therefore the allocation of this role to the enforcement office should also benefit creditors. This is especially the case for smaller creditors who may have less experience of the enforcement process and less knowledge of the appropriateness of the various methods of enforcement.

4.69 The Commission therefore recommends that the choice of enforcement method should be allocated to the Debt Enforcement Office. This choice should take account of the opinion of an enforcement officer, as contained in the report provided to the Debt Enforcement Office by the enforcement officer. This report on the debtor's means will, in turn be based on the Debt Enforcement Office's relevant Code of Practice, which should ensure that the interests of creditors, as well as of the debtor, are taken into account. Creditors should be permitted to make representations to the office as to the appropriate enforcement mechanism. Creditors should also be permitted to request the office to issue an Enforcement Information Disclosure Order or Request, for the purposes of obtaining further information on the debtor's means before any decision as to the appropriate method of enforcement is made. The decision of the enforcement office should be capable of being appealed to the office by creditors or debtors, and ultimately should be capable of being challenged in the courts by a party who remains aggrieved after this internal appeals process.

4.70 Where the Debt Enforcement Office decides as to the appropriate enforcement mechanism, having regard to the principle of proportionality,<sup>103</sup> it should make an order to this effect. The Office order should communicate this order to the debtor, creditor and local enforcement officer in the debtor's region. The enforcement officer should then implement the order.

4.71 Where the Debt Enforcement Office, having assessed the debtor's means (in accordance with the report of the local enforcement officer), finds that the debtor is insolvent, it should issue a stay of enforcement. The purpose of this stay would be to remove the "can't pay" debtor from the system for the enforcement of judgments and to allow him or her to consider entering the personal insolvency system, or entering into a voluntary debt management arrangement. The Debt Enforcement Office should communicate notice of the stay of enforcement to the debtor, creditor and enforcement officer, and should record the stay in the register of court judgments and enforcement proceedings.<sup>104</sup> The Office should also provide the debtor and creditor with information regarding money advice, and the options available under the personal insolvency law system and voluntary debt management plans. The procedure for the interaction of the personal insolvency law system and the system for the enforcement of judgments is discussed further below.<sup>105</sup> In addition, where it appears to the Debt Enforcement Office that a money judgment for the enforcement of which an application has been made cannot be enforced within a reasonable time by any enforcement order, the Office shall issue to the creditor and to the debtor a Certificate of Unenforceability, which would have the effect of bringing enforcement proceedings in respect of that debtor to a close. This would of course also facilitate the debtor's entry into the personal insolvency system.

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<sup>102</sup> See e.g. Capper "A Debt Enforcement Office?" Paper presented at *Reforming the Law on Personal Debt*, Law Reform Commission Annual Conference 2009, 18<sup>th</sup> November 2009, Dublin Castle.

<sup>103</sup> See paragraph 5.16 below.

<sup>104</sup> See paragraphs 4.76 to 4.81.

<sup>105</sup> See paragraphs 4.93 to 4.100 below.

4.72 *The Commission recommends that the choice of enforcement method should be allocated to the Debt Enforcement Office. The Commission recommends that the local enforcement officer should include his or her opinion as to the appropriate method of enforcement in the report provided to the Debt Enforcement Office, and his or her opinion as to whether an Enforcement Information Disclosure Order/Request is required to make a decision as to the appropriate method. The Commission recommends that creditors and debtors should be entitled to make representations to the office as to the appropriate enforcement mechanism, and that creditors should be entitled to argue that an Enforcement Information Disclosure Order/Request is necessary for effective enforcement. The Commission recommends that creditors and debtors should be permitted to appeal the decision of the office through the office's internal appeals mechanisms, and that the decision of the enforcement office should ultimately be capable of being challenged in the courts by a party who remains aggrieved after this internal appeals process.*

4.73 *The Commission recommends that enforcement orders made by the central Debt Enforcement Office should be implemented by the local enforcement officer in the debtor's region.*

## **F Register of judgments**

### **(1) Consultation Paper**

4.74 The Commission's Consultation Paper noted that an advantage of a centralised enforcement system is that it would facilitate a comprehensive register of judgments and enforcement proceedings that could be consulted by creditors before commencing proceedings.<sup>106</sup> The Paper highlighted the flaws in the current system for reporting judgments, noting that the registration system depends on creditor initiative and is not comprehensive in nature.<sup>107</sup> The Commission suggested that the obligatory registration of all judgments could eliminate information gaps in the system, and provide information to creditors and the courts for the purposes of assessing the extent to which enforcement proceedings have already been commenced against the debtor, thus facilitating a holistic approach to the repayment difficulties of the debtor. The Commission suggested that this register could be consulted by creditors in advance of commencing enforcement proceedings, and so could assist in alleviating a current problem of multiple enforcement proceedings being brought against a debtor who may not be in a position to satisfy even one judgment debt. The Commission also suggested that the existence of such a register might even facilitate responsible lending practices to a limited extent, by allowing lenders to consider the extent to which proceedings have previously been brought against a potential borrower before lending to him or her. The Consultation Paper noted further that Debt Settlement Arrangements could also be registered in this manner. The Commission however further considered the implications for the privacy and reputational rights of debtors of such a register, and suggested that access may need to be regulated. Therefore the Commission provisionally recommended that a comprehensive register of judgment debts should be established, while inviting submissions as to how access to this register should be controlled.

### **(2) Submissions**

4.75 Submissions received were unanimously in favour of the introduction of a comprehensive register of judgments. One submission suggested that as court judgments are a matter of public record, there should be unlimited access to the register. Another submission also suggested that the register should be publicly accessible, but that a fee should be charged for access and this fee should be payable on a subscription basis. It was suggested that access to the register should be available online. Two submissions noted that such a comprehensive register would be useful for lenders when making decisions as to the creditworthiness of a potential borrower. Another indicated that the proposed register would be useful for establishing priority amongst debtors, particularly if an attachment of earnings system is introduced.

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<sup>106</sup> See (LRC CP 56-2009) at paragraphs 3.365 to 3.366; 6.187 to 6.193.

<sup>107</sup> (LRC CP 56-2009) at paragraphs 3.239 to 3.241 and paragraphs 3.365 to 3.366.

### **(3) Conclusions and Recommendations**

4.76 The Commission accepts the views proposed in these submissions and recommends that a comprehensive register of all judgments should be introduced. The Commission notes that under the enforcement system in Northern Ireland, the register of judgments and enforcement orders only includes judgments in respect of which an application for enforcement (or preliminary application) has been made; judgments in respect of which an order for a stay of enforcement has been made on the ground of the debtor's inability to pay; and certain enforcement orders (including attachment of earnings orders, committal orders and administration orders).<sup>108</sup> The Commission notes that problems arise regarding the registration of all judgments, as some judgments may be satisfied without delay and without recourse to enforcement proceedings. A register of all judgments would therefore include judgments that have been repaid, and so would be required to note that a satisfaction piece has been issued indicating the repayment of the judgment. The Commission considers that it may therefore be more appropriate for the register to include only judgments in respect of which applications for enforcement have been brought, as is the case in Northern Ireland. Debtors against whom such judgments have been awarded and against whom enforcement proceedings have been commenced should be allocated a unique identifier number in order to facilitate the identification of the debtor and to ascertain readily whether any other proceedings have been brought against the debtor. All stays of enforcement and certificates of unenforceability issued on the grounds of the inability of the debtor to pay the judgment debt owed should also be recorded in the register. Similarly, information concerning all enforcement orders made by the Debt Enforcement Office should be stored in the register, subject to removal after a specified duration of time following the satisfaction of the judgment debt owed.

4.77 The Commission has considered the issue of the interference with the privacy and reputational rights of debtors involved in the establishment of such a comprehensive register. The Commission notes that Article 34.1 of the Constitution of Ireland provides that justice is to be administered in public and Article 6 of the European Convention of Human Rights similarly provides that judgment shall be pronounced publicly. Court judgments are therefore a matter of public record, and similar principles apply to proceedings for the enforcement of judgments. Experts have commented that so long as a register of judgments is accurate, this requirement should prevail over the debtor's right to privacy.<sup>109</sup> The Commission also recognises that the establishment of a comprehensive register of judgments should provide a benefit to debtors in assisting in ensuring that debtors are not subject to the harassment of multiple legal proceedings being issued against them where they may not be able to satisfy all of the judgment debts owed. The Commission therefore recommends that the proposed comprehensive register of judgment debts and enforcement proceedings should be publicly accessible, and that access to the register should not be restricted. The Commission recommends that a fee should be payable for accessing the register however, which would limit spurious access and would also help to fund the costs of maintaining the register.

4.78 The Commission recommends that this register should be integrated with the Personal Insolvency Register discussed in previous chapters, in order to allow a creditor, court and/or the Debt Settlement Office and Debt Enforcement Office to ascertain the extent of the debtor's previous participation in proceedings relating to personal debt.

4.79 *The Commission recommends that a comprehensive register should be established and maintained by the Debt Enforcement Office to record specified information in relation to:*

- *all court judgments in respect of which an enforcement application has been brought;*
- *all enforcement proceedings in respect of which a stay of enforcement or certificate of unenforceability has been issued on the grounds of the inability of the debtor to pay the amount owed;*

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<sup>108</sup> Article 116 of the *Judgments Enforcement (Northern Ireland) Order 1981*.

<sup>109</sup> See Jacob *The Legality of Debt Enforcement* (Justice Discussion Paper 2003) at 43.

- *all enforcement orders made by the Debt Enforcement Office, subject to the removal of information relating to such orders after a specified period of time following the satisfaction of the order.*

4.80 *The Commission recommends that the register of judgments and enforcement proceedings should be publicly accessible and searchable. The Commission recommends that a fee should be payable in order to access the register, in order to deter spurious searches and to assist in meeting the costs of maintaining the register.*

4.81 *The Commission recommends that this register should be integrated with the Personal Insolvency Register discussed in previous chapters.*

## **G General Procedural Issues**

4.82 In this Part, the Commission proposes recommendations concerning general procedural issues arising as part of the introduction of the proposed new enforcement system.

### **(1) Simplification of pre-judgment procedures**

4.83 In its Consultation Paper, the Commission raised several issues for consideration as to how the procedural rules in proceedings for the recovery of a consumer debt could be simplified and made more effective. Some of the considerations identified have been addressed by the Interim Report's proposals for the introduction of a Pre-Action Protocol in Consumer Debt Claims.<sup>110</sup> Other possible measures of reform discussed by the Commission included the potential introduction of a single application procedure for consumer debt claims in all courts;<sup>111</sup> the simplification of the documentation required to make a debt claim;<sup>112</sup> and the use of technological advances to make the debt claim process more efficient.<sup>113</sup>

4.84 The Commission has published a *Report on the Consolidation and Reform of the Courts Acts*,<sup>114</sup> and as part of this project the Commission has made recommendations as to how court procedures, and in particular procedures concerning the making of applications to court, can be reformed. The Commission therefore makes no recommendations on this subject in the present Report.

### **(2) Encouraging non-judicial settlement of claims**

4.85 The Consultation Paper sought to establish as a fundamental principle the idea that debt disputes should be resolved in a non-judicial context wherever possible.<sup>115</sup> In this regard the Commission provisionally recommended that in personal debt enforcement proceedings, attempts at negotiating a voluntary debt rescheduling arrangement or a statutory debt settlement should be mandatory preconditions for enforcement.<sup>116</sup> The Consultation Paper therefore discussed the possibility of providing for stays of enforcement proceedings in order to allow attempts to resolve disputes by alternative means. The Paper then proceeded to discuss various procedural mechanisms that could be employed to facilitate the staying of proceedings in this manner.<sup>117</sup> The Commission invited submissions as to which, if any, of the various procedural frameworks discussed would be most appropriate.<sup>118</sup>

<sup>110</sup> (LRC 96-2010) at Appendix C and paragraphs 2.59 to 2.65.

<sup>111</sup> (LRC CP 56-2009) at paragraphs 6.122 to 6.123.

<sup>112</sup> (LRC CP 56-2009) at paragraphs 6.124 to 6.126.

<sup>113</sup> (LRC CP 56-2009) at paragraphs 6.127 to 6.128.

<sup>114</sup> LRC 97-2010.

<sup>115</sup> (LRC CP 56-2009) at paragraphs 2.117 to 2.120.

<sup>116</sup> (LRC CP 56-2009) at paragraph 6.132.

<sup>117</sup> (LRC CP 56-2009) at paragraphs 6.133 to 6.138.

<sup>118</sup> (LRC CP 56-2009) at paragraph 6.142.

4.86 Submissions received by the Commission on this subject varied to a considerable extent. Notably, there was opposition to the requirement that voluntary settlements should be attempted in all cases, as in some cases this would be inappropriate, such as where a debtor is attempting to frustrate enforcement. Also, one submission objected to this provisional recommendation on the basis that a statutory Debt Settlement Arrangement is only a possibility where the debtor is insolvent, and so in cases where the debtor “can pay”, it would be inappropriate to seek to reach an arrangement of this type. It would be inappropriate also to seek to negotiate a voluntary debt management plan in cases where the debtor has sufficient means to repay his or her obligations. This submission also stated that there should be a single entry point to the Debt Settlement Arrangement procedure, and that debtors should not be given multiple opportunities to enter the procedure where they have not availed of earlier opportunities. This could result in delays and inefficiencies in the enforcement process. Therefore while this submission agreed with the promotion of the non-judicial resolution of debt disputes, it disagreed with the proposed mandatory requirement that attempts be made to reach a voluntary resolution of the dispute in all cases, particularly where attempts to resolve the dispute in an amicable manner may have been made at earlier stages in the process. The submission did however make some suggestions as to how the use of the Debt Settlement Arrangement procedure could be promoted over enforcement proceedings. It suggested that greater exempted income allowances could be provided to debtors under the Debt Settlement Arrangement procedure than under enforcement rules, in order to encourage debtors to exercise initiative and enter the arrangement procedure rather than failing to address their problems and allowing enforcement action to be taken against them.

4.87 Remaining submissions addressed the procedural framework for the interaction of the proposed new Debt Settlement Arrangement procedure with the new system for the enforcement of judgments. This subject is discussed below.<sup>119</sup>

4.88 The Commission considers that the subject of promotion of non-judicial resolutions to debt disputes over formal legal enforcement proceedings has been adequately addressed through the Commission’s Interim Report and through recommendations made elsewhere in this Report. In particular, the Commission’s recommendations for the introduction of a Pre-Action Protocol in Consumer Debt Claims seek to promote the amicable resolution of debt disputes without recourse to legal proceedings.<sup>120</sup> The Interim Report contains Model Rules of Court designed by the Commission and members of the Courts Service management to provide a means for giving effect to the Pre-Action Protocol.<sup>121</sup> Under these Model Rules, a creditor would be obliged to provide certain information to the debtor in the form of a “warning letter” in advance of commencing court proceedings for the recovery of a debt. Therefore the protocol is applicable at the pre-judgment stage of proceedings, before a court judgment has been obtained and so before enforcement action may be taken. The Model Rules contain detailed rules as to the content of the “warning letter” to be supplied by creditors, including requirements that the letter should explain the nature and consequences of the proceedings that the creditor intends to bring, as well as the circumstances giving rise to the proceedings. Most importantly for present purposes, the warning letter must advise the debtor to consider urgently seeking the assistance of the Money Advice and Budgeting Service or another debt advice service or of a legal advisor. It also must state whether the creditor is willing to accept part-payment in satisfaction of the amount claimed, and should specify an acceptable amount. In addition, the warning letter may invite the debtor to use mediation, conciliation, arbitration or another dispute resolution process to settle the claim before legal proceedings are commenced.

4.89 In addition to these requirements in relation to the provision of a “warning letter”, the Model Rules provide that judgment may not be obtained in the court office in respect of consumer debt proceedings in default of appearance or in default of defence. Instead, an application for leave to enter judgment must be made by motion returnable before the Master of the High Court (or equivalent officer in the Circuit and District courts). This hearing is intended to facilitate the resolution of the dispute without court proceedings, and the Model Rules provide that the Master of the High Court may adjourn

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<sup>119</sup> See paragraphs 4.93 to 4.100 below.

<sup>120</sup> (LRC 96-2010) at paragraphs 2.59 to 2.65.

<sup>121</sup> (LRC 96-2010) at Appendix C.



proceedings to allow attempts to resolve the claim amicably to take place.<sup>122</sup> In addition, the Court may adjourn proceedings in similar circumstances,<sup>123</sup> or impose costs sanctions in the event of non-compliance by the creditor with the requirement to deliver a warning letter to the debtor. The Court may take these actions also where the creditor has failed without reasonable opportunity to give the debtor a reasonable opportunity to attempt to settle the claim by an alternative dispute resolution process.<sup>124</sup>

4.90 The Commission believes that these measures are sufficient to promote the amicable resolution of consumer debt disputes outside of the legal process. The requirement that the creditor send a letter to the debtor advising him or her to consider seeking independent advice and potentially inviting the debtor to cooperate in resolving the dispute should facilitate the aim of avoiding litigation, while also retaining a balance in permitting creditors to proceed with enforcement where the debtor is not engaging in the process and does not avail of the options identified in the warning letter. The Commission notes that the consequences of non-compliance with requirements to send a warning letter and to provide an opportunity to settle the dispute through alternative dispute resolution mechanisms include the adjournment of proceedings and costs sanctions. The Commission takes the view that such deterrents are sufficient to lead creditors to attempt to resolve disputes outside of the legal process in appropriate cases, while not being so severe as to restrict creditors' right of access to the court in cases where such attempts are inappropriate.<sup>125</sup> Therefore the Commission makes no further recommendation in this regard.

4.91 *The Commission recommends that, in order to promote the resolution of debt disputes outside of the legal process in appropriate cases, the recommendations for a Pre-Action Protocol in consumer debt claims and Model Rules of Court proposed in the Commission's Interim Report should be implemented at High Court, Circuit Court and District Court levels.*

4.92 The Commission also wishes to clarify that the proposed Debt Settlement Arrangement procedure is reserved for debtors who are insolvent and who meet the other eligibility criteria for the procedure outlined above.<sup>126</sup> Therefore where attempts are made to resolve a debt dispute without recourse to enforcement proceedings, consideration of the Debt Settlement Arrangement procedure may not be appropriate unless the debtor is insolvent. Nonetheless, where the debtor is advised to obtain money advice by the "warning letter" as part of the Pre-Action Protocol, this money advice may lead to insolvent debtors considering the option of entering the Debt Settlement Arrangement procedure, and in such a case a debtor may then apply to enter that procedure. In this manner in certain cases the Pre-Action Protocol for legal proceedings for the recovery of a debt may result in a Debt Settlement Arrangement, but the Commission wishes to emphasise that where a debtor is not insolvent the non-judicial methods of resolving amicably the debt dispute will not involve such an arrangement.

### **(3) *Procedural framework for interaction of enforcement and Debt Settlement Arrangement/Debt Relief Order system***

4.93 The next issue to be discussed is that of the appropriate procedural framework for the interaction of legal proceedings for the recovery of debt (encompassing both the obtaining of a court judgment and the enforcement of that judgment) and the proposed Debt Settlement Arrangement procedure. The Consultation Paper outlined three options in this regard.<sup>127</sup> The first of these options involved providing for a power of the court in consumer debt claims to stay proceedings in order to allow the options of reaching a Debt Settlement Arrangement or voluntary debt rescheduling plan to be

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<sup>122</sup> See Draft Order 13, rule 15 of the *Rules of the Superior Courts 1986-2010*, (LRC 96-2010) at Appendix C.

<sup>123</sup> See Draft Order 37A, rule 4 of the *Rules of the Superior Courts 1986-2010*, (LRC 96-2010) at Appendix C.

<sup>124</sup> See proposed Draft Order 76 rule 129 of the *Rules of the Superior Courts 1986-2010*, (LRC 96-2010) at Appendix C.

<sup>125</sup> See (LRC CP 56-2009) at paragraphs 2.07 to 2.23 for a discussion of creditors' right of access to a court and property rights.

<sup>126</sup> See 1.334 above.

<sup>127</sup> (LRC CP 56-2009) at paragraphs 6.133 to 6.138.

considered. The second option proposed would involve allowing a creditor to obtain a court judgment against the debtor and so to establish priority, while providing that the Debt Enforcement Office could stay enforcement to allow these alternative approaches to be explored. Finally, the third option proposed would involve requiring creditors to seek the permission of the Debt Enforcement Office before they could even commence proceedings in a consumer debt claim. This procedure would involve an assessment of the debtor's means at the pre-judgment stage, and the direction of the appropriate procedures by the Debt Enforcement Office based on this assessment. The Commission then invited submissions as to which of these proposed procedural models, if any, would be most appropriate.

4.94 The Commission received several submissions in response to these proposals. These submissions varied considerably in their preferences. Submissions from parties representing debtor interests tended to favour the third option of requiring the authorisation of the Debt Enforcement Office in order to bring proceedings for the recovery of a debt. This view was based on the potential for such an approach to allow the majority of the process to take place outside of the court setting. Parties representing creditor interests in contrast favoured the second option, of allowing creditors to obtain a court judgment against a defaulting debtor, but then providing for a stay of enforcement activity in order to allow the debtor to avail of the Debt Settlement Arrangement procedure where he or she is insolvent. This approach was said to be most respectful of the property rights and right of access to a court of creditors, and fitted most easily with the principle of appropriate and proportionate enforcement, based on a comprehensive assessment of the debtor's means.

4.95 Having considered these submissions and recommendations made elsewhere in this Report, the Commission recommends that the appropriate procedural framework for the interaction of the new enforcement and insolvency systems should take the form of a combination of the first and second options.<sup>128</sup> The Commission notes that this view is partly informed by the procedure under the proposed Pre-Action Protocol in consumer debt claims,<sup>129</sup> and by the recommendation that the Debt Enforcement Office, as informed by the opinions of the enforcement officer, creditor and debtor, should be responsible for deciding the appropriate method of enforcement in a given case.<sup>130</sup>

4.96 First, as a preliminary step, the Commission wishes to emphasise that a court judgment must be obtained before enforcement proceedings may be commenced. While the Commission notes that there have been some suggestions that the enforcement or recovery of debts should take place entirely outside the court system, and that the Commission supports the principle of the non-judicial resolution of debt disputes, nonetheless a court judgment must be obtained before the coercive enforcement mechanisms of the State may be used to recover a debt. This is required by the Constitution of Ireland, through the protection of the judicial function under Articles 34 and 37.1, and through the protection of the right of access to a court under Article 40.1.<sup>131</sup> In order to protect the rights of the parties to enforcement proceedings, a court judgment, and the adjudication on the respective rights of the parties which court proceedings involve, is a necessary safeguard. Therefore the Commission wishes to emphasise that before enforcement action may be taken through the Debt Enforcement Office, a creditor must first obtain a court judgment. This is a view that was accepted unanimously in the submissions made to the Commission.

4.97 *The Commission recommends that a court judgment should be a necessary precondition for an application to the Debt Enforcement Office for enforcement action.*

4.98 In relation to the following procedural steps, the Commission notes that the first option of the staying of court proceedings (i.e. before a judgment has been obtained) has already been proposed by the Commission in its Interim Report and in its recommendations above for the introduction of a Pre-Action Protocol in consumer debt claims.<sup>132</sup> Therefore the Model Rules of Court providing for the

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<sup>128</sup> See also (LRC CP 56-2009) at paragraphs 6.133 to 6.137.

<sup>129</sup> See paragraphs 4.88 to 4.91 above.

<sup>130</sup> See paragraphs 4.65 to 4.71 above.

<sup>131</sup> (LRC CP 56-2009) at paragraphs 2.07 to 2.15; 6.99 to 6.109.

<sup>132</sup> See paragraphs 4.88 to 4.91 above and (LRC 96-2010) at paragraphs 2.59 to 2.65; Appendix C.

introduction of the protocol specify that court proceedings may be adjourned in order to require the creditor to advise the debtor to seek money advice, or to require the creditor to invite the debtor to attempt to resolve the dispute via alternative dispute resolution mechanisms. Where a debtor obtains money advice during this period, he or she may choose to apply to enter the Debt Settlement Arrangement procedure, provided that he or she is insolvent and meets the other eligibility requirements. Therefore this procedure in effect amounts to the first option proposed by the Commission in its Consultation Paper. This approach serves to promote the non-judicial resolution of debt disputes and the facilitation of a holistic consideration of the most appropriate option in the debtor's circumstances, while also avoiding limiting unduly creditors' right of access to the courts and property rights. The Commission therefore considers that this approach is more compatible with the protection of these rights of creditors than the third option considered by the Commission in its Consultation Paper, which would involve the intervention of the Debt Enforcement Office before creditors have been given the chance to access a court and assert their rights.

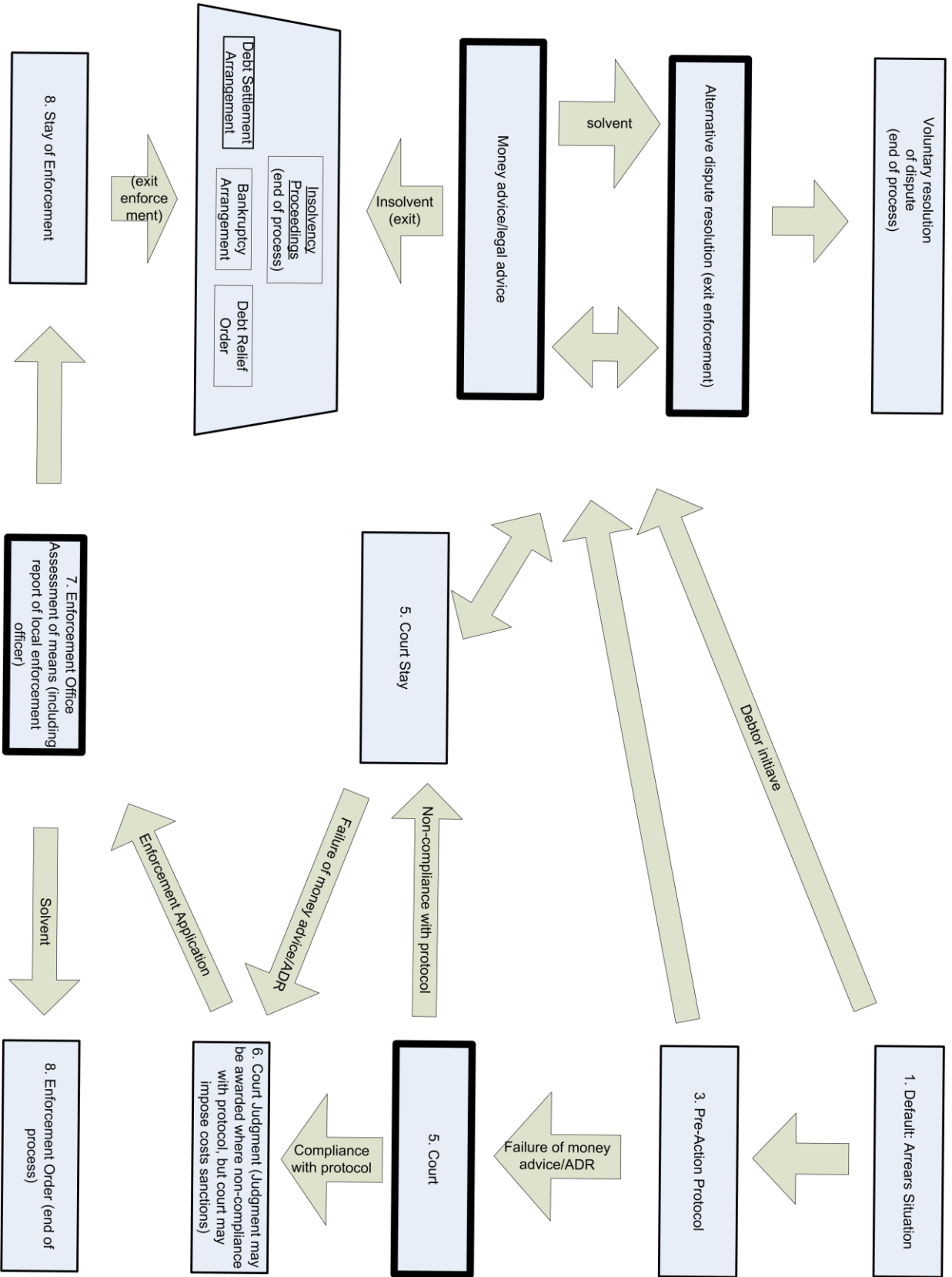
4.99 The Commission has recommended above that the Debt Enforcement Office should be responsible for assessing the debtor's means and making a decision as to the appropriate method of enforcement in each case in which an enforcement application is brought.<sup>133</sup> This suggests that the role of the office in postponing enforcement in order to allow insolvency procedures to be considered should take place after a judgment has been obtained, an enforcement application has been brought, and the means of the debtor have been assessed. Following the procedure in Northern Ireland, the Commission has recommended above that where the assessment of the debtor's means finds him or her to be insolvent and leads the Debt Enforcement Office to conclude that the debtor's assets and income should be administered collectively for the benefit of all of his or her creditors, the Debt Enforcement Office should be empowered to stay enforcement.<sup>134</sup> This stay of enforcement is designed to facilitate the exit of the debtor from the enforcement system and his or her entry into the most appropriate of the three insolvency procedures to be established under the recommendations contained in Chapters 1 to 3, or into a voluntary debt management plan. In addition, the Commission has recommended that where it appears to the Debt Enforcement Office that a money judgment for the enforcement of which an application has been made cannot be enforced within a reasonable time by any enforcement order, the Office shall issue to the creditor and to the debtor a Certificate of Unenforceability. Therefore for this reason the Commission recommends that the system should provide for a facility to stay enforcement after judgment has been obtained where the debtor has been found to be insolvent, and where insolvency proceedings rather than enforcement proceedings are more appropriate.

4.100 The Commission therefore proposes that the procedure for the interaction of the enforcement and insolvency systems should take the form outlined in the following illustration:

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<sup>133</sup> See paragraphs 4.65 to 4.81 above.

<sup>134</sup> See paragraph 4.71 above.



**(4) Single application for all enforcement mechanisms**

4.101 In its Consultation Paper, the Commission provisionally recommended that enforcement proceedings should be commenced by a single application procedure, irrespective of the method of enforcement which is ultimately chosen.<sup>135</sup> This procedure would involve judgment creditors applying to the Debt Enforcement Office for the enforcement of a judgment, with the Debt Enforcement Office, in tandem with local enforcement officers, deciding upon the appropriate enforcement mechanism in the circumstances of the case.

4.102 The submissions received by the Commission unanimously supported this provisional recommendation. It was suggested that the introduction of a single application procedure for the enforcement of judgment debts would greatly simplify the process from the perspective of both the creditor and debtor. Submissions suggested that a simplification of the procedure, documentation and terminology required to commence proceedings for the enforcement of a judgment would be desirable and could also lead to lower costs.

4.103 The Commission accepts the views expressed in these submissions and considers that its provisional recommendation should be adopted. The Commission therefore recommends that enforcement proceedings should be commenced by a single application procedure, irrespective of the method of enforcement which is ultimately chosen by the Debt Enforcement Office, and irrespective of the enforcement mechanism favoured by the judgment creditor in the given case. The application procedure should however permit judgment creditors to indicate which enforcement mechanism they consider should be adopted in a given case, and to provide the grounds on which they consider that mechanism to be appropriate. The Commission recommends that secondary legislation should specify the procedure for making an application for the enforcement of a judgment, as well as the documentation required.

4.104 *The Commission recommends that enforcement proceedings should be commenced by a single application procedure, irrespective of the method of enforcement which is ultimately chosen by the Debt Enforcement Office, and irrespective of the enforcement mechanism favoured by the judgment creditor in the given case. The Commission recommends that the application procedure should however permit judgment creditors to indicate which enforcement mechanism they consider should be adopted in a given case, and to provide the grounds on which they consider that mechanism to be appropriate. The Commission recommends that secondary legislation should specify the procedure for making an application for the enforcement of a judgment, as well as the documentation required.*

**(5) Summary of procedure for the enforcement of judgments**

4.105 For the purpose of providing an overview of the proposed arrangements, the Commission summarises here the procedure for the enforcement of judgments under the proposed new system as including the following procedural steps:

- Court judgment
- Enforcement application made by judgment creditor to Debt Enforcement Office
- Communication by Office of notice of enforcement application to debtor and local enforcement officer in debtor's region.
- Information obtained on debtor's means:
  - Debtor completes Standard Financial Statement; or
  - Local enforcement officer visits debtor's home and interviews him/her; or
  - Debtor summoned to answer questions under oath in local enforcement officer's office.
- Report of local enforcement officer presented to central Office, debtor and creditor
  - Debtor and creditor can make submissions to Office as to appropriate enforcement mechanism
  - Creditor can argue for Enforcement Information Disclosure Order

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<sup>135</sup> (LRC CP 56-2009) at paragraph 6.199.

- Office decides whether sufficient information is available to make an enforcement order
  - If not, Office makes Enforcement Information Disclosure Order
- Office makes enforcement order
  - If necessary, Office communicates information obtained under Enforcement Information Disclosure Order to the local enforcement officer
  - If debtor is insolvent, a stay of enforcement is issued to allow consideration of consideration of options under insolvency procedures or voluntary debt management plan
  - If debtor shows no reasonable prospect of paying within a reasonable period, Office may issue certificate of unenforceability: terminates enforcement proceedings.
- Office communicates decision to local enforcement officer, debtor and creditor.
  - Creditor and debtor can avail of Office’s internal appeal mechanism
  - Creditor and debtor can challenge decision in court.
- local enforcement officer implements enforcement order.
- Local enforcement officer makes report to creditors and to the Office:

4.106 The Consultation Paper, building on a recommendation of a previous Report of the Commission,<sup>136</sup> proposed that under the enforcement mechanism of execution against goods, enforcement officers should be required to provide reports to creditors on the progress of the enforcement process.<sup>137</sup> The paper noted that under the current law, the Sheriff or County Registrar is obliged to make a return to the court indicating the success of the execution process, but that there is no duty to make such a return to the judgment creditor. A practice does exist (without being required by law) whereby monies realised are paid directly to creditors, who are also presented with the execution order with the result endorsed on it for filing in court. The Commission recommended that the introduction of a duty of enforcement officers to report to creditors would improve levels of transparency and accountability in the enforcement process, and noted that these factors have been cited as reasons for the levels of satisfaction existing in relation to the enforcement activities of the Revenue Sheriffs.<sup>138</sup> The Commission therefore provisionally recommended that judgment creditors should be entitled to obtain a progress report from an enforcement officer detailing the steps that have been taken to enforce a judgment debt. The Commission invited submissions as to the information that should be contained in such a report, and as to the time after the issue of an execution order at which such a report should be made available.

4.107 The submissions received by the Commission in response to this provisional recommendation unanimously supported it. Submissions noted that such reporting requirements would increase transparency and accountability in the enforcement process. One submission suggested that progress reports and inventories currently operating under the Revenue Commissioners and Revenue Sheriffs’ enforcement system could be adapted for the proposed new system. Reports could be lodged by local enforcement officers with the central Debt Enforcement Officers. Another submission suggested that progress reports should be required to be made on a regular basis, such as every month. The information required to be provided in a report should include such details as the efforts made by an enforcement officer where the enforcement attempts have been unsuccessful.

*4.108 The Commission recommends that the procedure for enforcement under the proposed new system should require the submission of reports by the enforcement officers to both the Debt Enforcement Office and the judgment creditor within a specified period detailing the progress of the enforcement process and the efforts made to enforce the judgment debt in question.*

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<sup>136</sup> Law Reform Commission *Report On Debt Collection: (1) The Law Relating to Sheriffs* (LRC 27–1988) at paragraph 28.

<sup>137</sup> (LRC CP 56-2009) at paragraphs 6.420 to 6.424.

<sup>138</sup> (LRC CP 56-2009) at paragraphs 6.54 to 6.57; 6.422.

4.109 *The Commission recommends that the procedure for enforcement under the proposed new system should require the submission of reports by the enforcement officers to both the Debt Enforcement Office and the judgment creditor within a prescribed period of time detailing the progress of the enforcement process.*





## CHAPTER 5 DEBT ENFORCEMENT: REFORM OF INDIVIDUAL ENFORCEMENT MECHANISMS

### A Introduction

5.01 This Chapter contains the Commission's recommendations for the reform of procedural and substantive rules relating to individual enforcement mechanisms. In addition to making recommendations for the establishment of a new structural framework for the enforcement of court judgments, the Consultation Paper also provisionally recommended changes to the law applicable to these individual methods of enforcement.<sup>1</sup> These provisional recommendations were intended to facilitate the operation of the enforcement mechanisms within the proposed new system, in addition to modernising and improving these procedures in accordance with the principles for reform outlined by the Consultation Paper.<sup>2</sup> The following Parts therefore recount the provisional recommendations of the Consultation Paper, before presenting a brief account of the content of submissions received by the Commission in response. Each Part concludes with the Commission's final recommendations for reform in respect of each enforcement mechanism.

### B Instalment Orders

5.02 The first mechanism for the enforcement of judgments to be examined by the Commission is the instalment order procedure. An outline of this enforcement method can be found in the Consultation Paper.<sup>3</sup>

#### (1) Consultation Paper: Provisional Recommendations

5.03 The Consultation Paper noted the general dissatisfaction existing in relation to the operation of the instalment order procedure, both from the point of view of debtors and creditors.<sup>4</sup> While the most serious deficiencies in the procedure were remedied by the *Enforcement of Court Orders (Amendment) Act 2009*, the Paper stated that some specific difficulties remained to be addressed.

5.04 The Commission noted that the instalment order procedure is less restrictive of the rights of debtors than other more severe enforcement mechanisms, and as it is often an appropriate enforcement mechanism having regard to the financial circumstances of the debtor. The Commission therefore took the view that the prioritisation of the instalment order procedure would assist in enshrining the principle of proportionality in the new proposed enforcement system.<sup>5</sup> The Commission therefore proposed a general rule that in each case enforcement through the instalment order procedure must be attempted, or at least considered and disregarded as inappropriate, before other enforcement mechanisms may be used. The Commission emphasised that creditors should be permitted to have recourse to other methods of enforcement where it could be shown that the instalment order procedure would be inappropriate or ineffective however.

5.05 The Consultation Paper also provisionally recommended that suspended execution orders against goods, garnishee orders and attachment of earnings orders should be capable of being used in

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<sup>1</sup> (LRC CP 56-2009) at paragraphs 6.200 to 6.445.

<sup>2</sup> (LRC CP 56-2009) at paragraphs 2.05 to 2.125.

<sup>3</sup> (LRC CP 56-2009) at paragraphs 3.283 to 3.297.

<sup>4</sup> (LRC CP 56-2009) at paragraphs 3.290 to 3.294; 6.200.

<sup>5</sup> (LRC CP 56-2009) at paragraph 6.201.

conjunction with instalment orders, and that these suspended orders could come into effect automatically in the case of a failure to comply with an instalment order.<sup>6</sup>

5.06 In addition to these proposals, the Commission also considered how the instalment order procedure could be otherwise improved. The Commission therefore provisionally recommended the introduction of a reformed procedure to enable debtors to make offers of payment by instalments on receipt of a summons for debt proceedings.<sup>7</sup> The Commission invited submissions as to the most appropriate procedure for facilitating consensual instalment payments in this manner. Next the Consultation Paper identified a problem arising under the current instalment order procedure whereby instalment orders may be made by a District Court in the absence of the debtor. This has the consequence that instalment orders may be made without sufficient accurate information being made available to the court concerning the debtor's financial circumstances to allow the court to make a realistic and appropriate order. The Commission therefore provisionally recommended that an instalment order should not be capable of being made in the absence of accurate information about the debtor's means and ability to pay.<sup>8</sup>

5.07 The Commission's provisional recommendations also included a proposal that the debtor should be provided with clear and readily understandable information on his or her right to seek a variation of an instalment order where the debtor's ability to comply with an order changes.<sup>9</sup>

5.08 A final issue examined by the Commission in relation to the instalment order procedure was the situation where multiple enforcement orders are made against a single debtor in respect of several different debts.<sup>10</sup> It was noted that at present the general lack of a holistic approach in the enforcement of judgment debts has as a consequence the result that multiple orders may be made against a debtor who may be unable to repay even one such order. While the Consultation Paper noted that other measures it proposed should alleviate this problem, it noted that suggestions have been made that another appropriate reform would be for a system of consolidated instalment orders to be introduced, whereby multiple instalment orders could be combined into a single regular repayment. The Commission therefore invited submissions as to whether such a consolidated instalment order mechanism should be introduced.

## **(2) Submissions**

5.09 The submissions received by the Commission in relation to the issue of the prioritisation of instalment orders over other methods of enforcement varied widely. Some submissions were strongly opposed to the suggestion that instalment orders should be mandatorily applicable in certain cases. It was suggested that such an approach would not be compatible with creditors' rights, with one submission arguing that such an approach could frustrate recovery where more effective and reasonable recovery options are available. One submission was most concerned with the principle that the most appropriate enforcement mechanism in each case should be identified and applied based on an assessment of the actual circumstances of the debtor. This submission emphasised the need to retain flexibility in the enforcement system to allow appropriate enforcement in each case. The expense of instalment orders, and in particular the cost of supervising continuous repayments, was also highlighted. It was noted also that many debtors will have been given the opportunity by a creditor to pay through instalments before enforcement was attempted, thus meaning that it may be inappropriate to require a further attempt at repayment by instalments.

5.10 In contrast, other submissions were more positive towards the suggestion that instalment orders should be prioritised, although it should be noted that even these submissions did not go quite so far as to suggest a position whereby instalment orders are mandatory unless shown to be inappropriate. Thus one submission suggested that instalment orders should be promoted by the Debt Enforcement

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<sup>6</sup> (LRC CP 56-2009) at paragraphs 6.202 to 6.203.

<sup>7</sup> (LRC CP 56-2009) at paragraphs 6.207 to 6.210.

<sup>8</sup> (LRC CP 56-2009) at paragraphs 6.211 to 6.212.

<sup>9</sup> (LRC CP 56-2009) at paragraphs 6.215 to 6.216.

<sup>10</sup> (LRC CP 56-2009) at paragraphs 6.213 to 6.214.

Office as a first step in the enforcement of judgments, particularly in cases of the enforcement of debts arising from unsecured credit agreements. This submission's main concern was that the individual circumstances of the debtor should be taken into account in all enforcement proceedings, and that the law should reflect the findings of research that debt default is most often caused by factors external to the debtor. A final submission similarly noted that instalment orders are an effective method of achieving debt repayment but that caution must be exercised in relation to the making of such orders and sufficient income must always be left to the debtor to permit a reasonable standard of living.

5.11 There was less disagreement in relation to the Commission's other proposals for the reform of the instalment order procedure. Submissions demonstrated widespread support for the introduction of a procedure whereby instalment orders could be accompanied by suspended execution orders against goods, garnishee orders and attachment of earnings orders. Such a position would allow enforcement mechanisms such as execution against goods or attachment of earnings to come into effect automatically where a default occurs in repaying an instalment order. Those submissions that addressed the issue of introducing reformed procedures to enable debtors to make offers of payments by instalments on receipt of a summons for debt proceedings all supported this proposal. Submissions also supported the general principle that an instalment order should not be made in the absence of information concerning a debtor's circumstances and ability to pay. Caution was urged in relation to this principle however, and it was argued that the principle must not be abused to allow debtors to frustrate the enforcement process by refusing to provide information concerning their ability to pay. In this regard the Commission's proposals for ensuring access to more comprehensive and accurate information concerning a debtor's ability to pay should be noted.<sup>11</sup>

5.12 A majority of submissions also supported the proposal considered by the Commission for the introduction of consolidated instalment orders. Important concerns regarding the introduction of such a system were raised however. The primary concern among submissions related to how priorities among creditors would be established and ordered under such a system. One submission was opposed to the introduction of consolidated instalment order entirely on the basis that it would be difficult to protect the position of creditors under such a system, in that creditors who have acted in a timely manner may not be rewarded and may be undermined by creditors who have acted more inefficiently. In relation to this last point the Commission notes that creditors who begin court proceedings hastily without considering appropriate alternatives may not be following practices of responsible arrears management, and so may not deserve to be rewarded.<sup>12</sup> This is particularly the case if rewarding such creditors would be at the expense of creditors who are more responsible in exploring options other than court proceedings.

### **(3) Conclusions and Recommendations**

5.13 The following paragraphs therefore present the Commission's conclusions and recommendations regarding the reform of the instalment order procedure.

#### **(a) Prioritisation of Instalment Orders**

5.14 The Commission accepts the arguments made in the majority of submissions to the effect that it may not be appropriate to introduce a procedure whereby enforcement via instalment order must be attempted unless this procedure can be shown to be ineffective based on the facts of the case. The Commission notes however that the principle of proportionality in enforcement, as discussed in cases such as *McCann v Judge of Monaghan District Court and Ors.*, requires that methods of enforcement that are less restrictive of the rights of debtors be attempted before more restrictive measures may be deployed.<sup>13</sup> Therefore while it may not be appropriate to introduce a statutory rule requiring instalment orders to be prioritised in all cases unless shown to be inappropriate, the fact that an instalment order may be the least restrictive method of enforcement in many individual cases must nonetheless continue to be borne in mind.

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<sup>11</sup> See paragraphs 4.32 to 4.81 above.

<sup>12</sup> See (LRC CP 56-2009) at paragraphs 1.80 to 1.95; 3.103 to 3.130; 4.174 to 4.234.

<sup>13</sup> See (LRC CP 56-2009) at paragraphs 2.32 to 2.34; 2.93 to 2.101.

5.15 The Commission therefore does not recommend that a statutory rule should be introduced to require enforcement through an instalment order to be attempted or at least considered before other enforcement mechanisms may be used. The Commission instead recommends that an express statutory rule should be created to the effect that the Debt Enforcement Office, when deciding on the appropriate method of enforcement in a given case, should have regard to the principle of proportionality and the need to ensure that the enforcement method chosen is the mechanism that is least restrictive of the debtor's rights in the given case. The Commission believes that such an approach would accord with the principle of proportionate enforcement, as established in the *McCann* case, while also providing the flexibility necessary to ensure the appropriate enforcement mechanism is chosen in each individual case.

5.16 *The Commission recommends that an express statutory rule should be included in legislation to the effect that the Debt Enforcement Office, when deciding on the appropriate method of enforcement in a given case, should have regard to the principle of proportionality and the need to ensure that the enforcement method chosen is the mechanism that is least restrictive of the debtor's rights in the given case.*

**(b) Instalment orders accompanied by other suspended enforcement mechanisms**

5.17 As noted above, the submissions received by the Commission expressed support for the provisional recommendation that suspended execution orders against goods, garnishee orders and attachment of earnings orders should be introduced to take effect automatically where a default occurs in the payment of an instalment order. In light of the support for this provisional recommendation, the Commission makes a final recommendation to this effect.

5.18 *The Commission recommends that suspended execution orders against goods, garnishee orders and attachment of earnings orders should be capable of being made in conjunction with instalment orders, so that these suspended orders could come into effect automatically in the case of a failure to comply with an instalment order.*

**(c) Facilitating offers of instalments in uncontested claims**

5.19 Submissions generally accepted the Commission's provisional recommendation to the effect that a procedure should be introduced to enable debtors to make offers of payment by instalments on receipt of a summons for debt proceedings. The submissions received did not however provide opinions as to the detail of how such a procedure should operate. While the Consultation Paper had provisionally recommended that a procedure should allow a debtor to make an offer of payment by instalments on receipt of the summons initiating legal proceedings, the Commission considers that its proposals for the introduction of a Pre-Action Protocol in Consumer Debt Claims could facilitate the making of such an offer of payment by instalments at an even earlier stage.<sup>14</sup> In light of the support for the provisional recommendation and the principle that consensual arrangements to repay debts by instalment should be facilitated at the earliest possible stage of legal proceedings, the Commission recommends that a procedure should be introduced whereby a debtor who receives notice of impending legal proceedings for the recovery of a debt may admit the claim and make an offer to pay the amount owed by instalments, with such offer capable of being made into a consensual court order on the agreement of the creditor. This procedure could be developed from the Commission's proposed Pre-Action Protocol in Consumer Debt Claims, which obliges creditors (in a pre-litigation notice or "warning letter") to notify debtors in advance of the commencement of legal systems whether they are willing to accept part payment in satisfaction of the amount claimed, and to invite debtors to settle the claim via a dispute resolution process.<sup>15</sup> A procedure could be created whereby a response by the debtor to these offers of the creditor could be embodied in a consensual court order, where the creditor accepts the debtor's response. The Commission recommends that Rules of Court should be introduced to specify the detailed format that this procedure should take.

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<sup>14</sup> Law Reform Commission *Interim Report on Personal Debt Management and Debt Enforcement* (LRC 96-2010) at paragraphs 2.59 to 2.65 and Appendix C.

<sup>15</sup> (LRC 96-2010) at paragraph 2.63 and Appendix C. See in particular draft Order 37A Rule 2(e) and 2(g) of the *Rules of the Superior Courts 1986-2010*.

5.20 *The Commission recommends that a procedure should be introduced whereby a debtor who receives notice of impending legal proceedings for the recovery of a debt may admit the claim and make an offer to pay the amount owed by instalments, with such offer capable of being made into a consensual court order on the agreement of the creditor. The Commission recommends that the introduction of this procedure should build upon the Pre-Action Protocol in Consumer Debt Cases proposed by the Commission in its Interim Report on Personal Debt Management and Debt Enforcement. The Commission recommends that Rules of Court should be introduced to specify the detailed format of this procedure.*

**(d) No instalment order to be made in the absence of adequate information concerning a debtor's resources**

5.21 As noted above, the Consultation Paper also provisionally recommended that the law should provide that an instalment order should be incapable of being made in the absence of accurate information about the debtor's means and ability to pay.<sup>16</sup> This provisional recommendation was based on the failings of the current system as clearly identified by the Free Legal Advice Centres reports on this area of the law.<sup>17</sup> A problem arising in relation to the existing procedure is that instalment orders may be made by a District Court in the absence of the debtor, in circumstances where the court may not have had comprehensive information as to the ability of the debtor to comply with the payment schedule imposed by the order.

5.22 The Commission notes that under its proposed reforms to the enforcement system as a whole, it is envisaged that enforcement orders will only be made following a comprehensive assessment of the debtor's means.<sup>18</sup> Enforcement orders will also be the result of a decision by the Debt Enforcement Office as to the debtor's ability to satisfy the judgment debt, and the most appropriate mechanism for so doing. The Commission has recommended that in order to facilitate the making of such decisions, improved procedures for obtaining information about the debtor's financial circumstances should be made available to the Debt Enforcement Office.<sup>19</sup> The Commission takes the view that these new procedures should be sufficient to achieve the aim of ensuring that an instalment order is not made in the absence of adequate information concerning the debtor's ability to satisfy the debt, and should prevent unsustainable instalment orders from being made. The Commission therefore considers it unnecessary to make any further recommendation in relation to this point.

**(e) Consolidated instalment orders**

5.23 The issue of the potential introduction of consolidated instalment orders proved to be more controversial than some of the other matters raised in the Consultation Paper in relation to instalment orders, as is seen from the discussion above of the submissions received on this issue. The primary concern of the submissions received on this issue related to the question of how priorities among creditors would be established under a system of consolidated instalment orders.

5.24 The Commission notes in this regard that consolidated instalment orders would only be applicable in situations where an assessment of a debtor's means by the Debt Enforcement Office and enforcement officers has found the debtor to have the resources necessary to repay multiple judgment debts via instalments. If the Debt Enforcement Office reaches the conclusion that the debtor is insolvent for the purposes of the bankruptcy, Debt Settlement Arrangement or Debt Relief Order procedures,<sup>20</sup> the office must refuse to make an enforcement order and may either issue a certificate of unenforceability or stay enforcement for the purposes of affording the debtor the opportunity to avail of these insolvency

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<sup>16</sup> (LRC CP 56-2009) at paragraph 6.212.

<sup>17</sup> Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 114; Joyce *To No One's Credit: The Debtor's Experience of Instalment and Committal Orders in the Irish Legal System* (Free Legal Advice Centres 2009) at 150.

<sup>18</sup> See paragraphs 4.65 to 4.71 above.

<sup>19</sup> See paragraphs 4.41 to 4.64 above.

<sup>20</sup> See section 15 of the *Bankruptcy Act 1988* and paragraphs 2.47 to 2.69.

procedures.<sup>21</sup> A consolidated instalment order may therefore be made only where the debtor is in a position to repay all of his or her debts in full within a reasonable period of time of five years.<sup>22</sup> Thus a consolidated instalment order should only be made where it will provide for the full repayment of all of the relevant judgment debts within this time. Concerns of creditors regarding priorities may therefore be lessened when it is considered that a consolidated instalment order should lead to full repayment for all of the creditors concerned, albeit over a reasonably long period of time. If a multiple instalment order would not lead to such an outcome, the Commission recommends that one of the relevant insolvency procedures should be the appropriate instrument for the debtor's case.

5.25 Nonetheless, in cases where the debtor's circumstances are such as to permit the repayment of instalment orders within a reasonable period of time, the Commission considers that consolidated orders may be an effective method of enforcement. In such cases issues arise as to how the deductions from the debtor's income should be apportioned between creditors. The options here would include either affording a form of priority status to the debtor who was first to obtain a court judgment and apply to the Debt Enforcement Office, or instead introducing a mechanism whereby all creditors who are party to the consolidated instalment order share the deducted income on a *pro rata* basis. The Commission considers that it may be unfair to provide an advantage to the creditor who was first to apply for enforcement. This is particularly the case where a debtor may have limited resources and where to allow the first creditor to claim more of the debtor's income could lead to considerable delays in receipt of proceeds by the other creditors. In addition, the first creditor's speed of application may be due to a failure to observe responsible arrears management practices, a course of action that the Commission would not wish to incentivise. Therefore the Commission recommends that the law should provide for consolidated instalment orders, and that these should consist of the sharing of the instalments made by the debtor amongst his or her relevant judgment creditors on a *pro rata* basis.

5.26 *The Commission recommends that where a debtor's financial circumstances are such as to permit his or her multiple judgment debts to be repaid by instalment orders within a reasonable period (of five years), a consolidated instalment order mechanism should be introduced, and that these consolidated orders should provide for the sharing of the instalment payments made by the debtor amongst his or her relevant judgment creditors on a pro rata basis.*

## **C Attachment of Debts Order (Garnishee Orders)**

5.27 The next method of enforcement to be discussed is that of garnishee orders. Such orders permit a judgment creditor to attach a debt owed by a third party to the judgment debtor, with the effect of diverting the payment of the debt away from the judgment debtor and to the judgment creditor.<sup>23</sup> The debt most commonly attached through this procedure is the bank account of the judgment debtor. It must be noted however that the available evidence shows that this procedure is not widely used against consumer debtors. The Commission's Consultation Paper identified problems arising in relation to this enforcement mechanism, and made a number of provisional recommendations for reform. The following paragraphs discuss these issues, before outlining the submissions received by the Commission in response to the provisional recommendations. This Part then concludes with the Commission's final recommendations for reform in relation to garnishee orders.

### **(1) Consultation Paper: Provisional Recommendations**

5.28 The Consultation Paper noted that garnishee orders can be effective and useful methods of enforcement, but that their use is limited in two respects.<sup>24</sup> First, the use of the procedure at present is permitted only where the creditor can demonstrate that legal enforcement mechanisms have been ineffective, with courts usually requiring the production of a return of no goods by a Sheriff or County

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<sup>21</sup> See paragraphs 4.99 to 4.100 above.

<sup>22</sup> This refers to the "insolvency" condition for accessing the Debt Settlement Arrangement procedure as recommended by the Commission at paragraph 1.333.

<sup>23</sup> See (LRC CP 56-2009) at paragraphs 3.298 to 3.306.

<sup>24</sup> (LRC CP 56-2009) at paragraphs 3.360.

Registrar in order to satisfy this condition. This position was noted to be problematic, as it does not reflect well the aim of achieving the most appropriate, least coercive and most proportionate method of enforcement in a given case. This is because if an order attaching a debt is the most appropriate, least coercive and most appropriate mechanism of enforcement, it may be a futile waste of time and resources to require execution against goods to be attempted before the most appropriate enforcement mechanism may be used. This is especially true in the context of the Commission's proposed new enforcement system, where the Debt Enforcement Office is to decide upon the appropriate method of enforcement in each case, based on a comprehensive assessment of the debtor's circumstances.<sup>25</sup> The second major limitation on the use of the garnishee procedure identified by the Commission's Consultation Paper was the unavailability of comprehensive and accurate information on a debtor's financial position under the current enforcement system. The Commission believes that the recommendations for improving access to information on the debtor's circumstances outlined above should be sufficient to resolve this problem.<sup>26</sup>

5.29 The Consultation Paper identified a further problem in relation to garnishee orders as being the fact that while the general understanding is that such orders are not available in respect of future earnings, Order 38 rule 10 of the *Circuit Court Rules 2001 to 2010* seems to envisage an order being made in respect of such amounts.<sup>27</sup> Therefore the Consultation Paper suggested that the uncertainty generated by this position should be removed.<sup>28</sup>

5.30 In response to these problems, the Commission made a number of provisional recommendations as to how the law relating to garnishee orders could be improved. The Commission argued that, in accordance with the principles of appropriate and proportionate enforcement, the garnishee order mechanism should be more widely used, as this method will often be a productive and appropriate method of satisfying a judgment debt.<sup>29</sup> The Commission noted that the procedure nonetheless involves a significant interference with the privacy rights of debtors, and so should not be used lightly. As long as the principle of proportionality is adequately respected however, the Commission took the view that the use of the procedure should be facilitated in appropriate cases however.<sup>30</sup>

5.31 In accordance with this view, the Commission's provisional recommendations first provided that creditors should be entitled to apply for a garnishee order without first attempting enforcement through execution against goods.<sup>31</sup> Secondly, the Commission provisionally recommended that legislation should ensure that garnishee orders do not deprive debtors the funds necessary to maintain a minimum standard of living for themselves and their dependents, inviting submissions as to the best approach to ensure this aim.<sup>32</sup> The Commission emphasised that a balance should be struck when considering this aim, and that the rights of creditors to access the assets held by the judgment debtor must also be adequately respected. Thirdly, the Commission discussed the difficult question of whether the current legal prohibition on the attachment of bank accounts held jointly by the debtor with another should be modified, inviting submissions as to whether joint bank accounts should be capable of being attached to satisfy a judgment debt.<sup>33</sup>

5.32 Next, the Commission made two provisional recommendations of a more general nature regarding the garnishee order procedure. The Commission noted that the current law relating to

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<sup>25</sup> See paragraphs 4.65 to 4.71 above.

<sup>26</sup> See paragraphs 4.32 to 4.64 above.

<sup>27</sup> (LRC CP 56-2009) at paragraph 3.305.

<sup>28</sup> (LRC CP 56-2009) at paragraph 3.362.

<sup>29</sup> (LRC CP 56-2009) at paragraph 6.221.

<sup>30</sup> (LRC CP 56-2009) at paragraph 6.222.

<sup>31</sup> (LRC CP 56-2009) at paragraph 6.227. The Commission notes that the Supreme Court has confirmed, in *Harrahill v Cuddy*, February 2009 (an *ex tempore* decision in which the Court's judgment was delivered by Geoghegan J), that while this has been a practice it is not a pre-condition.

<sup>32</sup> (LRC CP 56-2009) at paragraph 6.233.

<sup>33</sup> (LRC CP 56-2009) at paragraph 6.243.

garnishee orders is found in the *Common Law Procedure Amendment (Ireland) Act 1856*, case law, and relevant Rules of Court. The Commission noted that the existence of various sources of law in this area has led to some uncertainties, such as the fact that Order 38 Rule 10 of the *Circuit Court Rules* envisages the garnishment of future earnings, while the general understanding appears to be that the garnishment of earnings in this manner is not permitted under Irish law.<sup>34</sup> The Consultation Paper therefore provisionally recommended that legislation and Rules of Court relating to garnishee orders should be repealed, consolidated and replaced as part of legislation introducing a new overall system for the enforcement of judgments. The paper also provisionally recommended that this confusion regarding Order 38 Rule 10 CCR should be removed, and that the new legislation should clarify the respective scopes of attachment of earnings orders and garnishee orders.

5.33 Finally, the Consultation Paper described the term “garnishee order” as being unnecessarily complicated and confusing, and so provisionally recommended that it should be replaced with a term that more clearly describes the process involved. The paper invited submissions as to the most appropriate new term, suggesting that options could include “attachment of debt order” or “third party debt order”.

## **(2) Submissions Received**

5.34 The submissions received by the Commission were largely in support of the provisional recommendation that creditors should be entitled to apply for a garnishee order without first attempting enforcement by execution against goods. One submission, while largely in favour of this proposal in order to allow garnishee orders to be more widely used, noted that garnishee orders should not be considered to be an appropriate enforcement mechanism in all cases. While garnishee orders may be more appropriate than other enforcement mechanisms in many cases, a test of appropriateness and proportionality must be applied in each case. Similarly, both the privacy rights and reasonable standard of living of debtors must be adequately respected in circumstances where the facility of the attachment of the debtor’s bank account becomes more widely available.

5.35 Submissions also supported the Commission’s provisional recommendation that legislation should ensure that garnishee orders do not deprive debtors of the funds necessary to maintain a minimum standard of living for debtors and their dependents. One submission suggested that the detail of what is an acceptable or reasonable standard of living is a question of legislative policy, and so did not forward a view as to how the protected bank account balance level should be calculated. This submission argued that social welfare payments should be exempt from attachment, and that garnishee orders should not leave a debtor with a lower standard of living than he or she would have if his or her only income was from social welfare payments. Another submission, also supporting this provisional recommendation, suggested that the national minimum wage should be used to calculate the appropriate level of exemption from garnishment.

5.36 In relation to the issue of whether a bank account held jointly by the judgment debtor with another person should be capable of being attached, submissions varied. A majority of submissions were however in favour of permitting a joint bank account to be attached in this manner. One submission argued that such accounts should be capable of being attached, as otherwise enforcement could be frustrated easily by the debtor’s placing of the proceeds of the sale of his or her assets into an account held under joint names. Two submissions suggested that the position should be similar to that under section 1002(1)(e) of the *Taxes Consolidation Act 1997*, under which the Revenue Commissioners are empowered to attach a bank account held jointly by a tax debtor with another. These submissions therefore suggested that there should be a presumption that deposit sums are held to the benefit of the debtor and the other account holder in equal shares, subject to the entitlement of the parties to adduce evidence to the contrary within 10 days of the receipt of notice of the intention of the Revenue Commissioners to attach the account. The non-indebted account holder should then be entitled to apply to the court for an alternative equitable division of the proceeds of the account, with the debtor to bear the costs of the application. One submission was opposed to the attachment of joint bank accounts on the

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<sup>34</sup> This statement must be qualified by noting that an attachment of earnings procedure exists for the enforcement of family maintenance debts: see the *Family Law (Maintenance of Spouses and Children) Act 1976* and (LRC CP 56-2009 at paragraph 6.261.



grounds that such a mechanism could raise very serious considerations of constitutional law, and so could result in protracted court proceedings.

5.37 All submissions were in favour of the updating of the legislation and Rules of Court relating to garnishee orders in order to clarify and consolidate the law in this area. The provisional recommendation for the replacement of the term “garnishee order” with a more readily understandable term was also unanimously supported.

### **(3) Conclusions and Recommendations**

5.38 In response to the submissions received and a further consideration of the issues raised in this area, the Commission makes the following recommendations.

#### **(a) Updating Terminology and Legislation**

5.39 First, the Commission notes that its provisional recommendation to update the term “garnishee order” was unanimously supported by the submissions received, and that this term has been replaced in neighbouring jurisdictions such as Northern Ireland and England and Wales.<sup>35</sup> The Commission therefore recommends that this term should be replaced with a term that describes more clearly the process involved. The Commission has considered the alternative options for naming this procedure, and concludes that the term “attachment of debt order” is the most appropriate title. The Commission notes that the term “attachment of debts” is already used in relevant provisions of the *Rules of the Superior Courts 1986-2010*,<sup>36</sup> and that the legislative provisions empowering the Revenue Commissioners to intercept debts owed to a defaulting taxpayer refer to the process as “attachment”.<sup>37</sup> Therefore this term is already used in Ireland and may be familiar to relevant parties. Similarly, “attachment of debts order” was the term adopted in Northern Ireland when the term “garnishee order” was replaced.<sup>38</sup> While the Commission notes that the term “third party debt order” was chosen in England instead of the option of “attachment of debts order” on the grounds that confusion could otherwise be caused between this procedure and the attachment of earnings mechanism, the relevant report in that country noted that the risk of confusion was small.<sup>39</sup> The Commission also notes that in fact the term “attachment of debts order” may be more appropriate due to the very fact that the term “attachment of earnings order” is already in use in Irish law in the context of family law, and its meaning is understood in that context. Therefore the use of the similar term of “attachment of debts order” may be more readily understood than an entirely new term, as it would indicate that the procedure is analogous to that of attachment of earnings. The process of “attachment” should therefore have a more familiar meaning than would a wholly new term. The Commission therefore recommends that the term “garnishee order” should be replaced by the term “attachment of debts order”

5.40 *The Commission recommends that the term “garnishee order” should be replaced with the term “attachment of debts order”.*

5.41 Similarly, submissions received by the Commission were in favour of the provisional recommendation to update and consolidate the legal basis of garnishee orders. Similarly, the proposal to clarify the law in this area, in particular in relation to the respective scopes of attachment of earnings orders and garnishee orders, was supported by the submissions received by the Commission. The Commission therefore recommends that, as part of the introduction of a comprehensive new system for the enforcement of judgments, the law relating to attachment of debts orders should be consolidated into a single set of legislative provisions. The Commission recommends that the respective scopes of attachment of debts orders and attachment of earnings orders should be clarified, with Order 38 Rule 10

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<sup>35</sup> See (LRC CP 56-2009) at paragraphs 6.247 to 6.250.

<sup>36</sup> See Order 45 *Rules of the Superior Courts 1986-2010*.

<sup>37</sup> Section 1002 of the *Taxes Consolidation Act 1997*.

<sup>38</sup> See Article 69 of the *Judgments Enforcement (Northern Ireland) Order 1981*.

<sup>39</sup> See Lord Chancellor’s Department *Enforcement Review Report of the First Phase of the Enforcement Review* (2000) at paragraphs 221-222.

of the *Circuit Court Rules 2001 to 2010* (or an equivalent replacement procedural rule under the new non-court-based enforcement system) amended to achieve this result.

5.42 *The Commission recommends that, as part of the introduction of a comprehensive new system for the enforcement of judgments, the law relating to attachment of debts orders should be consolidated into a single set of legislative provisions. The Commission recommends that the respective scopes of attachment of debts orders and attachment of earnings orders should be clarified, with Order 38 Rule 10 of the Circuit Court Rules 2001 to 2010 (or an equivalent replacement procedural rule under the new non-court-based enforcement system) amended to achieve this result.*

**(b) *The availability of attachment of debts orders without first attempting execution against goods***

5.43 The Commission next turns to the provisional recommendation that creditors should be entitled to seek an attachment of debts order without first attempting enforcement through execution against goods. The Commission notes that the Supreme Court, in *Harrahill v Cuddy*,<sup>40</sup> made clear that this was not a necessary pre-condition. The Commission nonetheless considers that this should be clarified in the proposed legislation and notes that this provisional recommendation was widely supported in the submissions received by the Commission, and also reflects a proposal of the Committee on Court Practice and Procedure made in 1972.<sup>41</sup>

5.44 The Commission also believes that the removal of the requirement for execution against goods to have been attempted and to have been shown to have failed reflects well the Commission's aims of ensuring appropriate and proportionate enforcement. It could constitute a disproportionate interference with the private life of a debtor to attempt execution against goods in the debtor's home where he or she does not have goods available for seizure solely as a pre-requisite to the making of an attachment of debts order. Similarly, where a debtor is owed debts that are available for attachment, it would be appropriate that the attachment of debts order procedure should be used over other less appropriate or potentially more restrictive methods of enforcement.

5.45 Furthermore, the primary aim of the new enforcement system proposed by the Commission is to ensure that the most appropriate enforcement mechanism is chosen by the neutral and independent Debt Enforcement Office, based on access to comprehensive information concerning the means of the debtor (together with submissions from the debtor and creditor).<sup>42</sup> The enforcement procedure is also to be based around a single application procedure irrespective of the method of enforcement ultimately chosen by the office, or the method that the creditor submits should be chosen.<sup>43</sup> In this context, the rationale for requiring that execution against goods be attempted, said to lie in the fact that a creditor could not justify the expense of the costs of an application for a garnishee order unless the less expensive mechanism of execution against goods had first been attempted, is of little relevance.<sup>44</sup> In further support of the Commission's provisional position, it should be noted that the requirement to attempt execution against goods before applying for an attachment of debts order does not derive expressly from Rules of Court, but has instead been developed in court practice.

5.46 The Commission therefore recommends that the Debt Enforcement Office should be empowered, subject to the principles of appropriate and proportionate enforcement, to make an attachment of debts order without first attempting execution against goods.

5.47 *The Commission recommends that it should be possible for the Debt Enforcement Office, subject to the principles of appropriate and proportionate enforcement, to make an attachment of debts order without first requiring enforcement by execution against the debtor's goods to be attempted.*

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<sup>40</sup> February 2009. This was an *ex tempore* decision of the Court (the judgment being delivered by Geoghegan J).

<sup>41</sup> The Committee on Court Practice and Procedure Eighteenth Interim Report: Execution of Money Judgments, Orders and Decrees (The Stationary Office Dublin 1972) at 13.

<sup>42</sup> See paragraphs 4.65 to 4.71 above.

<sup>43</sup> See paragraphs 4.101ff. above.

<sup>44</sup> See (LRC CP 56-2009) at paragraphs 6.225 to 6.226.

**(c) Exempted living costs**

5.48 The provisional recommendation that legislation should ensure that attachment of debts orders do not deprive debtors of the funds necessary to maintain a minimum standard of living for themselves and their dependents was universally supported by the submissions made to the Commission. The Commission therefore can readily make a final recommendation to this effect. A difficult question arises however as to how exactly this aim should be achieved, and as to how it can be best balanced with the need to ensure that the rights of creditors to have access to the assets of the debtor are adequately respected. The Commission invited submissions on this issue, and the suggestions made have been noted above.

5.49 The starting point for discussing this issue is to note that all enforcement orders are to be made by the proposed Debt Enforcement Office, based on comprehensive information concerning the debtor's financial circumstances, and in accordance with the principles of appropriate and proportionate enforcement. Therefore the office would examine the circumstances of the debtor, including his or her income, assets and necessary expenditure, and would select a method of enforcement that is appropriate in these circumstances. The Commission notes that recommendations made in this report discuss a similar issue of protecting a reasonable standard of living for the debtor in the contexts of personal insolvency proceedings,<sup>45</sup> attachment of earnings and execution against goods. Subject to the suggestion above that the levels of exempted income and assets of a debtor under the Debt Settlement Arrangement procedure should be slightly higher than under the enforcement system in order to encourage debtors to seize initiative in seeking a resolution to their debt difficulties, consistency should be ensured between these exemption levels as far as possible.

5.50 The Commission's Consultation Paper discussed how under existing Irish law a court is given discretion to ensure that a garnishee order will not be made where it would result in an inequitable situation or where it would not leave the debtor with sufficient means to maintain him or herself and his or her dependents.<sup>46</sup> The Consultation Paper also discussed the approaches of the law in other countries to this issue.<sup>47</sup> The Consultation Paper noted that in England and Wales, a judgment debtor who has been made subject to a third party debt order may apply to court for an "interim hardship payment", and the court may then exercise its discretion as to whether or not such a payment should be made.<sup>48</sup> The court is to take into account both the hardship that would be suffered by the debtor if such an order was not made with the disadvantage to the creditor of not being able to recover all that is owed. A similar system operates in Northern Ireland.<sup>49</sup> In Scotland, legislation passed in 2007 provides for the protection of a minimum balance in consumer debtors' bank accounts, with this balance representing the equivalent amount to the net monthly earnings from which no deduction would be made under an attachment of earnings order.<sup>50</sup> The review and consultation that led to the introduction of this provision rejected two other options of exempting certain funds from attachment based on their sources; and preventing the attachment of a debtor's bank account entirely where the debtor is already subject to attachment of earnings.<sup>51</sup>

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<sup>45</sup> See paragraphs 1.285 to 1.287 above.

<sup>46</sup> (LRC CP 56-2009) at paragraph 6.229; *Martin v Nadel* [1906] 2 KB 26; Order 38 Rule 10 *Circuit Court Rules 2001 to 2010*.

<sup>47</sup> (LRC CP 56-2009) at paragraphs 6.230 to 6.231.

<sup>48</sup> See Lord Chancellor's Department *Enforcement Review Report of the First Phase of the Enforcement Review* (2000) at paragraphs 210-215; *Civil Procedure Rules 72.7*.

<sup>49</sup> (LRC CP 56-2009) at paragraph 6.230.

<sup>50</sup> See section 73F of Part 9 of the *Bankruptcy and Diligence etc. (Scotland) Act 2007*, inserting a new Part 3A into the *Debtors (Scotland) Act 1987*.

<sup>51</sup> *Enforcement of Civil Obligations in Scotland – A Consultation Document* (The Scottish Executive 2002) at 119-122.

5.51 The Commission reiterates its view that the law should ensure that attachment of debts orders do not deprive debtors of the funds necessary to maintain a minimum standard of living for themselves and their dependents. Taking into account the consideration of ensuring consistency between enforcement mechanisms, and the approaches adopted to this issue in other countries, the Commission takes the view that the best approach to achieving this aim may be to provide that a minimum balance in the judgment debtor's bank account should be incapable of being seized. This minimum balance level could be set at a level equivalent to the income level that is to be exempt from attachment under attachment of earnings orders. The Commission discusses the exempted income level under attachment of earnings orders in Part E of this Chapter.<sup>52</sup> The Commission takes this view for a number of reasons. First, approaches based on the exercise of court discretion are inappropriate under the Commission's proposed new enforcement system where enforcement orders are to be made by the proposed Debt Enforcement Office. Secondly, another option of exempting a bank account balance from being attached based on the source of the funds would be very difficult to operate in practice. Also, an approach preventing outright the attachment of a debt owed to the judgment debtor where the debtor is already subject to an attachment of earnings order may not reflect the principle of appropriate enforcement. Finally, the objection to the protection of a minimum balance in the debtor's account from attachment that such an approach would require consideration of whether the debtor has more than one bank would not be as significant given the holistic approach to the debtor's circumstances to be adopted by the proposed Debt Enforcement Office, and the methods of obtaining information to be given to the office.

5.52 The Commission recognises that this method of protecting the debtor's essential standard of living is designed specifically with the attachment of bank accounts, rather than any other debts, in mind. The Commission considers that a similar approach could be adopted where the debtor is owed another type of debt on which his or her standard of living depends, and that the Debt Enforcement Office should in all cases ensure that the level of an attachment of debts order is not such as to reduce the debtor's means below the level of income protected from seizure under attachment of earnings orders.

5.53 *The Commission recommends that legislation should ensure that attachment of debts orders do not deprive debtors of the funds necessary to maintain a minimum standard of living for debtors and their dependents. The Commission recommends that the most appropriate means of achieving this aim is to provide that a minimum balance in the debtor's bank account should be protected from attachment, and that the level of this balance should be equivalent to the level of monthly income exempted from attachment under an attachment of earnings order. The Commission recommends that a similar approach should apply where the debt being attached is one other than a bank account balance, and that the Debt Enforcement Office should in all cases ensure that the debtor's income is not reduced below the level of income exempted under an attachment of earnings order.*

**(d) Attachment of bank accounts held jointly by the debtor with another**

5.54 The Commission notes that the rule against the attachment of joint bank accounts has been subject to both judicial and academic criticism,<sup>53</sup> and that a large majority of submissions have supported the removal of this rule. In addition, the fact that under Irish law a procedure exists for the attachment of jointly-held debts by the Revenue Commissioners means that the principles of consistency and creditor equality in enforcement further suggest that the prohibition on private creditors from attaching a joint bank account should be removed.<sup>54</sup> The rationales for removing the rule centre on the fact that the rule provides debtors with a simple means of evading his or her obligations under a judgment debt by selling his or her assets and placing the proceeds in joint names with someone else. Also, as in the majority of cases of joint bank accounts either account holder is permitted to withdraw all of the deposit without the other party being able to object, the attachment of the judgment debtor's share of a joint bank account would be similar to a unilateral withdrawal from the account by one of the parties. For these reasons the Commission recommends that the rule prohibiting the attachment of joint bank accounts should be removed.

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<sup>52</sup> See paragraphs 5.92 to 5.100 below.

<sup>53</sup> See (LRC CP 56-2009) at paragraphs 6.237 to 6.238.

<sup>54</sup> See (LRC CP 56-2009) at paragraph 6.236 and section 1002(1) of the *Taxes Consolidation Act 1997*.

5.55 The Commission is also conscious of the need to protect the interests of the parties who may hold a joint bank account with a judgment debtor however. Therefore the Commission adopts the position that the amount of a balance held in a joint bank account capable of being attached should be limited to 50%.<sup>55</sup> In a rule similar to that operating under section 1002(1)(e) of the *Taxes Consolidation Act 1997*, a presumption should exist to the effect that a bank account held jointly is held in 50-50 shares, subject to the right of the non-debtor account holder to provide evidence that the funds in the account are proportioned differently. When the Debt Enforcement Office has decided that the attachment of the judgment debtor's share in a joint bank account is the most appropriate and proportionate method of enforcement in the case in question, the office should notify the non-debtor account holder of its provisional decision to issue an attachment of debts order in respect of the account. The non-debtor account holder should then be given the opportunity, within a specified deadline, to provide evidence to the office that the account is held otherwise than in equal shares. A procedure should then exist for determining the shares in which the account is held before a final order is made by the office. The appropriate procedural rules could be specified in secondary legislation, with an emphasis on ensuring that the process is carried out in an efficient and time-effective manner. The Commission notes that the procedure for the attachment of joint bank accounts under section 1002 of the *Taxes Consolidation Act 1997* has been criticised as imposing onerous duties on banks to make a difficult assessment as to the shares in which the account is held based on the evidence presented.<sup>56</sup> This can impose a significant burden on a third party for the purposes of resolving a debt dispute between two other parties. Therefore the Commission recommends that such an assessment should be made by the Debt Enforcement Office, on receiving evidence of the relevant parties, rather than by the third party to whom the attachment of debts order is directed.

5.56 The Commission recognises that the process of attaching a bank account held jointly by a judgment debtor with another may involve restrictions on the privacy rights of the judgment debtor, as the non-debtor account holder would be notified of the judgment debtor's liability. The Commission however notes that a judgment debt is already a matter of public record and that therefore the restriction on the debtor's right to privacy would be limited. The Commission also notes that any concerns regarding restrictions on rights under this procedure should be weighed by the Debt Enforcement Office when deciding whether an attachment of debts order is appropriate and proportionate in the circumstances of the case.

5.57 *The Commission recommends that a debt owed to the judgment debtor in the form of a bank account held jointly by the judgment debtor with another should be capable of being attached in order to satisfy the judgment debt.*

5.58 *The Commission recommends that the amount of a balance held in a joint bank account capable of being attached should be limited to 50% (or a proportionately lower amount where the account is held jointly by more than two people).*

5.59 *The Commission recommends that a presumption should exist to the effect that a bank account held jointly is held in 50-50 shares, subject to the right of the non-debtor account holder to provide evidence that the funds in the account are proportioned differently. The Commission recommends that the Debt Enforcement Office should notify the non-debtor account holder of its provisional decision to issue an attachment of debts order in respect of the account, and that the non-debtor account holder should then be given the opportunity, within a specified deadline, to provide evidence to the office that the account is held otherwise than in equal shares.*

5.60 *The Commission recommends that a procedure should then exist for the determination, by the Debt Enforcement Office, of the shares in which the account is held before a final order is made by the*

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<sup>55</sup> See Lord Chancellor's Department *Enforcement Review Report of the First Phase of the Enforcement Review* (2000) at paragraph 198. This limit of 50% would obviously only be applicable where the bank account was held jointly by two people. Where the account was held by more than two people, the limit on the attachable amount would decrease proportionally.

<sup>56</sup> Breslin "Revenue Power to Attach Debts Under Section 73 Finance Act, 1988: Implications for Credit Institutions" (1995) 2(7) *Commercial Law Practitioner* 167.

office. The Commission recommends that the appropriate procedural rules should be specified in secondary legislation, with an emphasis on ensuring that the process is carried out in an efficient and time-effective manner.

## D Receivers by Way of Equitable Execution

5.61 The Consultation Paper also dealt with equitable execution, a form of discretionary relief that a court may grant where the ordinary methods of execution are unavailable or are likely to be ineffective due to the nature of the assets available to satisfy the judgment.<sup>57</sup> This relief usually takes the form of the appointment of a receiver over certain assets of the judgment debtor, with the receiver for example receiving rents, profits and moneys receivable in respect of the judgment debtor. The power to appoint a receiver by means of equitable execution originates in the courts of equity, and the law relating to this procedure have been in existence since before the *Supreme Court of Judicature Act 1877*. Procedural rules are however contained in Order 45 Rule of the *Rules of the Supreme Court 1986 to 2010* and Order 39 *Circuit Court Rules 2001 to 2010*.

5.62 As noted above, equitable execution originated as a discretionary form of relief to respond to cases where the legal methods of execution were unable or ineffective. This has the consequence of meaning that before a judgment creditor may obtain an order for equitable execution, he or she is usually first expected to exhaust any reasonable method of legal execution.<sup>58</sup> Therefore in practice a judgment creditor must attempt execution against goods and produce to the court a Sheriff or County Registrar's return marked "no goods" before the creditor may obtain an order of equitable execution.<sup>59</sup> The Consultation Paper identified this requirement as problematic and potentially at odds with the principles of appropriate and proportionate enforcement.<sup>60</sup> The Commission suggested that creditors should not have to waste time and money in attempting execution against goods where an alternative means of enforcement is available which would be more appropriate and less restrictive of debtor rights. The Commission noted that the Committee on Court Practice and Procedure had recommended in 1972 that no requirement to attempt execution against goods before obtaining an order for equitable execution should exist.<sup>61</sup> The Commission however also noted that a review of enforcement in England and Wales considered that the requirement to attempt legal execution first should remain, as the appointment of a receiver is an expensive option which should not be used unless there is a strong likelihood that it will succeed in satisfying the judgment debt in question.<sup>62</sup> It was also noted that the traditional limitations on the use of the mechanism were retained under the new enforcement system in Northern Ireland, a position that was however criticised under a review conducted in that country.<sup>63</sup>

5.63 Having considered the above, the Commission ultimately invited submissions as to whether the appointment of a receiver should be available without first attempting legal execution.<sup>64</sup> The Commission received very few submissions on this issue. The submissions that were received were either in favour of the removal of the requirement to first attempt legal execution, or indicated that the appointment of a receiver is not widely used and so is not very relevant.

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<sup>57</sup> (LRC CP 56-2009) at paragraph 3.307.

<sup>58</sup> *O'Connell v An Bord Pleanála* [2007] IEHC 79. This is not an absolute requirement however: see (LRC CP 56-2009) at 6.435.

<sup>59</sup> (LRC CP 56-2009) at paragraph 3.308.

<sup>60</sup> (LRC CP 56-2009) at paragraph 3.360.

<sup>61</sup> (LRC CP 56-2009) at paragraph 6.436; The Committee on Court Practice and Procedure *Eighteenth Interim Report: Execution of Money Judgments, Orders and Decrees* (The Stationary Office Dublin 1972) at 13.

<sup>62</sup> (LRC CP 56-2009) at paragraph 6.437 and *Enforcement Review: Report of the First Phase of the Enforcement Review* (Lord Chancellor's Department 2000) at paragraphs 56-57.

<sup>63</sup> (LRC CP 56-2009) at paragraph 6.438; *Report of the Enforcement of Judgments Review Committee (Northern Ireland)* (1987) at paragraph 20.6.

<sup>64</sup> (LRC CP 56-2009) at paragraph 6.440.

5.64 The Commission notes the arguments for and against making the appointment of a receiver by way of equitable execution more readily available. The Commission considers that its other recommendations may provide a means of balancing both sides of this argument. By giving the choice of enforcement mechanism to the Debt Enforcement Office, subject to the obligation to choose the most appropriate and proportionate enforcement mechanism in each case, this method of enforcement should be chosen in appropriate cases without the need to attempt other legal enforcement mechanisms, but should not be chosen where it would be unjustifiably expensive. Therefore to clarify, the Commission recommends that there should be no requirement for legal execution to be attempted before equitable execution is permitted, but that a receiver should be appointed by way of equitable execution only where it is appropriate and proportionate in a given case. Case law has shown that a judgment creditor is not strictly obliged always to attempt legal execution, and may obtain an order for equitable execution in exceptional cases where it can be shown that such execution against goods would not be effective.<sup>65</sup> As the Debt Enforcement Office should consider the potential effectiveness of each possible enforcement method in each case, this recommendation will not change the current law significantly. The Commission nonetheless considers that this recommendation may clarify the law in this area.

5.65 *The Commission recommends that there should be no requirement for legal execution to be attempted before equitable execution is permitted, but that a receiver should be appointed by way of equitable execution only where it is appropriate and proportionate in a given case.*

5.66 As noted above, the law relating to equitable execution emerged from the case law of the Courts of Equity, and the power to order equitable execution is based upon the equitable jurisdiction of the courts. Therefore should the Commission's proposed new system of enforcement be introduced, the law relating to equitable execution should be codified in legislation, and the power to appoint a receiver should be given to the proposed Debt Enforcement Office. The codification of these rules may be desirable also to limit the discretion involved, as it may not be appropriate to give the wide discretion traditionally exercised by the courts in their equitable jurisdiction to a non-judicial body such as the proposed Debt Enforcement Office.

5.67 *The Commission recommends that the law relating to the appointment of a receiver by way of equitable execution should be codified in legislation, and that the power to appoint a receiver should be given to the proposed Debt Enforcement Office.*

## **E Attachment of Earnings**

5.68 The next enforcement mechanism to be discussed is that of attachment of earnings orders. As noted in the Commission's Consultation Paper, this enforcement method is not used in Ireland for the enforcement of judgments except in the context of family law, where it is used for enforcing court orders to make periodical payments for the maintenance of a spouse and any dependent children.<sup>66</sup> The paper further noted that it has been argued that such a procedure should be introduced in Ireland, largely in order to avoid the reliance on instalment orders and accompanying orders for arrest and imprisonment that existed prior to the decision in the *McCann* case<sup>67</sup> and the enactment of the *Enforcement of Court Orders (Amendment) Act 2009*.<sup>68</sup>

5.69 The following paragraphs describe the provisional recommendations made in the Consultation Paper in relation to the option of introducing an attachment of earnings mechanism for the enforcement of all judgment debts. The submissions received by the Commission in response to these provisional recommendations are also outlined, before this Part concludes with the Commission's final recommendations on this subject.

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<sup>65</sup> (LRC CP 56-2009) at paragraph 6.435, citing *Manchester and Liverpool District Banking Co. Ltd v Parkinson* (1889) 22 QBD 173; *O'Connell v An Bord Pleanála* [2007] IEHC 79.

<sup>66</sup> See (LRC CP 56-2009) at paragraphs 6.253 to 6.255; 6.261 to 6.263.

<sup>67</sup> *McCann v Judge of Monaghan District Court and Ors* [2009] IEHC 276; [2009] 4 I.R. 20.

<sup>68</sup> See (LRC CP 56-2009) at paragraphs 6.255 to 6.260.

**(1) Consultation Paper: Provisional Recommendations**

5.70 Having discussed the matters described above, the Consultation Paper proceeded to outline the advantages and disadvantages of the introduction of an attachment of earnings mechanism.<sup>69</sup> Advantages included the fact that this enforcement mechanism targets the future income of the debtor, which may be a more fruitful source of return to creditors than other assets such as tangible goods capable of seizure by a sheriff. Also, attachment of earnings may in fact benefit disorganised debtors who have the means to pay but find that lack of organisation leads them to default; while since lenders take into account the future income of a debtor when lending it may be appropriate for creditors to have access to this resource. Finally, attachment of earnings could operate as a further alternative to the use of imprisonment in enforcement. The disadvantages of introducing such a mechanism were said to include the potentially harmful effects of such orders on the debtor's relationship with his or her employer; the restriction of the debtor's privacy rights involved under such an order; and the potential of such orders to reduce incentives for debtors to seek or hold employment. A major criticism of attachment of earnings orders is that they have the potential to leave with insufficient income to provide a reasonable standard of living for the debtor and his/her dependents. Finally, it was noted that attachment of earnings orders create external costs for third parties, in that the debtor's employer becomes subject to the administrative burden of making (and in some cases calculating) deductions from the employee debtor's income and passing them on to creditors or court officers.

5.71 Having outlined these advantages and disadvantages of the attachment of earnings enforcement mechanism, the Consultation Paper noted that many of the arguments against the introduction of such a system can be limited by restricting the use of the mechanism to appropriate cases, and by introducing legislative safeguards to protect the debtor and his or her dependents, while also providing an effective enforcement procedure.<sup>70</sup> The Commission then invited submission as to whether it would be appropriate to introduce an attachment of earnings mechanism for the enforcement of judgment debts against individuals who are in receipt of regular income.

5.72 The Consultation Paper next identified for discussion the issue of the exemption from attachment of a sufficient portion of the debtor's earnings to enable the debtor and his or her dependents to maintain a reasonable standard of living.<sup>71</sup> The Commission noted that different methods of achieving this aim exist under the laws of other countries, with two primary methods identified. The first consists of an approach relying on the setting of an exemption level on a discretionary basis by a court or other authority based on the circumstances of the debtor in an individual case.. The alternative method involves the use of fixed tables to specify uniform levels of income exemptions that are applicable in all cases. Furthermore, some countries adopt a combination of these two approaches, and variations exist even within each approach, with the detail of the procedure differing from country to country. The paper outlined the respective advantages and disadvantages of the fixed and discretionary approaches, and ultimately invited submissions as to how the level of protected income that cannot be made subject to an attachment of earnings order should be calculated. The Commission in particular sought views of interested parties as to whether the level of exemption should be set in statute, or whether it should be decided by the enforcement officer in each individual case.

5.73 The Consultation Paper next addressed the admittedly difficult question of whether attachment of earnings orders should be available in respect of debtors whose sole source of income is composed of social welfare payments.<sup>72</sup> The paper noted varying approaches to this issue in different countries, highlighting that in many countries such forms of income are exempt from attachment. The Commission ultimately invited submissions as to whether social welfare payments should be subject to attachment. A similar issue arose in relation to whether the protection of a minimum level of a debtor's income should extend to cases where this income has been paid to the debtor and has been deposited in the debtor's

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<sup>69</sup> (LRC CP 56-2009) at paragraphs 6.264 to 6.270.

<sup>70</sup> (LRC CP 56-2009) at paragraph 6.271.

<sup>71</sup> (LRC CP 56-2009) at paragraphs 6.274 to 6.282.

<sup>72</sup> (LRC CP 56-2009) at paragraphs 6.283 to 6.286.



bank account.<sup>73</sup> The Commission discussed briefly some of the different approaches adopted to this issue in various countries, and noted that this issue would be addressed when considering the reform of the garnishee order procedure, as has been done in this Report.<sup>74</sup> The Commission provisionally recommended that the link between exemptions from attachment of earnings and exemptions from the attachment of bank accounts should be recognised and clarified, and that a consistent approach should be adopted to these two exemption levels. The Commission also provisionally recommended that the status of deposited earnings should be expressly addressed in legislation to extend the protection of exempted unpaid income to paid and deposited income. The Commission invited submissions as to how this exempt level of funds should best be calculated.

5.74 The Consultation Paper proceeded to discuss the question of how the law could ensure that the employment status of judgment debtors who are subject to attachment of earnings orders is not prejudiced by the making of such an order.<sup>75</sup> The paper noted that the Free Legal Advice Centres have recommended that the *Unfair Dismissals Acts, 1977 to 1993*, should be amended so that dismissal on the grounds of being subject to an attachment of earnings order should be added to the list of unfair reasons for dismissal.<sup>76</sup> Approaches adopted to this issue in other countries were also discussed, including employee protection provisions under the laws of the United States, Canada and the Australian State of Victoria. The paper noted that various approaches range from protecting employees who are made subject to attachment of earnings orders from being dismissed on the grounds of the existence of such an order, to protecting such employees from any discrimination whatsoever on this ground. The Commission invited submissions as to the best means of ensuring the protection of the employment of a debtor who is subject to an attachment or earnings order, and in particular sought views on whether legislation should solely provide for protection from dismissal, or alternatively whether a wider prohibition on discrimination should be introduced.

5.75 The next issue discussed by the Consultation Paper was the issue of the costs for employers of debtors involved under a system of attachment of earnings. The Commission noted the mechanisms operating in other countries for compensating employers for these costs, and provisionally recommended that employers should not be burdened with excessive administrative costs through their obligations to comply with attachment of earnings orders. The Commission then invited submissions as to how employers should be compensated.

5.76 The Consultation Paper next considered the significant restriction of the rights of debtors involved under the attachment of earnings procedure, and emphasised the need for this enforcement mechanism to be used proportionally, should it be introduced.<sup>77</sup> The paper noted that the lack of safeguards on the use of the mechanism in family law proceedings under Irish law has been criticised, and that in both Northern Ireland and England and Wales systems of suspended attachment of earnings orders exist, so that the debtor will only become subject to such an order (and the debtor's employer will only be notified of the order) if he or she has defaulted in paying regular instalments of the judgment debt. The Commission provisionally recommended that an attachment of earnings order should only be available where less restrictive enforcement mechanisms are unavailable or are ineffective, and that such an order should be used only where the debtor has first been provided with an opportunity to repay the judgment debt (by instalment order) and has defaulted. The Commission also provisionally recommended that suspended attachment of earnings orders should be made in conjunction with instalment orders so that an attachment of earnings order automatically comes into effect in the event of default.

5.77 Next, the Consultation Paper noted that attachment of earnings orders must be capable of taking account of changes in the debtor's circumstances over the life of the order, and provisionally

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<sup>73</sup> (LRC CP 56-2009) at paragraphs 6.287 to 6.290.

<sup>74</sup> See paragraphs 5.48 to 5.53 above.

<sup>75</sup> (LRC CP 56-2009) at paragraphs 6.291 to 6.295.

<sup>76</sup> Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 99.

<sup>77</sup> (LRC CP 56-2009) at paragraphs 6.303 to 6.308.

recommended that a power to apply to the Debt Enforcement Office to vary (or even to suspend) an attachment of earnings order would be an essential element if this mechanism was introduced.<sup>78</sup> The Commission invited submissions as to the circumstances in which such a power to apply for a variation or suspension of an attachment of earnings order should be available. The paper proceeded to note that a problem arising in the operation of attachment of earnings systems in many countries is that of continuing to implement an attachment of earnings order where the debtor leaves or changes employment while an order is in force.<sup>79</sup> The mechanisms in place for “tracking” debtors in this way under Irish family law were discussed, which rely on the debtor and the debtor’s employers to notify the court of changes in the debtor’s employment. Consideration was also given to how this problem has been addressed by the recent review of enforcement law in England and Wales, which has seen the introduction of legislative measures providing for the sharing of information held by revenue authorities concerning the debtor’s employment with the court. The Commission invited submissions as to whether measures should be introduced to enable information to be obtained independently of the debtor relating to changes in the debtor’s employment, and also sought views as to the best means of obtaining this information.

5.78 The final two issues in relation to attachment of earnings orders discussed by the Consultation Paper concerned situations where multiple attachment of earnings orders are made against a single debtor. The Commission first considered the possible introduction of a system of consolidated attachment of earnings orders similar to that operating in the UK under the *Attachment of Earnings Act 1971*, which allows a court to consolidate a number of attachment of earnings orders into a single order.<sup>80</sup> Such orders, which can be made either on the request of the debtor or a creditor, involve the *pro rata* distribution of the attached portion of the debtor’s income amongst the creditors in proportion to the amount owed under each judgment debt. The Commission discussed the advantages of such a mechanism, while also cautioning that in cases where a debtor is in default in respect of multiple obligations, the proposed debt settlement system may be the most appropriate solution. The Commission ultimately invited submission as to whether a consolidated attachment of earnings order should be introduced. Finally, the Commission discussed the issue of how any attachment of earnings system for the enforcement of ordinary civil debts would interact with the current system for enforcing maintenance debts under family law through attachment of earnings orders.<sup>81</sup> This is effect raised the issue of rules of priorities as between attachment of earnings orders. It was noted that in most European countries, attachments for the purposes of enforcing maintenance payments are given higher priority than attachments for the enforcement of other civil debts, and that a recent review of enforcement in Scotland recommended that a similar approach should be adopted there. The Commission noted from this analysis that strong policy arguments exist for affording family maintenance attachments priority over other attachments of earnings. The Commission invited submissions as to whether family maintenance attachment of earnings orders should be given priority over attachment orders for the enforcement of judgment debts, and also sought views as to whether attachment orders in respect of any other types of debts should be given a priority status.

## **(2) Submissions Received**

5.79 The Commission received several submissions in relation to the possible introduction of an attachment of earnings mechanism, which covered all of the discrete issues outlined in the Consultation Paper.

5.80 First, a large majority of submissions supported the introduction of an attachment of earnings orders mechanism. The arguments in favour of its introduction largely mirrored those made by the Commission in the Consultation Paper. It was noted that future income is often the single most reliable source of funds to satisfy debts, particularly in the case of consumer debtors. As future income is also an important criterion against which lenders extend credit, it was felt appropriate that creditors should be permitted to have access to this asset. The potential efficiency of this method of enforcement was also

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<sup>78</sup> (LRC CP 56-2009) at paragraphs 6.309 to 6.315.

<sup>79</sup> (LRC CP 56-2009) at paragraphs 6.316 to 6.321.

<sup>80</sup> (LRC CP 56-2009) at paragraphs 6.322 to 6.326.

<sup>81</sup> (LRC CP 56-2009) at paragraphs 6.327 to 6.330.

cited as an argument in favour of its introduction. Submissions emphasised that safeguards could be included in legislation to ensure that debtors are sufficiently protected, for example exempted a certain minimum level of income from attachment. The need to reduce interference with the debtor's privacy rights and the employer-employee relationship was also stressed. One submission cautioned that an attachment of earnings should last for no longer a duration than five years, in order to ensure that the debtor is not burdened with attachments throughout his or her life. Another noted the need to ensure the issue of the respective priority of different attachment of earnings orders against a single would require detailed consideration. One submission argued that attachment of earnings orders should be introduced, but should be restricted to an enforcement mechanism of last resort. It was suggested however that this method of enforcement could actually benefit certain debtors, as repayments would be managed on their behalf.

5.81 In relation to the issue of how the level of protected income that is exempted from attachment should be calculated, submissions offered various solutions. A majority of submissions suggested that the level of protected income should not be defined too rigidly, but should be capable of varying based on the circumstances of each individual case. Most submissions also supported the introduction of a baseline minimum level of income which should be guaranteed in all cases. One submission suggested that this baseline amount could be designed to ensure that debtors would not be pushed below the "dignity line" as discussed in the European Commission's 2008 *Recommendation on Active Inclusion*.<sup>82</sup> This submission also cautioned against the adoption of an overly complicated calculation method, and also warned that individual incentives of the protected income level in each case should not be overly subjective or inconsistent. It further proposed that the protected income level should be index-linked to inflation levels. Alongside these considerations, a majority of responses suggested that guidelines on how the protected level of income is to be calculated in each case should be introduced. It was nonetheless stressed that such guidelines should not be binding, and that the final decision as to the appropriate level of protected income decided based on the debtor's circumstances in each individual case. One submission proposed that such guidance could be based on the annualised minimum wage.

5.82 A large majority of submissions supported the position that where a debtor's income consists solely of social welfare payments, no attachment of earnings order should be capable of being made against the debtor. It was stated that the attachment of social welfare payments would lead to undue hardship for debtors and their families. One submission suggested that an approach similar to that adopted in other countries mentioned in the Consultation Paper should be introduced, whereby legislation expressly prohibits social welfare payments from being attached. This submission however suggested that any prohibition should be accompanied by a review of social lending policies, and a consideration of the possibility of introducing legislation designed to alleviate financial exclusion, such as the US *Community Reinvestment Act 1977*. This submission also suggested that the possibility of increasing the interest rate that credit unions are permitted to charge should be considered, as long as a corresponding measure reducing the amounts that credit unions may lend is considered in order to balance access to credit with the prevention of over-indebtedness. Submissions suggested that the important consideration is that the debtor is left with sufficient income to ensure a reasonable standard of living for him/her and his/her dependents, rather than the source of the income. Therefore some submissions suggested that social welfare payments should be capable of attachment where the debtor was left with sufficient income to ensure a reasonable standard of living, including, but not exclusively, where the debtor was in receipt of other income in addition to social welfare payments.

5.83 Submissions supported the Commission's provisional recommendation that there should be consistency between the exemption of income from attachment of earnings orders and the exemption of funds held in a bank account from an attachment of debts order. One submission suggested that rather than introducing strict legislative rules protecting a bank account balance to a certain level, a guiding principle should be introduced to the effect that an attachment of debts order should not deprive the debtor of the funds necessary to maintain a minimum standard of living. A discretionary approach should be adopted by enforcement officers, based on the individual debtor's circumstances. Another submission appeared to call for a more defined approach, suggesting that an exempt level of bank account balance

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<sup>82</sup> Recommendation 2008/867/EC of 30 Oct 2008, OJ L 307 18.11.08.

should be calculated by reference to the national minimum wage, with the level of exempt funds to be capped at the equivalent of two months of the minimum wage.

5.84 The provision recommendation for the protection of the employment status of debtors throughout the duration of an attachment of earnings order was supported by all submissions. One submission supported this principle, but did not offer any views on the specific manner in which employment should be protected. It emphasised the need to have regard to the underlying contract of employment, and particular to any obligations imposed on the debtor to disclose his or her credit history. Other submissions argued for the full application of employment equality legislation to prevent any discrimination against debtors who are subject to attachment of earnings orders on the ground of such an order. This protection should extend to all forms of discrimination, including downgrading of the debtor's employment role as well as dismissal.

5.85 The next provisional recommendation on which submissions were received was the Commission's proposal that an attachment of earnings order should only be available where less restrictive enforcement mechanisms are unavailable or ineffective, or where the debtor has been provided with an opportunity to repay the judgment debt by instalments and has defaulted. Submissions in this regard also dealt with the proposal that suspended attachment of earnings orders could be made in conjunction with instalment orders so that an attachment of earnings order automatically comes into effect in the event of default. Submissions were divided in relation to this issue of potential restrictions on the availability of attachment of earnings orders. One submission was in favour of the introduction of a mechanism for issuing suspended attachment of earnings orders in conjunction with instalment orders, particularly if the instalment order was to be prioritised as an enforcement mechanism.<sup>83</sup> Equally if a facility was to be introduced to allow for a debtor to offer instalment payments and to consent to a judgment requiring payment by instalments, this facility should be accompanied by automatically applicable attachment of earnings orders in the event of default in repayment by instalments. This submission however also suggested that the choice of enforcement mechanism in each case should be based on the circumstances of the debtor in the individual case in question. A second submission received on this subject agreed that an attachment of earnings order should be available as soon as the debtor fails to comply with an agreed voluntary or court ordered arrangement. Such orders should be suspended from coming into effect pending compliance with the required obligations for repayment by instalments.

5.86 Next, submissions supported the provisional recommendation that a power to apply to vary (and possibly to suspend) attachment of earnings orders would be an essential element of an attachment of earnings regime. Submissions agreed that flexibility should be built into any attachment of earnings system, and the amount and duration of attachments should be capable of being reviewed in accordance with changes in the debtor's circumstances. One submission suggested that consideration should be given to the question of whether reviews should be periodic or triggered by certain events, while another went further in suggesting that the debtor's financial circumstances should be monitored through a requirement that the debtor submit a sworn statement of financial affairs periodically. This latter submission argued that the knowing submission of a false statement should be treated as a contempt of court. A final submission also agreed with this proposal, suggesting that a request to vary from either the debtor or a creditor should be considered by an enforcement officer.

5.87 Submissions were divided in respect of the issue of whether information concerning a debtor's employment status should be available independently of the debtor in order to ensure the efficacy of an attachment of earnings order despite changes in the debtor's employment. A small majority of submissions suggested that this information should, at least as a first step, be obtained from the debtor. These submissions suggested that a debtor should be placed under a duty to notify the Debt Enforcement Office of any changes in the debtor's employment. These submissions were conscious of the need to protect the privacy rights of the debtor, and felt that obtaining information directly from the debtor would be less restrictive of these rights than obtaining information from a third party or than noting the existence of an attachment of earnings order on the debtor's "P45" form. While one of these submissions also proposed that information on the debtor's employment status should also be available

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<sup>83</sup> See paragraphs 5.14 to 5.16 above.

from Revenue Commissioners and Department of Social Protection records, it suggested that information should only be capable of being obtained in this manner where attachments of the debtor's income stop and where the debtor has not provided an explanation for this. Other submissions argued that information should be available independently from the debtor from such sources, but did not propose that this mechanism should only be limited to cases where attempts to obtain information directly from the debtor have failed.

5.88 Submissions generally favoured the introduction of a mechanism of consolidated attachment of earnings orders, subject to certain qualifications. First, one submission cautioned that important issues as to the apportionment and priority of attachments in respect of various creditors would need to be addressed. Secondly, one submission would only support the introduction of such consolidated orders if attachment of earnings orders in respect of family maintenance debts were prioritised. Most submissions in fact favoured the allocation of priority to family maintenance debts. It was suggested that the debtor's dependents should not be punished in the event of the debtor's refusal to repay his or her obligations. One submission suggested that both types of orders should however be capable of being varied in order to take account of the debtor's potentially changing circumstances. Another argued that all debts that are exempt from discharge under the proposed Debt Settlement Arrangement system should be repaid in priority under a consolidated attachment of earnings system.

### **(3) Conclusions and Recommendations**

5.89 Having considered the provisional recommendations and the submissions received in response to them, the Commission now proposes its final recommendations regarding the introduction of an attachment of earnings order mechanism for the enforcement of all judgment debts.

#### **(a) The introduction of a general attachment of earnings order mechanism**

5.90 First, the Commission recommends that an attachment of earnings order mechanism should be introduced for the enforcement of judgment debts. The Commission notes that its Consultation Paper specified several arguments in favour of the introduction of such a mechanism, as well as indicating how objections to its introduction could be overcome through appropriate safeguards. The Commission also notes that this method is used to enforce judgment debts in a large majority of other systems surveyed, and its introduction is widely supported in the submissions received by the Commission. The Commission therefore recommends that in cases where the use of such a mechanism would be both appropriate and proportionate, the Debt Enforcement Office should be empowered to make an attachment of earnings order for the enforcement of a judgment debt against an individual.

5.91 *The Commission recommends that an attachment of earnings order mechanism should be introduced for the enforcement of all judgment debts against individuals receiving regular income.*

#### **(b) Protected income levels exempt from attachment**

5.92 The Commission notes that its proposal that an attachment of earnings order should be prohibited from being set at such a level as would deprive the debtor of the means to maintain a reasonable minimum standard of living for both the debtor and his or her family was widely supported by the submissions received. This position is also endorsed by the fact that such minimum income levels are protected in the systems operating in other countries surveyed by the Commission. Several reasons for including such a limitation on the attachment of earnings were provided in the Consultation Paper, and it may be recalled that these included the following:

- To provide a debtor with the necessary income to survive.
- To protect the dignity of the debtor and his or her cultural and religious identity.
- To afford a means of financial rehabilitation.
- To protect the family unit from impoverishment.
- To spread the burden of the debtor's support from society to his creditors.<sup>84</sup>

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<sup>84</sup> See (LRC CP 56-2009) at paragraph 6.274, citing Walker "Wyoming's Statutory Exemption on Wage Garnishment: Should it Include Deposited Wages?" [2006] 6 *Wyoming Law Review* 53 at 58.

5.93 Therefore the Commission recommends that a fundamental feature of the proposed attachment of earnings mechanism should be a limitation on the portion of a debtor's income that may be attached, in order to ensure that the debtor is left with sufficient means to maintain a reasonable standard of living for him/herself and his/her dependents.

5.94 *The Commission recommends that under the proposed attachment of earnings system, the amount of a debtor's income that may be subject to attachment should be limited in order to ensure that the debtor has sufficient means to maintain a reasonable standard of living.*

5.95 In its Consultation Paper, the Commission invited submissions as to how the protection of a minimum necessary income level could best be achieved. The Consultation Paper in particular presented the alternative options of a discretionary or a fixed approach to the calculation of the level of protected income. As in relation to the question of the appropriate levels of repayments to be made under a Debt Settlement Arrangement,<sup>85</sup> the Commission considers that the issue of the level of income exempt from attachment raises policy choices and issues lying outside of the competence of the Commission. Nonetheless, the Commission highlights certain considerations that may be useful to policy-makers when deciding upon the level of protected income. Having regard to the considerations outlined in the Consultation Paper, and the submissions received in response, the Commission notes that the most appropriate approach may be to allow for a certain degree of flexibility in calculating the protected income level, with enforcement officers and the Debt Enforcement Office conducting assessment of the income required in each individual case. The Commission however also notes that a certain baseline amount should be established below which no attachment of earnings should be possible, in order to ensure that a basic standard of protection is offered in all cases. This amount could be set by secondary legislation, and index-linked. In order to ensure that a flexible approach does not lead to complicated and time-consuming calculations in each case however, the Commission considers that the Debt Enforcement Office should follow guidelines outlining a standard approach to the process of setting the protected income level. The Commission has proposed that guidelines should be prepared outlining reasonable income and expenditure levels for the purposes of calculating reasonable repayment levels under Debt Settlement Arrangements, and these guidelines would also assist in establishing the minimum amount of income required by a debtor to maintain a reasonable standard of living. The Commission has suggested above certain considerations that may be useful to take into account when drafting such guidelines, and suggests that in addition such guidelines should also indicate the discrete considerations that would be taken into account when calculating a reasonable protected income level in attachment of earnings orders as opposed to Debt Settlement Arrangements, in order to provide transparency and certainty to the process. Such considerations could for example include the suggestion made in one submission that the level of exempt income under a Debt Settlement Arrangement should be slightly higher than that under enforcement mechanisms, in order to encourage debtors to take steps to remedy their debt difficulties without the need for the case to proceed to the stage of enforcement. The Commission however makes no detailed recommendations as to the appropriate level at which the protected income exemption should be set.

5.96 While acknowledging that the calculation of the appropriate protected income level under the attachment of earnings procedure raises policy issues outside of the Commission's remit, the Commission suggests that legislation should provide for a flexible approach, with the amount of protected income to be calculated in each case based on the individual debtor's circumstances. The Commission suggests that secondary legislation should however fix a baseline protected income rate below which no attachment of earnings could be permitted.

5.97 *The Commission suggests that the reasonable income and expenditure guidelines proposed for the calculation of repayments under Debt Settlement Arrangements should be used by the Debt Enforcement Office when making assessments as to the appropriate protected income level in a given case, subject to the inclusion of discrete considerations that may be relevant specifically to attachment of earnings orders.*

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<sup>85</sup> See paragraphs 1.285 to 1.287 above.

**(c) Attachment of social welfare payments**

5.98 Similarly to the issue of the appropriate level of exempted income exemptions discussed above, the Commission considers that the question of whether or not income received in the form of social welfare payments should be capable of being attached raises policy choices lying outside of the scope of the Commission's Report. As noted in the submissions discussed above,<sup>86</sup> issues of social welfare provision and social lending policy are raised by a consideration of whether social welfare payments should be available to satisfy judgment debts, and these decisions should be more appropriately made by the responsible policy-makers.

5.99 The Commission however outlines certain issues that could be relevant when considering the appropriate response to this issue. First, the Commission reiterates the principle that enforcement should be appropriate and proportionate in all cases, and that all decisions as to the enforcement of a judgment must be based on an accurate and comprehensive assessment of the debtor's ability to repay the amount owed. Secondly, while the rights of creditors to have their judgment debts satisfied must be respected and vindicated, the above discussion has illustrated that there are convincing reasons why limitations must be placed on enforcement in order to ensure that the debtor's standard of living is not reduced below a basic level. Issues of public policy and the appropriate respective roles of the State and the credit industry should also be considered, as it should be asked whether it is justifiable for social welfare payments made by the State to those who lack the means to provide for their own needs to be used for the purposes of repaying judgment debts. Fourthly, issues of social lending and financial exclusion should be considered, as the question is raised of whether preventing enforcement action through attachment of earnings against those debtors whose only income is derived from social welfare will exclude such individuals from credit markets. Given the widespread use of credit among low-income individuals to pay for basic living expenses,<sup>87</sup> the issue of including such individuals within credit markets is an important consideration. Finally, the Commission suggests that the fact that a large majority of the submissions it received were in favour of prohibiting social welfare payments from being attached should also be considered. Submissions strongly argued that the core principle should be that debtors should be left with sufficient income to ensure a reasonable standard of living. If the attachment of social welfare payments would mean that this would not be the case, then such payments should be incapable of being attached.

5.100 Therefore the Commission makes no formal recommendation in respect of the question of whether social welfare payments should be capable of being attached, but instead suggests that this decision should be made by the Oireachtas in conjunction with the relevant policy-makers. The Commission however suggests that the considerations outlined above should be influential in making a decision in relation to this question.

**(d) Link between attachment of earnings orders and attachment of (bank account) debts orders**

5.101 The Commission's Consultation Paper identified as a further area for discussion the question of the interaction of attachment of earnings orders and attachment of debts orders. In particular, if a minimum level of as-yet-unpaid income is to be exempt from attachment, the question arises as to whether protection should also apply to the attachment of such income after it has been paid and deposited in a bank account. The Commission discusses this issue above and recommends that a consistent approach should be adopted to the exemption levels under attachment of debts orders and attachment of earnings orders, and that a minimum bank account balance level equal to the monthly attachment of earnings exemption level should be protected from attachment.<sup>88</sup> As discussed in the preceding paragraphs, the Commission does not make a recommendation as to the appropriate level at

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<sup>86</sup> See paragraph 5.82 above.

<sup>87</sup> See e.g. Stamp *An Exploratory Analysis of Financial Difficulties among Those Living Below the Poverty Line in Ireland* (Combat Poverty Agency Working Paper Series 09/02 2009); Ramsay "Consumer Credit Society and Consumer Bankruptcy" in Niemi-Kiesilainen (ed), Ramsay (ed) and Whitford (Ed) *Consumer Bankruptcy in Global Perspective* (Hart Publishing 2003) at 22.

<sup>88</sup> See paragraph 5.53 above.

which to set this exemption. The Commission has however suggested that the level could be set through a combination of a minimum protected income level, a flexible approach to the calculation of the appropriate actual income exemption level, and the application of reasonable income and expenditure guidelines. As the Commission suggests that a flexible approach to the attachment of earnings exemption should be adopted in cases where the debtor's income exceeds the baseline minimum protected amount, this would lead to a flexible approach to setting the level of the protected bank account balance in such cases also.

**(e) Protection of debtor's employment**

5.102 As noted above, submissions were unanimously in favour of introducing measures preventing the debtor's employment status from being adversely affected by the existence of an attachment of earnings order against the debtor. Having considered the options of protection of varying degrees outlined in the Consultation Paper, most submissions favoured a wide protection. Such wide protection would include not only a prohibition on terminating the debtor's employment on the grounds of the existence of an attachment of earnings order against him or her, but also the prohibition of any form of discrimination against a debtor on this ground, such as the downgrading of the debtor's employment role.

5.103 Having considered these submissions, the Commission recommends that legislation should prohibit not only the dismissal of an employee on the ground that he or she has become subject to one or more attachment of earnings orders, but should also prohibit any other adverse action being taken against the employee on this sole ground. The Commission is conscious that an examination of the scheme of employment equality legislation lies outside the scope of this Report. Therefore the Commission recommends that the aim of protecting a debtor's employment may be most appropriately achieved by introducing a standalone legislative provision, rather than by adding to the existing legislation in the area of employee discrimination. This is the position for example under the United States *Consumer Credit Protection Act 1968*, which provides for criminal liability for employers who wilfully discharge employees by reason of the fact that the employee's earnings have been subjected to attachment.<sup>89</sup> The Commission considers that a similar position should be adopted in Ireland, but that a wider protection should also be introduced so that adverse action other than dismissal may also be prohibited. In this regard the relevant legislative provisions in the Australian States of Victoria and Queensland may be relevant, which provide for sanctions for any person who dismisses an employee or injures the employee in his or her employment, or alters the employee's position to his or her prejudice, by reason of the circumstances that an attachment of earnings order has been made in relation to the employee or that the person is required to make payments under such an order.

5.104 Taking these considerations into account, the Commission recommends that legislation should provide that any employer who dismisses an employee or injures the employee in his or her employment, or alters the employee's position to his or her prejudice, by reason of the circumstances that an attachment of earnings order has been made in relation to the employee or that the employer is required to make payments under such an order in relation to the employee shall be guilty of an offence.

5.105 *The Commission recommends that legislation should provide that any employer who dismisses an employee or injures the employee in his or her employment, or alters the employee's position to his or her prejudice, by reason of the circumstances that an attachment of earnings order has been made in relation to the employee or that the employer is required to make payments under such an order in relation to the employee shall be guilty of an offence.*

**(f) Administrative costs for employers**

5.106 The Commission's provisional recommendation that employers should not be burdened with excessive administrative costs through their obligations to comply with attachment of earnings orders received no opposition in the submissions received. The Commission believes that employers should therefore be compensated for the administrative costs incurred in diverting a portion of an employee's income in order to satisfy an attachment of earnings order. Following the examples of legislation in

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<sup>89</sup> See (LRC CP 56-2009) at paragraph 6.292, citing §1674(a) and (b) *Consumer Credit Protection Act 1968* (15 USC) (USA).



Scotland and Northern Ireland,<sup>90</sup> the Commission recommends that legislation should empower employers to deduct a prescribed sum from the debtor's pay each time an attachment of earnings is made. This prescribed sum could be set in secondary legislation, and should be set at a level reflecting the actual costs incurred by employers. Employees should be notified in writing when this sum is deducted.

5.107 In line with reforms introduced in England and Wales designed to reduce the costs of administering attachment of earnings orders,<sup>91</sup> the Commission also recommends that all deductions should be payable by employers into a single office, the Debt Enforcement Office. The Debt Enforcement Office could then be responsible for distributing the funds to the relevant creditors. This would also allow for the payment of priority payments, if relevant, such as family maintenance, which are discussed below.

5.108 *The Commission recommends that legislation should empower employers to deduct a prescribed sum from the debtor's pay each time a deduction under an attachment of earnings order is made. The Commission recommends that this sum should be prescribed in secondary legislation, and should be set at a level reflecting the actual costs incurred by employers in making deduction. The Commission recommends that employees should be notified in writing of the making of any such deductions.*

5.109 *The Commission recommends that if possible employers should be permitted to pay all deductions under attachment of earnings orders into a single office, in order to reduce the cost of administering such orders. The Debt Enforcement Office could then be responsible for distributing the collected funds to the relevant creditors.*

**(g) Proportionate use of attachment of earnings orders**

5.110 The Commission next considers the issue of ensuring that attachment of earnings orders are only made in accordance with the principle of proportionality. In this regard the Commission notes that it recommends above that an express statutory rule should be included in legislation to the effect that the Debt Enforcement Office, when deciding on the appropriate method of enforcement in a given case, should have regard to the principle of proportionality and the need to ensure that the enforcement method chosen is the mechanism that is least restrictive of the debtor's rights in the given case.<sup>92</sup> The introduction of this general provision was thought preferable to the introduction of a more rigid rule prioritising certain enforcement methods such as instalment orders, that are perceived as being less restrictive of debtors' rights than other methods. Therefore the paramount consideration should be that the most appropriate and effective enforcement mechanism is chosen in each case based on the individual circumstances in question, subject to the condition of proportionality. The Commission also recommends that suspended execution orders against goods, attachment of debts orders and attachment of earnings orders should be capable of being made in conjunction with instalment orders, so that these suspended orders could come into effect automatically where a debtor defaults in making repayments under an instalment order.<sup>93</sup> The introduction of such a facility was widely supported by submissions received in response to the Consultation Paper.<sup>94</sup> The Commission also recommends that a procedure should be introduced to facilitate offers of payment by instalments in uncontested consumer debt claims.<sup>95</sup>

5.111 Given the above recommendations, the Commission does not consider it necessary to introduce any express provision restricting further the use of attachment of earnings orders. The Commission recognises that attachment of earnings orders have the potential to constitute a serious restriction on the rights of debtors. The Commission nonetheless considers that the above recommendations should be sufficient to ensure that attachment of earnings orders are not used in a

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<sup>90</sup> See (LRC CP 56-2009) at paragraphs 6.299 to 6.300.

<sup>91</sup> See (LRC CP 56-2009) at paragraph 6.298.

<sup>92</sup> See paragraph 5.16 above.

<sup>93</sup> See paragraph 5.18 above.

<sup>94</sup> See paragraphs 5.11 and 5.85.

<sup>95</sup> See paragraph 5.20 above.

disproportionate manner. The Commission therefore makes no formal recommendation in relation to this issue.

**(h) Power to apply to vary and to suspend attachment of earnings orders**

5.112 The Consultation Paper's provisional recommendation that both the debtor and creditor should be empowered to apply to vary (and possibly to suspend) attachment of earnings orders where there has been a material change in the debtor's circumstances was widely supported by submissions made to the Commission. The Commission considers that this power would be an essential element of an attachment of earnings system, and is crucial to ensuring that an order corresponds to the debtor's ability to pay and would leave the debtor with sufficient income to maintain a reasonable standard of living. Similarly, a creditor should be entitled to apply for an increase in the amount of repayments being made by attachment of earnings where the debtor's income increases substantially (although this entitlement must however be balanced with the need to continue to provide incentives to the debtor to seek employment and promotion). Where the debtor's circumstances are undergoing a temporary change which leaves him or her unable to meet repayments under an order for a short period of time, it may be appropriate to suspend the order temporarily rather than vary it. The Commission therefore recommends that a debtor should be empowered to apply for the suspension of an attachment of earnings order where his or her circumstances have changed rendering him or her temporarily unable to comply with the order. Debtors and creditors should be provided with readily understandable documentation in plain language containing information on their entitlement to apply to the Debt Enforcement Office for a variation or suspension of an attachment of earnings order, and the types of circumstances in which a variation or suspension is possible.

5.113 The Commission also considers that, in addition to the review of an attachment of earnings order on the application of the debtor or creditor, the Debt Enforcement Office should be empowered to review an order of its own motion under certain circumstances. These circumstances should include where an application to enforce another judgment debt is made against a debtor who is subject to an attachment of earnings order. As a Debt Settlement Arrangement, Debt Relief Order or bankruptcy order has the effect of suspending enforcement action against the debtor involved, these processes would also lead to the suspension of the attachment of earnings order. The Commission has considered the possibility of legislation providing for periodic reviews of all attachment of earnings orders by the Debt Enforcement Office, as suggested by some submissions and by the "Hunter Review" of enforcement practices in Northern Ireland.<sup>96</sup> The Commission considers that this could be a resource-intensive process however, and suggests that it may be more appropriate for reviews to take place only on the petition of the debtor or creditor, or where an application to enforce another judgment debt is made against a debtor who is already subject to an attachment of earnings order.

5.114 If a review of the debtor's changed circumstances (either on application of the debtor or creditor, or on the office's own motion) concludes that the debtor no longer possesses the means to satisfy a judgment debt through an attachment of earnings order, the Debt Enforcement Office should be empowered to discharge an order and provide the debtor with information of the relevant insolvency procedures that may be open to him or her.

5.115 *The Commission recommends that a debtor and creditor should be entitled to apply to the Debt Enforcement Office for a variation of an attachment of earnings order where the debtor's circumstances change materially. The Commission recommends that a debtor should be empowered to apply for the suspension of an attachment of earnings order where his or her circumstances have changed rendering him or her temporarily unable to comply with the order. The Commission recommends that both debtors and creditors should be provided with readily understandable documentation in plain language containing information on their entitlement to apply to the Debt Enforcement Office for a variation or suspension of an attachment of earnings order, and on the types of circumstances in which a variation or suspension is possible.*

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<sup>96</sup> See (LRC CP 56-2009) at paragraph 6.310, citing *Report of the Enforcement of Judgments Review Committee (Northern Ireland)* (1987) at paragraph 14.20. See also paragraph 5.86 above.

5.116 *The Commission recommends that the Debt Enforcement Office should be empowered to review an attachment of earnings order of its own motion where an application to enforce another judgment debt is made against a debtor who is subject to an attachment of earnings order.*

5.117 *The Commission recommends that where a review of the debtor's changed circumstances (either on application of the debtor or creditor, or on the office's own motion) concludes that the debtor no longer possesses the means to satisfy a judgment debt through an attachment of earnings order, the Debt Enforcement Office should be empowered to discharge an order and provide the debtor with information of the relevant insolvency procedures that may be open to him or her.*

**(i) Obtaining information about debtors' changes of employment**

5.118 The Commission notes that under the attachment of earnings procedure under the *Family Law (Maintenance of Spouses and Children) Act 1976*, where a debtor who is subject to an order leaves employment, obligations are placed on both the debtor and his or her new employer to provide the court with details of the debtor's new employment. As noted in the Consultation Paper, however, a review of enforcement procedures in England and Wales has found that despite the existence of similar provisions, creditors find it difficult to track debtors who change employment during the course of an attachment of earnings order.<sup>97</sup>

5.119 The Commission notes that a majority of submissions were in favour of the introduction of measures enabling information concerning a debtor's change of employment to be obtained independently of the debtor. It was suggested that such information could be obtained from records held by the Revenue Commissioners or the Department of Social Protection. Submissions however also cautioned against the potential restriction on privacy rights of the debtor involved in the introduction of such measures.

5.120 The Commission believes that allowing the Debt Enforcement Office to obtain information from records of the Revenue Commissioners and the Department of Social Protection concerning a debtor's employment status could be an effective means of alleviating the problem of tracing debtors to new jobs. The Commission recognises the potential restrictions on debtor rights and infringements of data protection law involved in such information-sharing however. Therefore the Commission recommends that in accordance with the principle of proportionality the use of such a mechanism should only be possible where less restrictive means of obtaining information have been unsuccessful. Therefore the Commission recommends that the primary method of obtaining information should be from the debtor, through the placing of an obligation on the debtor to inform the Debt Enforcement Office of any changes in his or her employment status. As is the case under the *Family Law (Maintenance of Spouses and Children) Act 1976*, a duty should also be placed on the debtor's new employer to notify the Debt Enforcement Office that it is the debtor's new employer where a new employee is subject to an attachment of earnings order. Only where attachment of earnings deductions have stopped, and the debtor has failed to respond to a request for the voluntary disclosure of information concerning his or her employment, should other means of obtaining such information be available. These other means could involve the sharing of information held by the Revenue Commissioners and the Department of Social Protection with the Debt Enforcement Office. The Commission recognises that this proposal may involve issues of data protection law, but a discussion of such issues lies outside the scope of this Report. Issues of information technology may also be raised by this proposal.

5.121 *The Commission recommends that, in the first place, a duty should be placed on a debtor who is subject to an attachment of earnings order to inform the Debt Enforcement Office of any change in his or her employment status. The Commission recommends that a duty should also be placed on the debtor's new employer to notify the Debt Enforcement Office that it is the debtor's new employer where the new employee is subject to an attachment of earnings order.*

5.122 *The Commission recommends that where attachment of earnings deductions have stopped, and the debtor has failed to comply with a request for the voluntary disclosure of details concerning his or*

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<sup>97</sup> See (LRC CP 56-2009) at paragraph 6.317, citing Lord Chancellor's Department *Effective Enforcement – Improved Methods for Recovery for Civil Court Debt and Commercial Rent and a Single Regulatory Regime for Warrant Enforcement Agents* (Cm5744 2003) at 79.

her employment status, a procedure should be introduced to allow information held in the records of the Revenue Commissioners and the Department of Social Protection to be shared with the Debt Enforcement Office. This recommendation is made subject to the requirements of data protection law and the capability of information technology systems to allow such data sharing.

**(j) Consolidated attachment of earnings orders**

5.123 As noted above, submissions generally favoured the introduction of a mechanism of consolidated attachment of earnings orders, subject to adequate consideration being given to the issues of the apportionment of the amount of attachment deductions among various creditors and the priority status to be afforded to any debts.

5.124 In a similar manner to the discussion of the proposed introduction of consolidated instalment orders above,<sup>98</sup> the Commission notes that consolidated attachment of earnings orders would only be applicable in situations where an assessment of a debtor's means by the Debt Enforcement Office and enforcement officers has found the debtor to have the resources necessary to repay multiple judgment debts via instalments. If the Debt Enforcement Office reaches the conclusion that the debtor is insolvent for the purposes of bankruptcy, Debt Settlement Arrangement or Debt Relief Order procedures,<sup>99</sup> the office must refuse to make an enforcement order and may either issue a certificate of unenforceability or stay enforcement for the purposes of affording the debtor the opportunity to avail of these insolvency procedures.<sup>100</sup> A consolidated attachment of earnings order would in this way be made only where the debtor is in a position to repay all of his or her debts in full within a reasonable period of time of five years.<sup>101</sup> Thus a consolidated attachment of earnings order would only be made where it would provide for the full repayment of all of the relevant judgment debts within this time. Concerns of creditors regarding priorities may therefore be lessened when it is considered that a consolidated instalment order should lead to full repayment for all of the creditors concerned, albeit over a reasonably long period of time. If a multiple instalment order would not lead to such an outcome, the Commission recommends that one of the relevant insolvency procedures should be the appropriate instrument for the debtor's case.

5.125 Nonetheless, in cases where the debtor's circumstances are such as to permit the repayment of multiple attachment of earnings orders within a reasonable period of time, the Commission considers that consolidated attachment of earnings orders may be an effective method of enforcement. In such cases issues arise as to how the deductions from the debtor's income should be apportioned between creditors. The options here would include either affording a form of priority status to the debtor who was first to obtain a court judgment and apply to the Debt Enforcement Office, or instead introducing a mechanism whereby all creditors who are party to the consolidated attachment of earnings order share the deducted income on a *pro rata* basis. The Commission considers that it may be unfair to provide an advantage to the creditor who was first to apply for enforcement. This is particularly the case where a debtor may have limited resources and where to allow the first creditor to claim more of the debtor's income could lead to considerable delays in receipt of proceeds by the other creditors. In addition, the first creditor's speed of application may be due to a failure to observe responsible arrears management, a course of action that the Commission would not wish to incentivise. Therefore the Commission recommends that, subject to the discussion below relating to the relative priority of family maintenance attachment of earnings orders, consolidated attachment of earnings orders should consist of the distribution of deductions from the debtor's income amongst the relevant creditors on a *pro rata* basis.

5.126 *The Commission recommends that where a debtor's financial circumstances are such as to permit his or her multiple judgment debts to be repaid by attachment of earnings orders within a reasonable period (of five years), a consolidated attachment of earnings order mechanism should be*

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<sup>98</sup> See paragraphs 5.23 and 5.24 above.

<sup>99</sup> See section 15 of the *Bankruptcy Act 1988* and paragraphs 2.47 to 2.69.

<sup>100</sup> See paragraphs 4.99 to 4.100 above.

<sup>101</sup> This refers to the "insolvency" condition for accessing the Debt Settlement Arrangement procedure as recommended by the Commission at paragraph 1.333 above.

introduced. The Commission recommends that a consolidated attachment of earnings order should consist of the distribution of a single amount deducted from the debtor's income amongst the relevant creditors on a pro rata basis.

**(k) Attachment of family maintenance attachment of earnings orders**

5.127 The Consultation Paper noted that family maintenance attachment of earnings orders are paid in priority to other judgment debts under the systems of most European countries, and outlined several reasons why family maintenance obligations are distinguished from other debts.<sup>102</sup> The Commission also noted that the trend of reform of the attachment of earnings mechanism in Irish family law has sought to make this procedure more effective, arguably demonstrating a policy of promoting the importance of maintenance payments.<sup>103</sup> Since the publication of the Consultation Paper, the *Civil Law (Miscellaneous Provisions) Bill 2010* seeks to further this policy by distinguishing family maintenance obligations from other judgment debts, and by providing for separate mechanisms for the enforcement of family maintenance orders.<sup>104</sup> The Bill proposes to do this by providing that a failure to make a payment due under a family maintenance order constitutes contempt of court on the part of the maintenance debtor.

5.128 In addition, the majority of submissions supported the allocation of priority status to attachment of earnings orders made in respect of family maintenance obligations.

5.129 In light of these considerations, the Commission recommends that priority status should be given to family maintenance obligations. Only where deductions from a debtor's income under a family maintenance attachment of earnings order leave sufficient income for further deductions (having regard to the protected income levels), should further attachment of earnings orders in respect of other judgment debts be capable of being made.

5.130 *The Commission recommends that only where deductions from a debtor's income for the payment in full of an attachment of earnings order made in respect of a family maintenance obligation leave sufficient income for further deductions should attachment of earnings orders for the enforcement of other judgment debts be capable of being made.*

**F Goods Seizure Order (Execution against Goods)**

5.131 In the following part the Commission makes recommendations for the reform of the enforcement mechanism of execution against goods, or the seizure and sale of a debtor's moveable property by a Sheriff or County Registrar for the purposes of satisfying the judgment debt owed. The Consultation Paper noted that the procedure of execution against goods as it currently exists is generally regarded as ineffective, providing low returns to creditors while at the same time imposing considerably on debtors.<sup>105</sup> Statistical evidence of the low success rate of this enforcement mechanism was presented, which also illustrated how the level of efficacy of this mechanism varies inconsistently throughout the country. The attribution of the function of seizing and selling debtors' goods to County Registrars, who are already subject to considerable responsibilities regarding the administration of the Circuit Courts, was also noted. Certain discrete areas of the law relating to execution against goods were also identified as being outdated or otherwise in need of review.<sup>106</sup> The Commission noted that despite its flaws this procedure remains the most widely used enforcement mechanism.

5.132 Due to the large number of issues considered in relation to this enforcement mechanism, the Commission divides this Part by reference to each discrete issue discussed, thus structuring the Part in a slightly different format to other Parts.

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<sup>102</sup> See (LRC CP 56-2009) at paragraph 6.237.

<sup>103</sup> See (LRC CP 56-2009) at paragraph 6.238 and the *Judicial Separation and Family Law Reform Act 1989*; the *Family Law Act 1995*; the *Family Law (Divorce) Act 1996*.

<sup>104</sup> See section 22 of the *Civil Law (Miscellaneous Provisions) Bill 2010*, inserting section 9A into the *Family Law (Maintenance of Spouses and Children) Act 1976*.

<sup>105</sup> (LRC CP 56-2009) at paragraphs 3.342 to 6.331.

<sup>106</sup> (LRC CP 56-2009) at paragraphs 3.351 to 3.359.

5.133 The Commission notes that in its Consultation Paper it expressed the view that the relevant statutory and common law rules concerning the procedure of execution against goods should be consolidated into a single legislative code as part of the reform of the overall system of enforcement.<sup>107</sup> The Commission reiterates this view, and makes its recommendations in this area with the intention that they should be implemented by incorporating them together into a single legislative text.

**(1) Reduction in Reliance on Execution against Goods as the Primary Method of Enforcement**

5.134 The first issue addressed by the Consultation Paper in relation to execution against goods was whether steps should be taken to change the current position whereby this method of enforcement is seen as the primary means of enforcing a court judgment.<sup>108</sup> The Commission presented an outline of how measures were introduced to meet this aim in a range of other countries, including Scotland, Northern Ireland, England and Wales, France and Austria. These measures generally involved requirements that the procedure of execution against goods should only be used where certain conditions are met, such as where reasonable steps have been made to resolve the debt dispute by other means<sup>109</sup> and where the costs of the process would exceed any proceeds of sale.<sup>110</sup>

5.135 The Commission expressed the view that reliance on this procedure should be reduced. First, it was suggested that this mechanism is historical in nature, and dates from a time when most individuals' wealth was held in physical goods, a position quite different from that prevailing today. Also, the principle of proportionate enforcement, as discussed in *McCann v Judge of Monaghan District Court and Ors*,<sup>111</sup> requires that this enforcement mechanism, which restricts the debtor's privacy and property rights, cannot be used as a default enforcement mechanism where it is not rationally connected with the aim of obtaining payment of the judgment debt or where less restrictive enforcement mechanisms are available.<sup>112</sup> The Commission therefore provisionally recommended, as part of the policy of promoting appropriate and proportionate enforcement, that the current position of over-reliance on enforcement by execution against goods should be removed, and that this mechanism should only be available where it is necessary, proportionate and not overly restrictive.<sup>113</sup> The Commission noted that many of the objections to execution against goods are related to the operation of the procedure in cases where goods are located at the debtor's home. The Commission for this reason invited submissions as to whether a two-tier system of execution against goods, involving a distinction between domestic and commercial premises, should be introduced.<sup>114</sup> The Commission noted that one of the reasons why this enforcement mechanism remains so widely used despite its lack of effectiveness is that creditors often lack sufficient information to attempt more targeted means of enforcement such as garnishee orders.<sup>115</sup> In this regard the Commission suggested that the availability of more comprehensive and accurate information about a debtor's means would help to address the over-reliance on this enforcement mechanism.<sup>116</sup> The Commission also noted that the introduction of an attachment of earnings mechanism might also reduce reliance on execution against goods.

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<sup>107</sup> (LRC CP 56-2009) at paragraphs 6.376 to 6.377.

<sup>108</sup> (LRC CP 56-2009) at paragraphs 6.333 to 6.353.

<sup>109</sup> See e.g. section 48 of the *Debt Arrangement and Attachment (Scotland) Act 2002*.

<sup>110</sup> See the practice in Northern Ireland, as discussed at (LRC CP 56-2009) paragraph 6.340.

<sup>111</sup> [2009] IEHC 276; [2009] 4 I.R. 20.

<sup>112</sup> See (LRC CP 56-2009) at paragraph 6.349.

<sup>113</sup> (LRC CP 56-2009) at paragraph 6.351.

<sup>114</sup> (LRC CP 56-2009) at paragraph 6.353.

<sup>115</sup> (LRC CP 56-2009) at paragraph 6.347.

<sup>116</sup> See paragraphs 4.48 to 4.64 above for the Commission's recommendations for the improving access to information concerning the debtor's means.

5.136 The submissions received by the Commission in relation to this subject expressed mixed views. Some submissions supported the reduction in reliance on this method of enforcement, provided that alternative enforcement methods were made available, which could perhaps be combined with suspended orders for execution against goods. A narrow majority of submissions however was opposed to varying different degrees to any limitation on enforcement by execution against goods. These submissions indicated that the power to seize goods, particularly commercial leaseholds, remains an important enforcement tool, and that even if actual seizure of the debtor's goods does not take place, the threat of seizure is very effective in inducing payment. One submission suggested therefore that any rules limiting recourse to execution against goods should be contained in a Code of Practice, but should not be embodied in legislation. In this manner enforcement officers and the Debt Enforcement Office could apply the proportionality principle when deciding upon the appropriate enforcement mechanism in a given case.

5.137 Submissions generally did not favour the introduction of a formal two-tier system of enforcement to distinguish between commercial and domestic premises, but agreed that different considerations arise in relation to these two types of cases. Submissions suggested that a Code of Practice, rather than legislation, may be a more appropriate means of taking into account these differences.

5.138 The Commission has considered the submissions received, as well as the measures adopted in other countries to limit recourse to execution against goods as an enforcement mechanism. The Commission retains its view that it is desirable (and most probably necessary under the Constitution of Ireland) that reliance on this enforcement method should be reduced. The Commission however considers that a similar approach should be adopted as has been proposed above in relation to the proposed prioritisation of instalment orders<sup>117</sup> and limitations on the use of the attachment of earnings procedure. Therefore the Commission does not recommend that legislation should expressly provide for the circumstances in which execution of goods would be appropriate and proportionate. Instead, as recommended above, an express statutory rule should be included in legislation to the effect that the Debt Enforcement Office, when deciding on the appropriate method of enforcement in a given case, should have regard to the principle of proportionality and the need to ensure that the enforcement method chosen is the mechanism that is least restrictive of the debtor's rights in the given case. Guidelines could be prepared by the Debt Enforcement Office indicating the types of circumstances in which the use of execution against goods would be appropriate and proportionate. Such guidelines could include factors such as the following:

- Whether other more appropriate and/or less restrictive methods of enforcement are likely to be successful in recovering a reasonable amount of the judgment debt owed within a reasonable time;<sup>118</sup>
- Whether the proceeds raised from the sale and seizure of a debtor's assets would exceed the costs incurred in the process by a reasonable amount.<sup>119</sup>

5.139 The Commission also does not consider that a formal two-tier system should be adopted to distinguish between cases of execution against goods in the commercial or domestic contexts, but instead is of the view that the differences between these two types of cases can be adequately addressed through the proposed guidelines.

5.140 *The Commission recommends that guidelines should be prepared by the Debt Enforcement Office indicating the types of circumstances in which the use of execution against goods would be appropriate and proportionate. Such guidelines could include factors such as the following:*

- *Whether other more appropriate and/or less restrictive methods of enforcement are likely to be successful in recovering a reasonable amount of the judgment debt owed within a reasonable time;*<sup>120</sup>

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<sup>117</sup> See paragraphs 5.14 to 5.16 and 5.110 to 5.111 above.

<sup>118</sup> See e.g. §264 of the Austrian *Execution Code*.

<sup>119</sup> See e.g. section 48 of the *Debt Arrangement and Attachment (Scotland) Act 2002*.

- *Whether the proceeds raised from the sale and seizure of a debtor's assets would exceed the costs incurred in the process by a reasonable amount.*<sup>121</sup>

**(2) Code of Practice for Enforcement Officers**

5.141 The Consultation Paper next provisionally recommended that a Code of Practice should be established to regulate the conduct of enforcement officers when engaged in the process of execution against goods.<sup>122</sup> The Commission noted that such a code has been introduced by the Revenue Commissioners and the Sheriffs' Association to provide for standards to be observed by Revenue Sheriffs when enforcing revenue debts through execution against goods. The Commission proposed that the Code of Practice should be drafted with the collaboration of enforcement officers and representatives of debtors and creditors. It should outline the duties of enforcement officers, debtors and creditors under the process of execution against goods, as well as establishing a disputes resolution procedure under which aggrieved debtors and/or creditors may make complaints. The Commission provisionally recommended that the Debt Enforcement Office could supervise the operation to the Code and manage complaints, with a further independent complaints procedure also an option if considered necessary. The Commission ultimately invited submission as to how the proposed Code of Practice should be drafted and as to its content.

5.142 The introduction of a Code of Practice was strongly supported by the submissions received by the Commission. It was suggested that such a code could follow the example of the Code of Practice established by the Revenue Commissioners and the Sheriffs' Association, with the Debt Enforcement Office occupying the role held by the Revenue Commissioners as supervisor of the operation of the code.

5.143 The Commission notes the widespread support for its provisional recommendation for the introduction of a Code of Practice for enforcement officers when carrying out the process of execution against goods, and thus makes a final recommendation to this effect. The proposed Code of Practice could be modelled on the current code operated by the Revenue Commissioners regulating the enforcement activity of Revenue Sheriffs, which the Commission understands has been operating quite satisfactorily. The Commission also recommends that consideration should be given to best practice in other countries when drafting the code, and models such as the *National Standards for Enforcement Officers* operating in England and Wales could be taken into account. The code should be drafted by the Debt Enforcement Office in collaboration with enforcement officers and representatives of creditor and debtor organisations. The operation of the code should be overseen by the Debt Enforcement Office, which could be responsible for handling complaints of debtors or creditors in respect of the conduct of enforcement officers when carrying out the functions of execution against goods. The code should establish detailed procedure for managing such complaints, in order to ensure the transparency and impartiality of the process.

5.144 *The Commission recommends that a Code of Practice should be introduced to regulate the conduct of enforcement officers when carrying out the process of execution against goods. The Commission recommends that the proposed Code of Practice could be modelled on the current code operated by the Revenue Commissioners regulating the enforcement activity of Revenue Sheriffs, while consideration should also be given to best practice in other countries when drafting the code. The Commission recommends that the code should be drafted by the Debt Enforcement Office in collaboration with enforcement officers and representatives of creditor and debtor organisations.*

5.145 *The Commission recommends that the operation of the code should be overseen by the Debt Enforcement Office, which could be responsible for handling complaints of debtors or creditors in respect of the conduct of enforcement officers when carrying out the functions of execution against goods. The Code of Practice should establish detailed procedures for handling complaints, ensuring the transparency and impartiality of the process.*

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<sup>120</sup> See e.g. §264 of the Austrian *Execution Code*.

<sup>121</sup> See e.g. section 48 of the *Debt Arrangement and Attachment (Scotland) Act 2002*.

<sup>122</sup> (LRC CP 56-2009) at paragraphs 6.354 to 6.358.



### **(3) Terminology**

#### **(a) Consultation Paper**

5.146 The Consultation Paper noted that much of the terminology involved in the procedure of execution against goods is largely outdated.<sup>123</sup> The paper noted that the procedure itself is known by several different names, while other terms such as “*fieri facias*”, “*nulla bonna*” and “bailiwick” were identified as being difficult to understand and unnecessarily complicated. It was also considered that the use of the “execution order” to refer to the process of execution against goods was potentially misleading, as all enforcement orders could be termed to be execution orders of varying types. In accordance with the policy of promoting the use of plain language in the law, the Commission therefore provisionally recommended that the terminology in this area should be updated, and in particular that the terms “execution against goods”, “execution order” and “order of *fieri facias*” should be replaced by clearer terms. The Commission invited submissions as to appropriate new terms. The Commission in this regard presented examples of updated terminology used in other countries.

#### **(b) Submissions**

5.147 Submissions received largely supported the Commission’s provisional recommendations. It was especially agreed that the term “order of *fieri facias*” should be updated and simplified. It was suggested by one submission that the term “debt enforcement order” or “goods seizure order” could instead be used. One submission suggested that the term “Sheriff” should be retained, as it is a term that has existed for a long period and is widely recognised.

#### **(c) Conclusions and Recommendations**

5.148 The Commission notes the support for its provisional recommendations and recommends that existing terminology in relation to the procedure of execution against goods should be wholly updated. The Commission recommends that a single order for execution against goods should be issued by the Debt Enforcement Office, irrespective of the court in which judgment was obtained. Thus the various terms of “order of *fieri facias*” and “execution order against goods” should be abolished.<sup>124</sup> The new single order should be simply termed a “goods seizure order”, a term which the Commission considers to be readily comprehensible and explicative of the substance of the order. The term “*nulla bonna*” should no longer be used, and the report of an enforcement officer presented to the creditor, debtor and Debt Enforcement Office should be expressed in plain English. As the Commission has already noted above, the duties of visiting the debtor’s premises and actually seizing and selling the debtor’s goods is to be carried out by newly-appointed enforcement officers (who could potentially be drawn from the ranks of current Revenue Sheriffs),<sup>125</sup> and the Commission considers that the term “Enforcement Officer” may be appropriate to describe the holders of this new position.

5.149 *The Commission recommends that the procedure known as “execution against goods” should be renamed “seizure and sale of goods”. The Commission recommends that “orders of fieri facias”, and “execution orders against goods” should be abolished, and replaced with a single order to be made by the Debt Enforcement Office known as a “goods seizure order”.*

5.150 *The Commission recommends that the report to be prepared by a local enforcement officer and presented to the creditor, debtor and Debt Enforcement Office should be expressed in plain language, and should avoid the use of Latin terms such as “nulla bonna”.*

### **(4) Substantive Reforms of the Mechanism**

5.151 In addition to making provisional recommendations in relation to the procedural and institutional matters discussed above, the Commission also presented provisional recommendations for the reform of the substantive law concerning execution against goods. The Commission’s final recommendations in this area are now presented.

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<sup>123</sup> (LRC CP 56-2009) at paragraphs 6.357 to 6.375.

<sup>124</sup> See (LRC CP 56-2009) at paragraph 3.242 for a discussion of these terms.

<sup>125</sup> See paragraphs 4.19 to 4.29 above.

**(a) Binding of the Debtor's Property**

5.152 The Consultation Paper noted that section 26 of the *Sale of Goods Act 1893* provides that the delivery of a writ of *fieri facias* to a sheriff has the effect of “binding” the property in the goods of a judgment debtor.<sup>126</sup> This means that the debtor’s goods become liable to seizure by the sheriff, and that the title to the debtor’s goods is subject to this liability to seizure, subject to the fact that a purchaser of the debtor’s goods who acted in good faith would not find his or her title to the goods to be prejudiced by the writ. The Consultation Paper noted that it would be necessary to amend the process of the “binding” of the property in the goods of the judgment debtor should the existing procedures of “orders of *fieri facias*” and “execution orders against goods” be replaced with a new order made by the Debt Enforcement Office. The Commission proposed that once an application for enforcement has been made to the Debt Enforcement Office, the debtor’s property should become “bound” in order to prevent the debtor dealing with the property pending the examination of his or her means and the making of an enforcement order. The Consultation Paper also noted that any goods exempt from seizure, as discussed in the preceding paragraphs, would not be affected by this binding effect. The Commission raised the question as to whether only the debtor’s physical goods should be bound, or whether other assets such as the debtor’s bank account should also be subject to such restrictions.

5.153 The Commission recommends (reflecting the view in the Consultation Paper) that an application for enforcement made to the Debt Enforcement Office should bind the property in the goods of the judgment debtor as from the time when the application is delivered to the Debt Enforcement Office. The Commission recommends, however, that this binding effect should not prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he or she acquired his or her title notice that such an application or any other application by virtue of which the goods of the execution debtor might be seized had been delivered to the Debt Enforcement Office. The Commission recommends that such binding effect should not apply to any goods of the debtor that are protected as being exempt from seizure. The Commission makes no recommendation as to whether other assets of the debtor, such as his or her bank account balance, should be similarly bound. The Commission notes in this regard that other procedures, such as a Mareva injunction, are available to prevent such assets from being dissipated with the intention of frustrating a court judgment.

5.154 *The Commission recommends that an application for enforcement made to the Debt Enforcement Office should bind the property in the goods of the judgment debtor as from the time when the application is delivered to the Debt Enforcement Office. The Commission recommends, however, that this binding effect should not prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he or she acquired his or her title notice that such an application or any other application by virtue of which the goods of the execution debtor might be seized had been delivered to the Debt Enforcement Office. The Commission recommends that such binding effect should not apply to any goods of the debtor that are protected as being exempt from seizure.*

**(b) Exempt Goods**

**(i) Consultation Paper**

5.155 The Consultation Paper noted that current rules specifying certain goods of the debtor that are exempt from seizure are outdated and inappropriate for ensuring that the debtor is afforded a reasonable standard of living.<sup>127</sup> This is largely due to the fact that the goods which the debtor may retain, including “necessary wearing apparel and bedding” and tools of the debtor’s trade, are only protected from seizure up to a monetary value of £15. This standard is clearly insufficient to preserve a reasonable standard of living for a debtor and his or her dependents under today’s standards. The Consultation Paper reviewed the rules relating to exemptions from seizure in other countries such as Northern Ireland, Scotland and England and Wales, before inviting submissions as to the categories of debtors’ assets which should be

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<sup>126</sup> (LRC CP 56-2009) at paragraphs 6.379 to 6.381.

<sup>127</sup> (LRC CP 56-2009) at paragraphs 3.356 to 3.359, 6.359.

exempt from seizure.<sup>128</sup> The Commission invited submissions specifically as to whether, and if so under what circumstances, a debtor's car or other vehicle should be exempt from seizure.<sup>129</sup>

**(ii) Submissions**

5.156 Submissions presented a wide range of approaches that could potentially be adopted in this regard. One submission proposed that goods under the existing categories, but up to an increased value of €750, should be capable of being retained by the debtor. This monetary amount should be index-linked or capable of being adjusted by secondary legislation, in order to maintain its real value in line with inflation. This submission suggested that the current categories should also be extended to include "household goods and appliances". Another submission suggested that the primary principle should be one of ensuring that a "reasonable standard of living" is maintained for the debtor. It argued that legislation should provide for exemptions for any equipment reasonably required by the debtor for his or her profession, trade or business. A monetary limit of €2000 should be placed on the exempt assets, according to this submission.

5.157 One more submission suggested that a modern reformulation of the existing statutory definition should be introduced. Protection should be afforded to tools and goods relied upon by individuals in the course of their trade, and most items within the debtor's home required to allow the debtor and his or her dependents to live with dignity should be exempt from seizure. This submission emphasised the fact that such goods would be unlikely to realise proceeds of a significant value in any case.

5.158 A final submission suggested that it may be preferable for flexible guidelines to be introduced rather than absolute legislative requirements. This submission argued in favour of a more individualised approach, where exemptions could be based on the circumstances of the debtor in question. Guidelines could in this manner be based on the exemptions provided under the laws of other countries.

5.159 Submissions were in general agreement that there should be no automatic exemption from seizure for a debtor's car or other motor vehicle. Some submissions suggested that the threat of seizure of a debtor's car is an important tool in inducing payment from debtors, even if this tool is only invoked in a small minority of cases. Therefore an outright exemption could seriously compromise the effectiveness of the process of execution against goods. Submissions also generally took the view however that a debtor's vehicle should be exempt from seizure where it is necessary for the debtor's trade, profession or employment or where its seizure would reduce the debtor's quality of life below an acceptable level. The availability of public transport in the debtor's area should be considered in this regard. It would also be necessary to take into account whether the debtor or any of his or her dependents have special needs such as to make the use of a motor vehicle particularly necessary. According to submissions, the value of the car should be taken into account, and any exemption could limit the value of a car that may be retained to a certain monetary amount, such as €5000. The replacement value of the debtor's vehicle would also be a relevant consideration.

**(iii) Conclusions and Recommendations**

5.160 The Commission notes that the enforcement review conducted in England and Wales in the last decade adopted a principled approach to the establishment of exemption rules, specifying the following principles for consideration:

- the range of exempt goods should not be so great as to find that there are no seizable goods in a debtor's home;
- the sale of the goods should not inflict greater hardship on the debtor than it would benefit the creditor; and
- the exemptions must be workable.<sup>130</sup>

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<sup>128</sup> (LRC CP 56-2009) at paragraphs 6.360 to 6.364.

<sup>129</sup> (LRC CP 56-2009) at paragraphs 6.365 to 6.366.

<sup>130</sup> Lord Chancellor's Department *A Single Piece of Bailiff Law and a Regulatory Structure for Enforcement* (Green Paper 2001) at paragraph 4.28. See also Beatson *Report of the Independent Review of Bailiff Law* (University of Cambridge Centre for Public Law 2000) at paragraph 7.5.

The Commission endorses these principles as a sound basis for establishing rules relating to assets exempt from seizure.

5.161 The Commission recommends that, mirroring the Commission's approach to the balance between what should be in primary and secondary legislation in connection with this matter in the context of Debt Settlement Arrangements, primary and secondary legislation should establish a general rule that any assets of the debtor reasonably necessary to ensure that the debtor and his or her dependents may maintain a reasonable standard of living should be exempt from seizure. The Commission notes that in respect of its proposals for the Debt Settlement Arrangement procedure it recommended that flexible guidelines, rather than legislation, should be introduced to outline the assets that a debtor may retain when participating in the procedure.<sup>131</sup> As the Debt Settlement Arrangement procedure involves negotiation of appropriate terms in an individual case between the debtor and creditors, different considerations may apply in the case of the enforcement of a judgment debt through execution against goods. Rules exempting goods from seizure could in this regard be less based on the reaching of a consensus between debtor and creditor or enforcement officer, and could be firmer in establishing a baseline of protection for debtors while also vindicating the rights of creditors so far as is possible. Nonetheless, similarities exist between the two exemption systems. It should be noted in this regard that the laws of Northern Ireland and England and Wales have not sought to list exhaustively the goods that are exempt from seizure, but rather have specified broad categories of exemptions in legislation, with non-statutory guidance to be issued as an aid to the interpretation of the legislative rules. The Commission notes that more rigid statutory provisions may not be workable, and so would not be in accordance with the principles accepted by the Commission in the preceding paragraph.

5.162 Based on the above, and having considered the approach adopted in other countries, the Commission recommends that certain categories of exempt goods should be established in legislation. This could be achieved by specifying certain categories of exemptions in primary legislation, while providing more detailed provisions or guidance, including limits on the monetary value of the exempted goods, in secondary legislation. The Commission notes that the identification of the goods necessary for the maintenance of a reasonable standard of living does not lie within its competence, but suggests, based on comparative analysis, that the categories of exemptions specified in primary legislation could include the following:

- Such household goods (including clothing, bedding, furniture and equipment) as are necessary for maintaining a reasonable standard of living for the debtor and his or her family;
- Such tools, books, vehicles and other items of equipment as are necessary to the debtor for use personally by him in his employment, business, profession or trade;
- A motor vehicle the use of which is reasonably required by the debtor for his or her employment, business, profession or trade; or the use of which is necessary for maintaining a reasonable standard of living for the debtor and his or her family; not exceeding a certain value (with the value to be specified in secondary legislation).

Secondary legislation could then include further detail as to these categories, and could place monetary limits on the value of the goods that are exempted. Such monetary limits should be index-linked or capable of being adjusted readily in order to ensure that their real values remain consistent over time. A certain level of discretion must be afforded to enforcement officers and/or the Debt Enforcement Office regarding the application of these exemptions to a particular case, bearing in mind that a complaints handling procedure should exist for aggrieved debtors or creditors.

5.163 *The Commission recommends that primary legislation should establish a general rule that any assets of the debtor reasonably necessary to ensure that the debtor and his or her dependents may maintain a reasonable standard of living should be exempt from seizure.*

5.164 *The Commission considers that certain basic exemptions should be established in legislation. The Commission recommends that this could be achieved by specifying certain categories of exemptions in primary legislation, while providing more detailed provisions or guidance, including limits on the*

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<sup>131</sup> See paragraphs 1.285 to 1.287 above.

monetary value of the exempted goods, in secondary legislation. The Commission suggests that the categories of exemptions specified in secondary legislation could include the following:

- Such household goods as are necessary for maintaining a reasonable standard of living for the debtor and his or her family;
- Such material items as are necessary to the debtor for use personally by him in his employment, business, profession or trade.

5.165 The Commission recommends that secondary legislation should provide further detail as to the content of these categories, and should place monetary limits on the value of the goods that are exempted. The Commission recommends that such monetary limits should be index-linked or capable of being adjusted readily in order to ensure that their real values remain consistent over time.

**(c) Goods available for seizure: Charging Orders and Stop Orders**

5.166 When discussing the question of the types of goods that can or cannot be seized by an enforcement officer, the Commission also wishes to raise the subject of the potential reform of the distinct, but related, enforcement mechanisms of charging orders and stop orders.

5.167 Charging orders and stop orders are methods of enforcing judgments which are rarely used in practice. Under a charging order, a court may order that stocks or shares belonging to a judgment debtor be charged and may ultimately order that such stocks or shares or any interest in them be transferred to the Sheriff. Similarly, a stop order prevents funds in court in which the judgment debtor has an interest from being paid out without the judgment creditor first being notified. The legislation governing this power in the High Court is very old, and is found under sections 23-24 & 27 of the *Debtors (Ireland) Act 1840*, and under sections 132-135 *Common Law Procedure (Ireland) Act 1853*. The Circuit Court may also make such an order, with jurisdiction to do so conferred by *Courts (Supplemental Provisions) Act 1961*, section 51 of the *Courts of Justice Act 1924* and section 34 of the *County Officers and Courts (Ireland) Act 1877*.<sup>132</sup> It appears that no such jurisdiction exists in relation to the District Court

5.168 The Consultation Paper noted that charging orders against stocks and shares and stop orders appear to be very rarely used in practice. The Commission invited submissions as to the extent to which these enforcement mechanisms are used, and as to any problematic issues arising under their operation.

5.169 The Commission received few submissions on this issue, and those received indicated that these enforcement mechanisms are very rarely used in practice. The submissions did suggest however that charging orders and stop orders could be efficient and useful enforcement mechanisms under a system in which greater information is available concerning debtors' available assets. As the Commission has recommended reforms to achieve this aim of greater access to information of this type, it is hoped that these enforcement mechanisms will become more capable of being used to good effect.<sup>133</sup> One submission suggested that as these enforcement mechanisms may become more effective and more readily used under the new system, the applicable law should be codified and consolidated in legislation. The Commission accepts this submission, and considers that as part of the introduction of the proposed new system of enforcement, the law relating to charging orders against stocks and shares and stop orders should be consolidated into a single piece of legislation.

5.170 The Commission recommends that the law relating to charging orders against stocks or shares and stop orders should be consolidated into a single piece of legislation, as part of the introduction of the proposed new system for the enforcement of judgments.

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<sup>132</sup> See The Committee on Court Practice and Procedure *Eighteenth Interim Report: Execution of Money Judgments, Orders and Decrees* (The Stationary Office Dublin 1972) at 14.

<sup>133</sup> See paragraphs 4.48 to 4.64 above.

**(d) Walking Possession**

**(i) Consultation Paper**

5.171 The Consultation Paper noted that “walking possession” agreements involve an arrangement between the debtor and the Sheriff/County Registrar under which the debtor agrees to hold goods for the Sheriff/County Registrar and return them to the Sheriff/County Registrar when required.<sup>134</sup> While seizure does not require any physical contact with the goods seized,<sup>135</sup> if a Sheriff/County Registrar leaves seized goods with the debtor in the absence of a walking possession arrangement, the Sheriff/County Registrar is deemed to have abandoned them.<sup>136</sup> In a previous Report, the Commission expressed doubts as to whether “walking possession” agreements were valid in Irish law, or alternatively whether a Sheriff leaving seized goods with the judgment debtor in law abandons them.<sup>137</sup> That Report believed that such arrangements were “clearly desirable” and recommended that a provision should be enacted to the effect that the Sheriff shall not be deemed to have abandoned possession of the seized goods if he or she permits them to remain in the possession of any person, including a judgment debtor. The judgment debtor or other person must acknowledge that the goods have been seized and agree to hold them for the Sheriff until they are demanded by him or her.<sup>138</sup> The Report did not consider that any special protection should be provided to *bona fide* purchasers for value of goods held under a “walking possession” agreement, and also recommended that the Sheriff or County Registrar’s right to remuneration and any other relevant charges should not be affected by any such “walking possession” agreement.

5.172 The Consultation Paper further noted that in 2007 a new general statutory procedure providing for walking possession arrangements was introduced in England and Wales.<sup>139</sup> Similar reforms in Northern Ireland which placed the procedure on a statutory footing were also discussed.<sup>140</sup>

5.173 Having considered the above, the Commission invited submissions as to whether legislation should provide for “walking possession” arrangements.

**(ii) Conclusions and Recommendations**

5.174 The Commission notes the wide support for the introduction of a provision placing “walking possession” arrangements on a statutory basis both in its previous Report and in the submissions received in response to the Consultation Paper. The Commission also notes that similar provisions have been enacted in other countries. Therefore the Commission recommends that a legislative provision should be enacted to place “walking possession” arrangements on a statutory footing. The Commission also notes the potential advantages of such arrangements, including the fact that an interval between the seizure and sale of the debtor’s assets may provide the debtor with the opportunity of settling the claim without recourse to the sale of the debtor’s goods.

5.175 The Commission thus recommends that legislation should provide that a walking possession arrangement should come into existence where an enforcement officer identifies certain goods as having been seized, and reaches an agreement in writing with the debtor that the goods have been seized but

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<sup>134</sup> (LRC CP 56-2009) at paragraph 6.382.

<sup>135</sup> Entry upon the premises on which the goods are situate, combined with a demonstration of an intention to seize the goods, is sufficient to establish a seizure of the goods: see Glanville *The Enforcement of Judgments* (Round Hall Sweet and Maxwell 1999) at 64.

<sup>136</sup> *Bales v Arundale* (1813) 1 M & S 77.

<sup>137</sup> Law Reform Commission *Report On Debt Collection: (1) The Law Relating to Sheriffs* (LRC 27–1988) at paragraph 75.

<sup>138</sup> *Ibid* at paragraph 79.

<sup>139</sup> (LRC CP 56-2009) at paragraph 6.384 and Schedule 12, section 13(1)(d) of the *Tribunals, Courts and Enforcement Act 2007*.

<sup>140</sup> (LRC CP 56-2009) at paragraph 6.387 and Article 35 of the *Judgments Enforcement (Northern Ireland) Order 1981*.

that the debtor is permitted to retain custody of them, subject to the condition that the debtor agrees not to remove or dispose of them, nor to permit anyone else to do so, before the judgment debt in question is paid. Where these conditions have been met, legislation should provide that the enforcement officer will not be deemed to have abandoned the goods. As the question of whether a third party purchaser in good faith of goods held under such an arrangement should obtain good title to the goods was not considered in the Consultation Paper nor raised by submissions, the Commission makes no recommendation in relation to this question.

*5.176 The Commission recommends that legislation should provide that a walking possession arrangement should come into existence where an enforcement officer identifies certain goods as having been seized, and reaches an agreement in writing with the debtor that the goods have been seized but that the debtor is permitted to retain custody of them, subject to the condition that the debtor agrees not to remove or dispose of them, nor to permit anyone else to do so, before the judgment debt in question is paid. Where these conditions have been met, legislation should provide that the enforcement officer will not be deemed to have abandoned the goods.*

**(e) Providing the Debtor with Notice in Advance of Seizure**

**(i) Consultation Paper**

5.177 The Consultation Paper noted that under the common law, a Sheriff or County Registrar is under no duty to provide notice to the debtor of his or her intention to levy execution before seizing the debtor's goods.<sup>141</sup> The fact that the debtor has been notified of the judgment awarded against him or her is seen to be sufficient to make the debtor aware of the possibility that his or her goods may be seized and sold in order to enforce the judgment.<sup>142</sup> The Consultation Paper noted that research conducted by the Free Legal Advice Centres however suggests that debtors are not always in fact served with notice of a judgment awarded against them.<sup>143</sup> The paper also noted that legislative reforms in the last decade in England and Wales and Scotland have introduced requirements that debtors be provided with notice of impending seizure and sale of their goods.<sup>144</sup> It was noted that the mandatory examination of means procedure in Northern Ireland means that the provision of notice to debtors in advance of a goods seizure is not as important an issue, but that additional notice must nonetheless be provided to the debtor at least eight days in advance of the seizure of his or her goods.<sup>145</sup> Having taken into account these considerations, the Commission provisionally recommended that adequate notice should be provided to debtors before enforcement officers visit their premises for the purpose of seizing and selling debtors' goods.<sup>146</sup>

**(ii) Submissions**

5.178 The majority of submissions received by the Commission did not support the Commission's provisional recommendation. One submission noted that in practice sheriffs give seven days' notice to debtors at present under the current system. Submissions suggested that a flexible approach should be adopted, which should allow for an enforcement officer to dispense with the requirement to give notice in cases where there is a risk that assets will be dissipated or that enforcement will be frustrated. For this reason it may be preferable to incorporate flexible notice requirements into a code of practice rather than creating statutory rules requiring notice. Other submissions similarly argued that a requirement to give notice to the debtor in advance of seizure of the debtor's goods may not adequately protect creditors' rights, and that the risk of the debtor disposing of assets on receiving such notice would be high.

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<sup>141</sup> (LRC CP 56-2009) at paragraph 3.247 and 6.388.

<sup>142</sup> *Wymes v Tehan* [1988] IR 717.

<sup>143</sup> Joyce To No One's Credit: The Debtor's Experience of Instalment and Committal Orders in the Irish Legal System (Free Legal Advice Centres 2009) at 62ff.

<sup>144</sup> (LRC CP 56-2009) at paragraphs 6.389 to 6.390.

<sup>145</sup> (LRC CP 56-2009) at paragraph 6.391.

<sup>146</sup> (LRC CP 56-2009) at paragraph 6.393.

**(iii) Conclusions and Recommendations**

5.179 The Commission considers that the requirement to give notice in advance of the seizure of the debtor's goods may be less relevant under the Commission's proposed new enforcement system than it is under the current system. As noted above, the Commission has proposed that after a court judgment has been obtained against a debtor and an application for enforcement has been made, notice of the application is to be provided to the debtor and the relevant local enforcement officer by the Debt Enforcement Office. The enforcement officer is then to conduct an examination of the debtor's means and to compile a report in which the officer's opinion as to the appropriate enforcement mechanism is expressed. The Commission has recommended that a copy of this report is to be given to both the debtor and creditor, and these parties are to be given the opportunity to comment on it before the Debt Enforcement Officer makes its order as to the appropriate enforcement mechanism. The Commission considers that its recommendations in respect of this process provide sufficient notice to the debtor of the possible enforcement mechanisms that may be deployed. Bearing in mind the obligation on the Debt Enforcement Office to choose the least restrictive enforcement mechanism in each individual case, the Commission therefore does not consider that any further requirement to provide notice specifically in advance of the implementation of a goods seizure order is necessary.

**(f) Third Party Property**

5.180 The following paragraphs discuss the subject of how to address problems arising where third parties have an interest in goods seized by an enforcement officer under a goods seizure order.

**(i) Consultation Paper**

5.181 The Consultation Paper outlined the rules relating to the seizure of goods belonging to a party other than the debtor, noting that the primary rule is that at common law the goods of third parties, including those of the debtor's spouse, cannot be seized.<sup>147</sup> The Sheriff/County Registrar is therefore liable to third parties for the wrongful seizure of their goods.<sup>148</sup> Where goods are owned jointly by the debtor with a third party, the Sheriff/County Registrar may seize and sell the goods, but the joint owner must be paid for his or her share out of the proceeds of sale.<sup>149</sup> The Consultation Paper's main concern was with section 13(1) of the *Enforcement of Court Orders Act 1926*, which allows the Sheriff to seize goods belonging to the debtor's spouse or children without incurring any liability, instead making the debtor liable to the third party for the value of the seized goods. The Consultation Paper noted that this provision has been criticised as being unjustifiable in principle and possibly breaching the protection of property rights under Articles 40.3.2<sup>o</sup> and 43 of the Constitution of Ireland.<sup>150</sup> This is due to the fact that the claim against the debtor provided to the debtor's family members under this provision will often be worthless, given the fact that the debtor has already failed to satisfy a judgment debt. The provision also derives from a time when social conditions regarding the ownership of property within families were most likely quite different to today's standards. The Commission noted that the provision is not much used, as the predominant practice is for Sheriffs and County Registrars to refrain from seizing goods claimed to be owned by a family member where that person can produce receipts as proof of ownership.

5.182 Having considered the laws of Northern Ireland, England and Wales and Scotland in relation to the seizure of third party goods,<sup>151</sup> the Commission made the following series of provisional recommendations.

5.183 First, the Commission provisionally recommended that the current rules on the seizure of goods owned by third parties should be codified. The Commission provisionally recommended that the primary rule should be that only the goods of the debtor should be capable of being seized. The Consultation Paper however also proposed that jointly-owned property should be capable of being seized

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<sup>147</sup> See (LRC CP 56-2009) at paragraph 3.250 and *Rondeau Le Grand & Co. v Marks* [1918] 1 KB 75.

<sup>148</sup> *Jones v Woodhouse* [1922] 2 KB 117.

<sup>149</sup> *Farrar v Beswick* (1836) 1 M&W 682.

<sup>150</sup> (LRC CP 56-2009) at paragraph 3.353, 6.396.

<sup>151</sup> (LRC CP 56-2009) at paragraphs 6.397 to 6.401.



subject to the protection of the interests of joint owners. In this regard the Commission invited submissions as to how third party interests should be protected, in particular with regard to the following options:

- Whether third parties should be compensated for their interest in seized and sold goods by the enforcement official in priority to the payment of the debt to the creditor and the payment of the costs of seizure and sale?
- Whether third parties should be paid for their interests by the judgment creditor after the proceeds of sale have been paid to the judgment creditor?
- Whether third parties should be entitled to prevent the sale of jointly owned goods or goods in which they have an interest by buying out the debtor's interest in the seized goods or by demonstrating that it would be unduly harsh on their interests to allow the sale to continue?
- Where a debtor has a right to sell goods upon making a payment to a third party, whether the enforcement officer should be entitled to sell those goods provided that the judgment creditor pays this sum to the third party?<sup>152</sup>

5.184 The Consultation Paper continued to invite submissions as to the desirability of introducing a presumption of ownership in relation to goods found (a) within the possession of the debtor and/or (b) on the premises of the debtor.<sup>153</sup> In relation to the complicated question of the seizure of goods that are subject to leasing, hiring or retention of title agreements, the Commission invited submissions as to whether enforcement officers should be given the power to pay the balance owed under such agreements in order to obtain a clear title to the goods in advance of sale.<sup>154</sup> The Consultation Paper particularly invited submissions as to whether the additional costs involved for enforcement officers would be justified in such cases. Finally, the Commission invited submissions as to how the interpleader procedure, which provides for the adjudication upon claims of ownership by third parties, could be made more effective.<sup>155</sup>

**(ii) Submissions**

5.185 Submissions were in favour of the retention of the general rule that only goods of the debtor should be liable to be seized. Submissions however also argued that subject to the protection of the interests of third parties, goods jointly owned should be capable of being seized. There was agreement that third parties should be compensated for their interest in goods in priority to both payments to creditors and the payment of costs incurred by the enforcement officer, as this was seen as a means of providing effective protection for third parties and creating disincentives against the seizure of third party goods. Submissions took diverging views however as to whether third parties should be entitled to prevent the sale of jointly owned goods in which they have an interest. There was agreement that where the debtor has a right to sell goods upon making a payment to a third party, the enforcement officer should be entitled to sell those goods provided that the judgment creditor pays the required sum to the third party. It was suggested in this regard that the enforcement officer should have discretion in relation to the exercise of these options, and that consideration should be given to the extent to which the value of the goods in question can be best preserved, and the returns to the creditors maximised. One submission was in favour of the retention of the immunity given to sheriffs under sections 12 and 13 of the *Enforcement of Court Orders Act 1926*. This submission stated that alternatively, a reform proposed in the Commission's previous *Report on Debt Collection (1): The Law Relating to the Sheriff* to the effect that the sheriff would not be liable for seizing the goods of a third party unless he or she had actual or constructive notice of a third party interest in the goods.<sup>156</sup> Such a provision would be similar to a

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<sup>152</sup> (LRC CP 56-2009) at paragraph 6.404.

<sup>153</sup> (LRC CP 56-2009) at paragraph 6.406.

<sup>154</sup> (LRC CP 56-2009) at paragraph 6.410.

<sup>155</sup> (LRC CP 56-2009) at paragraph 6.414. The interpleader procedure is explained at paragraph 3.251.

<sup>156</sup> *Debt Collection: (1) The Law Relating to Sheriffs* (LRC 27-1988) at paragraph 96.

provision of Northern Irish law stating that no liability unless actual notice or wilful/negligent failure to comply with provisions of legislation or a code of practice.<sup>157</sup>

5.186 Submissions also unanimously supported the introduction of a presumption of ownership in relation to goods found both within the possession of the debtor and/on the premises of the debtor. Similarly, the proposal that enforcement officers should be given the power to pay the balance owed under hire or leasing agreement in order to obtain a clear title to goods held under such an agreement was widely supported. One submission also suggested in this regard that enforcement officers should be allowed to obtain relief against forfeiture in respect of leases of licensed premises in order to prevent the expiration of a licence held in respect of the premises.

5.187 In relation to the reform of the interpleader procedure, it was suggested that vexatious claims of ownership designed to delay the enforcement process should be eliminated, by either introducing civil or criminal liability for the makers of such claims. It was also proposed that the recommendation of the 1988 Report of the Commission that a claim of ownership used to instigate interpleader proceedings should be grounded on an affidavit.<sup>158</sup> Submissions however generally preferred that situations of third party claims of ownership should be resolved informally by the delivery up of the goods by enforcement officers to third parties claiming an interest on the production by the third parties of valid receipts or other satisfactory proof of ownership.

### **(iii) Conclusions and Recommendations**

5.188 The Commission considers that the primary rule to the effect that only the goods of the debtor are liable to be seized should be retained. The Commission notes however that the seizure of goods in which third parties have an interest is necessary in some circumstances for the purpose of efficient enforcement, and the Commission considers that this must be possible, subject to the protection of the rights of third parties. The Commission considers that the differential treatment given to the debtor's family members under section 13 of the *Enforcement of Court Orders Act 1926* should be removed, and that all third party interests should be regulated by the same rules. The rule under section 13 of the 1926 Act should be replaced with a presumption of ownership, whereby an enforcement officer may presume that goods found in the debtor's possession and/or on the debtor's premises are capable of being seized, unless the enforcement officer knows or ought to know that the goods are not solely owned by the debtor.<sup>159</sup> The enforcement officer should make reasonable enquiries as to ownership of any person present at the place in which the goods are situated. If the enforcement officer does so, and does not have actual or constructive notice of the third party's interest in the goods, he or she will not be liable for the seizure of the goods. The Commission considers that the introduction of this procedure should facilitate effective enforcement.

5.189 The Commission however is also conscious of the need to protect adequately third party interests. Therefore it considers, consistently with submissions and practice in other countries, that third parties who hold an interest in seized goods should be compensated for their interest by the enforcement officer in priority to the payment of the debt to the creditor and the payments of the costs incurred during the process. Third parties should be entitled to apply to the Debt Enforcement Office within a specified period to prevent the sale of the goods where it can be shown that due to some exceptional circumstances the sale would have an unduly harsh effect on the third party.<sup>160</sup> The Commission also recommends that where a debtor has a right to sell goods upon making a payment to a third party, the enforcement officer should be entitled to sell those goods provided that the judgment creditor pays this sum to the third party. This reflects the recommendation of the Commission's 1988 Report and the views

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<sup>157</sup> Article 134 of the *Judgments Enforcement (Northern Ireland) Order 1981*.

<sup>158</sup> *Debt Collection: (1) The Law Relating to Sheriffs* (LRC 27-1988) at paragraph 96.

<sup>159</sup> See e.g. sections 13(1) and 13(3) of the *Debt Arrangement and Attachment (Scotland) Act 2002*; (LRC CP 56-2009) at paragraph 6.399.

<sup>160</sup> See e.g. section 35(3) of the *Debt Arrangement and Attachment (Scotland) Act 2002*.

expressed in submissions.<sup>161</sup> Similarly, an enforcement officer should be given the option of paying up any balance owed under a hire or lease agreement under which seized goods are held, in order to obtain clear title to the goods.

5.190 *The Commission recommends that the current rules on the seizure of goods owned by third parties should be codified. The Commission recommends that the primary rule should be that only the goods of the debtor should be capable of being seized. The Commission however recommends that jointly-owned property should be capable of being seized subject to the protection of the interests of joint owners.*

5.191 *The Commission recommends that an enforcement officer should be entitled to presume that goods found in the debtor's possession and/or on the debtor's premises are capable of being seized, unless the enforcement officer knows or ought to know that the goods are not solely owned by the debtor. The Commission recommends that the enforcement officer should make reasonable enquiries as to ownership of any person present at the place in which the goods are situated. Provided that these conditions are met, the Commission recommends that the enforcement officer should not incur liability for seizing third party goods.*

5.192 *The Commission recommends that third parties holding interests in seized goods should be compensated for their interests by an enforcement officer in priority to the payment of the debt to the creditor and the payment of the costs of seizure and sale.*

5.193 *The Commission recommends that third parties should be entitled to prevent the sale of jointly owned goods or goods in exceptional circumstances by applying to the Debt Enforcement Office and demonstrating that it would be unduly harsh on their interests to allow the sale to continue.*

5.194 *The Commission recommends that where a debtor has a right to sell goods upon making a payment to a third party, an enforcement officer should be entitled to sell those goods provided that the judgment creditor pays this sum to the third party. The Commission also recommends that enforcement officers should be empowered to pay any balance owed under hire or leasing agreements in order to obtain a clear title to the goods held under such an agreement in advance of sale.*

5.195 The Commission notes that submissions received in relation to the interpleader procedure were very much in favour of allowing third party claims to seized goods to be resolved in an informal and inexpensive manner, as they currently are in practice. For this reason Where third parties claim an interest in goods, the Commission recommends that a procedure should be put in place to give a legal basis to the practice of enforcement officers informally delivering goods to the third parties on the production of receipts or other similar proof of ownership. The Commission also recommends that a more formal non-judicial procedure based on application to the Debt Enforcement Office or local enforcement officer should be established also to adjudicate where disputes cannot be resolved in this informal manner. The possibility of having recourse to court proceedings should also remain however.

5.196 The Commission also notes the support in submissions for the imposition of liability on a third party who makes a vexatious claim for ownership with the intention of frustrating the enforcement process. The Commission recommends that a maker of a vexatious claim should be liable for any additional costs incurred as a result of the claim, and that any claim should be grounded on an affidavit in order to further ensure honesty in the making of such claims.

5.197 *The Commission recommends that a procedure should be put in place to give a legal basis to the existing practice of enforcement officers informally delivering goods to third parties claiming an interest in the goods on the production of receipts or similar proof of ownership. The Commission also recommends that a more formal, but non-judicial interpleader procedure should be established to adjudicate upon disputes as to ownership which cannot be resolved in this informal manner. The Commission recommends that parties should remain entitled to have recourse to court proceedings however.*

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<sup>161</sup> Law Reform Commission *Report On Debt Collection: (1) The Law Relating to Sheriffs* (LRC 27–1988) at paragraph 62.

5.198 *The Commission recommends that a third party who makes a vexatious claim with the intention of frustrating enforcement proceedings should be liable for any costs incurred by any party as a result of the vexatious claim. The Commission also recommends that a third party claiming an interest in seized goods should be required to swear an affidavit to this effect, with the usual sanctions for making a false statement in an affidavit being applicable.*

**(g) Right of Entry on Premises**

5.199 The following paragraphs discuss the question of whether the existing law entitling a Sheriff or County Registrar to enter forcibly the premises of debtors should be modified.

**(i) Consultation Paper**

5.200 The Consultation Paper considered provisions of existing law under which a Sheriff or County Registrar may forcibly enter a debtor's premises for the purpose of seizing his or her goods in execution provided the Sheriff or County Registrar has first made reasonable efforts to enter "peaceably and without violence".<sup>162</sup> It was noted that the law currently also allows an officer to enter the premises of a third party provided that he or she has good grounds for believing that goods of the debtor are on the premises. The paper noted that this issue had been raised by the previous Report of the Commission, which concluded that the existing law was satisfactory.<sup>163</sup> The Report took the view that since the powers of entry were specified in law and were only exercisable under an execution order of a court, concerns about the potential infringement of the constitutional protection of the inviolability of the dwelling and the privacy rights of the debtor were unfounded. The Consultation Paper noted that enforcement agents are provided with powers of forcible entry under the laws of other countries, such as Northern Ireland and England and Wales. It also raised the question of whether the powers of entry of Sheriffs and County Registrars should be extended to facilitate access to multi-unit developments. The Commission invited submissions as to the desirability of requiring further procedural safeguards to be introduced limiting the power of a sheriff to forcibly enter a premises, and as to whether assistance should be provided by law to sheriffs to facilitate access to multi-unit developments.<sup>164</sup>

**(ii) Submissions**

5.201 The submissions received by the Commission in relation to this issue provided varying views. The majority of submissions were not in favour of any amendment to the law in this area, arguing that the power of an enforcement officer to enter forcibly the debtor's premises is extremely important, and should not be constrained. It was suggested that since the Sheriff or County Registrar is entering the debtor's premises under the authority of a court order, sufficient safeguards already exist. These submissions also suggested that the powers of entry should be expanded to cater for cases in which the debtor's premises is located in a multi-unit development, where initial access to the development may need to be facilitated in order to permit access to the debtor's premises. It was suggested that an enforcement officer should be permitted to direct an official of the management company of such a development to facilitate access at a specified time, provided that reasonable notice is provided by the enforcement officer to the management company.

5.202 A minority of submissions argued that further procedural safeguards should be introduced to limit the power of entry of enforcement officers.

**(iii) Conclusions and Recommendations**

5.203 When considering this question, it is first necessary to recall the context in which goods seizure orders are to be made under the proposed new enforcement system. The new system is to be founded on the principles of proportionate and appropriate enforcement, and the Commission has recommended that legislation should expressly require the Debt Enforcement Office to choose the least restrictive

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<sup>162</sup> (LRC CP 56-2009) at paragraphs 6.415 to 6.419; section 12 of the *Enforcement of Court Orders Act 1926*.

<sup>163</sup> Law Reform Commission *Report On Debt Collection: (1) The Law Relating to Sheriffs* (LRC 27-1988) at paragraphs 81 to 84.

<sup>164</sup> (LRC CP 56-2009\_ at paragraph 6.419.

enforcement mechanism necessary to ensure effective enforcement in each case.<sup>165</sup> Therefore goods seizure orders will only be made where necessary for the recovery of the judgment debt in question and where other less restrictive enforcement mechanisms would be inappropriate or ineffective. It has been argued in other countries that the interference with the rights of debtors involved in this procedure could be disproportionate and so violate the protection of the physical security of the home under Article 8 of the European Convention on Human Rights where other less restrictive enforcement mechanisms are available. Therefore the safeguard requiring the Debt Enforcement Office to consider which procedure is least restrictive of the debtor's rights in each case should prevent such disproportionate application of the procedure.<sup>166</sup> This analysis is supported by the decision of the European Commission of Human Rights in the decision of *K v Sweden*,<sup>167</sup> as discussed in the Consultation Paper.<sup>168</sup>

5.204 The Commission also notes that the laws of other countries provide for a power of enforcement agents to enter a debtor's premises forcibly where necessary. Northern Irish legislation permits any enforcement officer to enter at a reasonable time, by force if necessary, any land occupied or used by the debtor, his or her spouse or partner, any of his or her dependents, or any other person who has been given notice, provided that the enforcement officer produces his or her credentials on so doing.<sup>169</sup>

5.205 In Scotland, an officer is permitted to open shut and lockfast places for the purposes of execution against goods.<sup>170</sup> Under Scottish law, the seizure and sale of a debtor's goods may only take place in respect of domestic premises exceptional circumstances where an "exceptional attachment order" is made by a court.<sup>171</sup> An exceptional attachment order similarly empowers an enforcement officer to open shut and lockfast places for the purposes of executing the order.<sup>172</sup> A number of conditions apply to the exercise of this power however. First, the execution officer must be satisfied at the time of entry that there appears to be a person present in the premises who is aged 16 years or over, and is not unable to understand the consequences of the procedure being carried out.<sup>173</sup> Secondly, the officer must have served notice on the debtor setting out the intention to enter the premises, at least four days before the intended date of entry.<sup>174</sup> The court may however dispense with the requirement to give notice where the sheriff is satisfied that to give such notice would be likely to prejudice the execution of the order.<sup>175</sup>

5.206 In England and Wales, legislation enacted in 2007 provides for a series of quite detailed conditions for the entry onto the debtor's premises by an enforcement agent. The position under the law existing prior to 2007 was that enforcement agents had a right of entry to the debtor's premises, but that right could only be exercised with the permission of the occupier and without the use of force.<sup>176</sup> The 2007 legislation provides for a general power to use reasonable force to enter premises under certain circumstances, such as where goods are being seized to satisfy a liability arising out of a criminal offence, or where the debtor is carrying on a trade or business on the premises in question.<sup>177</sup> In cases not falling

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<sup>165</sup> See paragraph 5.16 above.

<sup>166</sup> See (LRC CP 56-2009) at paragraph 2.45; National Association of Citizens Advice Bureaux *Undue Distress* (2000) at 4.26; Jacob *The Legality of Debt Enforcement – A Justice Discussion Paper* (Justice 2003) at 54. This is discussed below at paragraph 2.54.

<sup>167</sup> Application No 13800/88 E Com HR.

<sup>168</sup> (LRC CP 56-2009) at paragraph 2.44.

<sup>169</sup> Articles 36 and 38 of the *Judgments Enforcement (Northern Ireland) Order 1981*.

<sup>170</sup> Section 15 of the *Debt Arrangement and Attachment (Scotland) Act 2002*.

<sup>171</sup> Section 47 of the *Debt Arrangement and Attachment (Scotland) Act 2002*; 5.134

<sup>172</sup> Section 47(2)(c) of 2002 Act.

<sup>173</sup> Sections 49(1)(a) and 49(2) of the 2002 Act.

<sup>174</sup> Section 49(1)(b) of the 2002 Act.

<sup>175</sup> Section 49(3) of the 2002 Act.

<sup>176</sup> *Khazanchi v Fairchem Investments Ltd, McLeod v Butterwick* [1998] 2 All ER 901.

<sup>177</sup> Schedule 12, paragraphs 17 to 19 of the *Tribunals, Courts and Enforcement Act 2007*.

under this general power to use reasonable force, an enforcement agent may apply to the court to use reasonable force.<sup>178</sup> The court may not issue a warrant permitting the use of force unless it is satisfied that prescribed conditions are met. These conditions are to be prescribed in secondary legislation. Other conditions for the entry of an enforcement agent on to a premises are also specified in the legislation, including the following:<sup>179</sup>

- The enforcement agent may enter and remain on the premises only within prescribed times of day (although regulations may empower courts in prescribed circumstances to authorise an enforcement agent to enter or remain on the premises at other times).
- The enforcement agent must on request show evidence of his or her identity and his or her authority to enter the premises.
- The enforcement agent is permitted to take other people onto the premises, provided that they do not remain on the premises without the enforcement agent.
- The enforcement agent must provide a notice for the debtor giving information about what the enforcement agent is doing, with the form and content of the notice to be specified in secondary legislation.
- If the premises are occupied by any person apart from the debtor, the enforcement agent must leave at the premises a list of any goods he or she removed.
- The enforcement agent must leave the premises as effectively secured as he or she finds them.

5.207 The fact that these other jurisdictions permit forcible entry to the debtor's premises suggests that this power should remain under Irish law. It can be seen from the above analysis, however, that in Scotland and England and Wales court authorisation is required for forcible entry, at least in the case of domestic premises.

5.208 The Commission notes that under the present law, execution orders are made by the court, while it is proposed that goods seizure orders should be made by the Debt Enforcement Office under the new system. The Commission considers that it may be appropriate to require court authorisation for forcible entry to the debtor's premises however. The Commission notes that the decision of the Irish High Court in *Deighan v Hearne*<sup>180</sup> suggests that is constitutionally permissible for legislation to provide for entry to a tax defaulter's premises without court authorisation. The Commission considers however that it may be more appropriate, given the current position in respect of the enforcement of ordinary judgment debts and the trends of the law in other countries, to continue to require a court order for forcible entry as opposed to entry with the consent of the debtor.

5.209 Therefore where an enforcement officer has been refused access to a premises for the purposes of executing a goods seizure order, or has reasonable cause to think that such access will be refused, the enforcement officer should be empowered to apply to court for a warrant authorising forcible entry to a premises. The court should grant such a warrant where it is satisfied that forcible entry to the premises is reasonably necessary for the enforcement of the judgment debt in question. This would involve a consideration both of whether access to enter has been refused, and where the enforcement officer can show that should access is likely to be refused, and where an attempt to enter the premises without force may prejudice the ability to enforce the judgment.

5.210 *The Commission recommends that enforcement agents should retain a right of forcible entry to debtors' premises. The Commission recommends however that such a right should only be exercisable under a warrant of the court, with such warrant issued by the court only where it is satisfied that forcible entry is reasonably necessary for the enforcement of the judgment debt in question.*

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<sup>178</sup> Schedule 12, paragraphs 20 to 22 of the 2007 Act.

<sup>179</sup> Schedule 12, paragraphs 23 to 30 of the 2007 Act.

<sup>180</sup> [1986] IR 603.

5.211 The Commission accepts the view expressed in its submission that provisions should be put in place to facilitate access to multi-unit developments for enforcement officers, and recommends that legislation should provide for such a measure.

5.212 *The Commission recommends that legislation should provide for measures to facilitate access to multi-unit developments by enforcement officers.*

#### **(h) Reports to Creditors**

5.213 The Consultation Paper, building on a recommendation of the previous Report of the Commission, identified a further possible reform the introduction of a duty for enforcement officers to make reports to creditors regarding the progress of the enforcement process. Such reports could indicate the steps taken by the enforcement officer to seize and sell the debtor's goods.<sup>181</sup> The Commission provisionally recommended that judgment creditors should be entitled to obtain a progress report from an enforcement officer detailing steps take to attempt to execute a judgment debt. The Commission invited submissions as to the information which should be contained in such a report and as to the time after the issue of an execution order at which such a report should be made available.

5.214 The Commission has recommended above that creditors should be provided with reports on the progress made in enforcing a judgment debt under all enforcement methods, and in this regard the Commission considers that it is unnecessary to reconsider this issue specifically in relation to the enforcement method of seizure and sale of the debtor's goods.

### **G Removing The Role of Imprisonment**

5.215 The Commission now considers the role of the procedure of arrest and imprisonment in the enforcement of judgment debts. The role of this procedure as a secondary means of enforcement where default has occurred in the repayment of an instalment order was the most controversial and problematic aspect of the entire system for the enforcement of judgment debts prior to the Irish High Court decision of *McCann v Judge of Monaghan District Court and Ors*<sup>182</sup> and the consequential *Enforcement of Court Orders (Amendment) Act 2009*.<sup>183</sup> Imprisonment for debt has long been outlawed both under international conventions to which Ireland is a party and under Irish legislation.<sup>184</sup> While the procedure existing prior to the 2009 reforms<sup>185</sup> may not have constituted imprisonment for debt for these purposes, it nonetheless raised serious issues of potential human rights abuses, as well as being criticised as an ineffective, illogical and draconian procedure.

5.216 As noted in the Consultation Paper, the *McCann* decision found the procedure existing at the time under section 6 of the *Enforcement of Court Orders Act 1940* to violate the constitutional protections of the right to fair procedures and to liberty.<sup>186</sup> The procedural safeguards introduced in response by the *Enforcement of Court Orders (Amendment) Act 2009* aim to reduce significantly the use of the procedure of arrest and imprisonment. In particular, the reforms seek to ensure that the procedure is only used as an absolute last resort against debtors who refuse to pay their obligations under a judgment debt, where less severe measures have been considered and found to be insufficient to achieve the legitimate aim of the enforcement of the decisions of the State's courts.<sup>187</sup> Therefore the role of the imprisonment in the

<sup>181</sup> (LRC CP 56-2009) at paragraphs 6.420 to 6.424.

<sup>182</sup> [2009] IEHC 276; [2009] 4 I.R. 20.

<sup>183</sup> See Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) and Joyce *To No One's Credit: The Debtor's Experience of Instalment and Committal Orders in the Irish Legal System* (Free Legal Advice Centres 2009) for comprehensive criticism of the procedure of arrest and imprisonment existing prior to the 2009 reforms.

<sup>184</sup> See Article 1, Protocol 4 of the *European Convention on Human Rights*; Article 11 of the *United Nations International Convention on Civil and Political Rights*; section 5 of the *Debtors (Ireland) Act 1872*.

<sup>185</sup> Under the *Enforcement of Court Orders Acts 1926 and 1940*.

<sup>186</sup> (LRC CP 56-2009) at paragraphs 2.24 to 2.34.

<sup>187</sup> As required by the findings of Laffoy J in *McCann*: see [2009] IEHC 276 at 82-83.

system for the enforcement of judgments has been considerably curtailed, and there should no longer be any doubts as to the prohibition of imprisonment for debt under Irish law.

5.217 Nonetheless, arrest and imprisonment remains a possibility as an enforcement mechanism of last resort in cases where a creditor has proved beyond all reasonable doubt that the judgment debtor (assisted by free legal representation) has failed to comply with an instalment order due to his or her wilful refusal or culpable neglect. The following Part therefore considers whether this continued limited role for the procedure of arrest and imprisonment should remain, or whether reliance on arrest and imprisonment should be abolished entirely.

### **(1) Consultation Paper: Provisional Recommendations**

5.218 Based on the above considerations, the Commission invited submissions as to whether imprisonment should be retained as a last resort in debt enforcement proceedings after all other enforcement methods have been found to be ineffective, and where a debtor has wilfully refused or culpably neglected to obey a court order.<sup>188</sup> The Commission noted that two parallel procedures for the arrest and imprisonment of debtors exist under the *Enforcement of Court Orders Acts 1926 to 2009* and sections 6 and 7 of the *Debtors (Ireland) Act 1872*. The Commission provisionally recommended that both of these procedures should be repealed in the context of a reformed system of court-based enforcement, and that if imprisonment is to be retained as a remedy of last resort against “won’t pay” debtors, a single new procedure should be enacted.<sup>189</sup> The Commission provisionally recommended that if imprisonment is retained as a procedure for the enforcement of judgment debts, orders for imprisonment must continue to be made by a court, and not by the proposed Debt Enforcement Office.<sup>190</sup>

### **(2) Submissions Received**

5.219 The Commission received several submissions addressing the issue of the appropriateness of retaining a continued role for imprisonment in the enforcement of judgment debts. Perhaps reflecting the controversial nature of this subject, the views expressed were quite divided.

5.220 Some submissions opposed the imprisonment of debtors in any circumstances and argued that imprisonment should no longer be retained, even as a last resort. These submissions pointed to the fact that at an individual level imprisonment may interfere disproportionately with a debtor’s rights, while also having undue social and economic cost at a societal level. These submissions suggested that consideration should be given to introducing alternatives to imprisonment, such as community service or other forms of restorative justice.

5.221 One submission, while contemplating the retention of imprisonment as an absolute last resort in exceptional cases, drew a distinction between the two scenarios under which imprisonment is permitted under the current law. Thus debtors who “culpably neglect” to pay their obligations under a judgment debt were distinguished from those whose lack of payment arises from “wilful default”.<sup>191</sup> This submission suggested that imprisonment should not be permitted in cases where the lack of payment arises from the debtor’s negligence, as this may lead to the imprisonment of vulnerable debtors who have difficulty in managing debt repayments. In the rare cases where a debtor is simply refusing outright to honour his or her obligations, however, imprisonment should be retained as a last resort. While this submission generally favoured the use of restorative justice mechanisms such as community service over imprisonment, it suggested that the threat of imprisonment should remain in such extreme cases.

5.222 The remaining submissions, which constitute a small majority, supported the retention of imprisonment as a last resort in cases involving “won’t pay” debtors and where no other viable alternative to enforcement exists. One submission indicated that some creditors found the threat of committal to an effective means of encouraging repayment, and called for the law to be retained in its present state.

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<sup>188</sup> (LRC CP 56-2009) at paragraph 6.428.

<sup>189</sup> (LRC CP 56-2009) at paragraph 6.431.

<sup>190</sup> (LRC CP 56-2009) at paragraph 6.433.

<sup>191</sup> See section 6(8) of the *Enforcement of Court Orders Act 1940*, as inserted by section 2(1) of the *Enforcement of Court Orders (Amendment) Act 2009*.



Others submissions feared that if a threat of imprisonment did not lie at the end of the enforcement process, the entire system for the enforcement of judgment debts could grind to a halt, and that a moral hazard problem may arise as a small number of debtors may incur credit with the intention of not repaying it. Submissions stressed the view that recourse should only be had to imprisonment as a last resort, and that any imprisonment procedure should be used very sparingly.

### **(3) Conclusions and Recommendations**

5.223 The Commission has considered these submissions received in this regard and has also considered recent developments regarding prison policy in Ireland.

5.224 The Commission notes that one of the primary aims of the *Fines Act 2010* was stated as being “to provide alternatives to imprisonment where a fine is not paid by the due date and ensure that those alternatives will always take precedence over imprisonment.”<sup>192</sup> The Minister for Justice noted in this regard that “[i]t is socially desirable that prison be an option for fine defaulters only in the most exceptional circumstances such as where someone has a malign reason for refusing to pay the fine.”<sup>193</sup> While the Commission notes that imprisonment in the case of a failure to pay a fine imposed for a breach of the criminal law must be distinguished from imprisonment for a failure to comply with a civil law obligation to pay a judgment debt, similar considerations nonetheless apply. In this regard it could be seen as even more appropriate to limit the use of imprisonment even further in cases of civil enforcement procedures than where breaches of the criminal law have been found to have been committed.

5.225 The Office of the Inspector of Prisons published a report in 2010 entitled “The Irish Prison Population – an Examination of Duties and Obligations owed to Prisoners”.<sup>194</sup> From the point of view of the control of the numbers in the prison population, this report welcomed the reforms introduced by the *McCann* decision and subsequent *Enforcement of Court Orders (Amendment) Act 2009* in limiting the imprisonment of debtors to certain exceptional circumstances.<sup>195</sup> The report also welcomed the introduction of the *Fines Act 2010* for the effect it will have in decreasing the prison population. The Office of the Inspector of Prisons also proposed that certain other initiatives could be considered in order to reduce the number of people imprisoned in Ireland, such as the automatic suspension of short prison sentences consisting of a period less than a specified number of months.<sup>196</sup> In addition, it was suggested that in certain cases and subject to comprehensive screening and a security evaluation, certain selected prisoners could be deemed suitable to serve a significant part of their sentences under strict supervision in the community. The benefits of such an approach were said to include the fact that such community supervision could be provided at less expense to the State than imprisonment, and that prison spaces could be freed up by the introduction of such measures. The Office of the Inspector of Prisons however emphasised that the subject of the stabilisation or possible reduction of the prison population forms part of larger debate and is a matter of policy for the Minister for Justice and Law Reform and the Irish Prison Service. The report nonetheless is relevant for present purposes due to the views it offers on the desirability of reducing the use of imprisonment where possible.

5.226 The Commission notes that similar policy trends towards the reduction of reliance on imprisonment and the search for alternative methods of law enforcement can be observed in recent reports published in legal systems similar to our own. In Scotland, the Scottish Prisons Commission recommended in 2008 that a community supervision order should be imposed instead of a custodial

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<sup>192</sup> 202 *Seanad Debates* Col 169 (Second Stage, 22 April 2010), per Deputy Dermot Ahern, Minister for Justice and Law Reform.

<sup>193</sup> 202 *Seanad Debates* Col 173 (Second Stage, 22 April 2010), per Deputy Dermot Ahern, Minister for Justice and Law Reform.

<sup>194</sup> Office of the Inspector of Prisons *The Irish Prison Population – An Examination of Duties and Obligations owed to Prisoners* (Department of Justice 2010), available at: <http://www.justice.ie/en/JELR/IOP,%20the%20Irish%20Prison%20Population.pdf/Files/IOP,%20the%20Irish%20Prison%20Population.pdf>.

<sup>195</sup> *Ibid* at paragraph 20.7.

<sup>196</sup> *The Irish Prison Population – An Examination of Duties and Obligations owed to Prisoners* at paragraph 20.8.

sentence of six months or less, subject to the proviso that exceptional cases could warrant a custodial sentence.<sup>197</sup> This report recommended that legislation should oblige a sentencing judge who would otherwise have imposed a sentence of 6 months imprisonment or less, to impose a community supervision order unless satisfied that a custodial sentence should be imposed. The judge should decide whether a custodial sentence is justified by having regard to a number of prescribed factors, such as the nature of the offence committed and other orders or sentences to which the offender is already subject. The considerations giving rise to this recommendation were drawn from the distinct context of the criminal law, and the fact that during short sentences prisons can do little to reduce the likelihood of reoffending, but rather may in fact increase the likelihood.<sup>198</sup> This is because such short sentences can lead to the breaking of positive ties held by the offender and the building of negative ones. Similar reasoning could potentially be applied to the imprisonment of those who refuse to repay judgment debts nonetheless, as a debtor may be less likely to meet his or her obligations after being imprisoned, due to factors such as possible resentment towards the imprisoning creditor and loss of income due to imprisonment.

5.227 A 2010 study conducted by Imperial College London and the Howard League for Penal Reform sought to examine the effectiveness of short prison sentences, again in the context of the imprisonment of offenders under the criminal law.<sup>199</sup> This report identified the various aims of sentencing, and sought the opinions of members of the Prison Governors' Association as to the extent to which these aims are met by short sentences. These aims were stated to be: punishing offenders; reducing crime (including by deterrence); reforming and rehabilitating offenders; protecting the public; and making reparation by offenders to the victims of their offences. It should be noted that these aims of imprisonment are not relevant to situations where judgment debtors refuse to obey court orders, in which cases imprisonment solely serves to act as a threat and so compel payment. Some findings of relevance from this study may include the fact that 81% of those surveyed disagreed or strongly disagreed that short prison sentences serve to reform or rehabilitate the offender, while 59% of the association members disagreed or disagreed strongly with the proposition that short sentences serve to deter people from committing crime.<sup>200</sup> Almost 76% of survey respondents considered the current use of sentences of less than six months to be "excessive".<sup>201</sup> The report noted that UK policy regarding the reduction of re-offending seeks to improve offenders' access to mainstream services across seven "pathways". For present purposes it may be useful to note that one of these pathways is "finance, benefit and debt". When asked their views as to the ability of short sentences of twelve months or less to address this factor, a total of 49.5% of respondents considered that short sentences addressed it either unsatisfactorily or very unsatisfactorily.<sup>202</sup> Only 26.5% of respondents considered that this factor was addressed either satisfactorily or very satisfactorily by short sentences. It should also be noted that in late 2010 the UK government indicated an intention to reduce the use of short term custodial sentences.<sup>203</sup>

5.228 While the documents above have largely focussed on assessment and consideration of the effectiveness of short sentences in the context of the criminal law, for present purposes they serve at least to indicate that the current trend of research and policy is questioning severely the appropriateness of short prison sentences. As many of the purposes served by sentencing are not relevant to

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<sup>197</sup> *Scotland's Choice – Report of the Scottish Prisons Commission 2008* (Scottish Prisons Commission 2008) at paragraph 3.36.

<sup>198</sup> *Scotland's Choice – Report of the Scottish Prisons Commission 2008*.

<sup>199</sup> Trebilcock *The Reality of Short Term Prison Sentences: Early findings from Research with the Prison Governors' Association* (Imperial College London, Howard League for Penal Reform 2010), available at: [http://www.howardleague.org/fileadmin/howard\\_league/user/pdf/Research/The\\_reality\\_of\\_short\\_term\\_prison\\_sentences\\_-\\_press.pdf](http://www.howardleague.org/fileadmin/howard_league/user/pdf/Research/The_reality_of_short_term_prison_sentences_-_press.pdf).

<sup>200</sup> *Ibid* at 2.

<sup>201</sup> *The Reality of Short Term Prison Sentences op cit.* at 3

<sup>202</sup> *The Reality of Short Term Prison Sentences op cit.* at 3.

<sup>203</sup> *Speech on Government Plans for Prison Reform* (Ministry of Justice 2010), available at: <http://www.justice.gov.uk/news/sp221010a.htm>.

imprisonment as part of the enforcement of a judgment debt, and as a debtor who fails to comply with a judgment commits no wrong under the criminal law, jail terms in this context may be even more inappropriate in this context. It would appear from this point of view that the imprisonment of a judgment debtor in the event of his or her refusal to repay a judgment debt is very difficult to justify.

5.229 While the Commission considers that this subject raises several issues outside of the economic sphere, it should nonetheless be noted that the imprisonment of judgment debtors incurs great cost to the State, both from the costs of imprisonment itself, and from the costs of conducting court hearings and providing legal representation to debtors as a court considers whether an order for arrest and imprisonment should be made. The procedure would appear to generate little benefit to weigh against these costs. If other mechanisms of enforcement are improved to ensure the more effective recovery of judgment debts, the amounts recovered through the use of the threat of imprisonment are likely to be minimal.

5.230 Nonetheless, at least under the current flawed framework for the enforcement of judgments, the threat of imprisonment is said by some to be an effective means of compelling recalcitrant debtors to pay the amount owed under a judgment debt. The consideration that the protection of creditor rights and the integrity of the legal system requires mechanisms for compelling payment by “won’t pay” debtors who knowingly refuse to pay their obligations. Even this consideration must have its limits, however, as illustrated by the following quote:

“[t]he granting of credit ultimately rests upon the promise of the state to enforce debts. [Nonetheless], the state has always qualified that promise by restricting how far it will coerce people to pay.”

This policy is seen throughout this Report, as the Commission has proposed that coercive enforcement mechanisms such as attachment of debts orders, attachment of earnings orders and orders for the sale and seizure of goods should be limited to ensure that a debtor is not deprived of the means to maintain a reasonable standard of living.

5.231 In this regard it must be recalled the context in which imprisonment may arise under the Commission’s proposed new enforcement system. First, enforcement orders may only be made against debtors who have been found by the Debt Enforcement Office to have the means to satisfy a judgment debt. Debtors who do not have such means and are insolvent are to fall within the bankruptcy, Debt Relief Order or Debt Settlement Arrangement procedures. Secondly, following the decision in *McCann v Judge of Monaghan District Court and Ors.*, recourse may be had to an imprisonment procedure only after all other less restrictive enforcement mechanisms have been attempted or have been otherwise found to be inappropriate. Thus imprisonment would only be a possibility in cases where a debtor has been found to have the means to pay, but yet where enforcement by instalment order, attachment of debts order, attachment of earnings or by sale and seizure of goods have all failed or have been found to be inappropriate. It should also be borne in mind that the Commission has recommended that considerable measures should be introduced to allow the Debt Enforcement Office to have access to information concerning the debtor’s financial circumstances, thus facilitating the effectiveness of these enforcement mechanisms. Having regard to these considerations, the Commission considers that the cases in which imprisonment would be a possibility would be very few. Consequently the Commission considers that should the Commission’s other recommendations be introduced, the removal of the possibility of imprisonment would be likely to have little impact on the amount recovered by creditors. The removal of a procedure for imprisonment could however have a significant symbolic value and assist in establishing a fresh approach of the law in this area. The Commission also notes that the removal of imprisonment for failure to comply with a judgment debt in ordinary civil proceedings could be without prejudice to the retention of imprisonment in other scenarios such as the enforcement of family maintenance orders.

5.232 The Commission has ultimately concluded and so recommends that imprisonment for non-payment of debt should be abolished, even where this occurs through culpable neglect or wilful refusal, the terms used in the *Debtors (Ireland) Act 1872*. This clearly requires the repeal of the 1872 Act and the *Enforcement of Court Orders Acts 1926 to 2009* and their replacement by comprehensive reform measures consistent with the Commission’s recommendations in this Report.

5.233 The Commission therefore recommends that, subject to the introduction of the Commission's other recommendations for the improvement of the efficacy of the enforcement system, all procedures for the imprisonment of debtors who fail to repay a judgment debt should be abolished. The Commission accepts, however, that this should not alter or affects the law of contempt of court.<sup>204</sup> In line with the view of the Oireachtas in the *Fines Act 2010* and of the reports referred to above, the Commission also recommends that a person should continue to be criminally liable where he or she wilfully refuses to pay a personal debt arising out of a court order to that effect but that such a person should be liable on summary conviction to a community service order under the *Criminal Justice (Community Service) Act 1983*.

5.234 *The Commission recommends that, subject to the implementation of the Commission's other recommendations for the improvement of the efficacy of the enforcement system, all procedures for the imprisonment of debtors for failure to repay a judgment debt should be abolished. The Commission recommends that the Debtors (Ireland) Act 1872 and the Enforcement of Court Orders Acts 1926 to 2009 should be repealed in the context of a reformed system of court-based enforcement. The Commission also recommends that this should not alter or affects the law of contempt of court. The Commission also recommends that a person should continue to be criminally liable where he or she wilfully refuses to pay a personal debt arising out of a court order to that effect, but that such a person should be liable on summary conviction to a community service order under the Criminal Justice (Community Service) Act 1983.*

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<sup>204</sup> The Commission's *Report on Contempt of Court* (LRC 47-1994) recommended that the law on contempt of court be placed on a statutory footing.

## CHAPTER 6 REGULATION OF DEBT COLLECTION UNDERTAKINGS

### A Introduction

6.01 In this Chapter, the Commission presents its recommendations for the regulation of debt collection undertakings. Part B outlines the provisional recommendations made by the Commission's Consultation Paper. Part C provides a brief comparative discussion of the approaches that have been adopted for regulating debt collection undertakings in other countries. This chapter concludes by presenting the Commission's conclusions and recommendations in Part D.

### B Consultation Paper on Personal Debt Management and Debt Enforcement

#### (1) Current Law

6.02 The Commission's *Consultation Paper on Personal Debt Management and Debt Enforcement* identified problems arising due to the lack of regulation of the debt collection industry in Ireland.<sup>1</sup> These included concerns relating to the use of deceptive and unfair practice and fears of undue debtor harassment. The Consultation Paper also described the current law applicable to debt collection activities, as contained in section 11 of the *Non-Fatal Offences Against the Person Act 1997*, the Financial Regulator's<sup>2</sup> *Consumer Protection Code* and the *Consumer Credit Act 1995*.

6.03 Section 11 of the 1997 Act criminalises certain activities which amount to the persistent harassment of a debtor. These include:

- making demands of the debtor which are calculated to subject him or her to distress, alarm or humiliation;
- falsely representing that a collector is authorised in an official capacity to collect a debt or presenting documents which falsely represent to have this character; and
- falsely representing that criminal proceedings lie for non-payment of the debt.

It is an offence to engage in any of these activities, and an offender can be liable to a fine not exceeding £1500.

6.04 Under the *Consumer Protection Code*, entities regulated by the Financial Regulator are required to ensure that any outsourced activity, including the appointment of debt collection agencies, complies with the requirements of the Code.<sup>3</sup> In addition, under the common law rules on agency, regulated entities will be responsible for the acts of their agents. This means that if a debt collector acting as the agent of a regulated entity acts contrary to the provisions of the Code, the Financial Regulator may take appropriate action against the regulated entity. Relevant provisions of the Code for present purposes include the following obligations:

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<sup>1</sup> (LRC 56 - 2009) at paragraphs 4.196 to 4.202.

<sup>2</sup> The term "Financial Regulator" is used throughout this chapter to refer to the Financial Regulation division of the Central Bank of Ireland.

<sup>3</sup> General Principle 10 of the *Consumer Protection Code* and the *Consumer Protection Code for Licensed Moneylenders* provides that: "...[a regulated entity]...must ensure that in all its dealings with consumers and within the context of its licence, it: ensures that any outsourced activity complies with the requirements of this Code". Common Principle 37 of the *Consumer Protection Code for Licensed Moneylenders* also provides that "Where a moneylender engages the services of a third party to collect debts on its behalf, the moneylender must have in place a written contractual arrangement which seeks to ensure that its consumers are treated in accordance with the provisions of this Code and the relevant provisions of the Act."

- To act honestly, fairly and professionally in the best interests of customers and with due skill, care and diligence in the best interests of its customers;<sup>4</sup>
- Not to exclude or restrict, in any communication or agreement with a consumer, any liability or duty of care or any other duty in any agreement with a consumer;<sup>5</sup> and
- To avoid personal visits or oral communications except in specified circumstances.<sup>6</sup>

The Financial Regulator does not possess any power to take action against debt collectors directly for breaching these rules, but must take action against the relevant regulated entity instead.

6.05 If a debt collector is not acting as an agent of a regulated entity, but rather has been assigned a consumer debt, no responsibility will lie against the collector or the regulated entity for a breach of the Code. It appears that this is the position only in respect of entities subject to the *Consumer Protection Code*, and that a different rule applies in respect of moneylenders. Where a moneylending agreement is assigned to a third party, the legal position is that the third party requires a moneylending licence to collect outstanding monies owed under a moneylending agreement. It is therefore an offence for such a third party to collect the debt without first obtaining a moneylending licence. Where a collector has obtained such a licence, the provisions of the 1995 Act and the *Consumer Protection Code for Licensed Moneylenders* then apply to collection activities.

6.06 Under sections 2(2) and 40 of the *Consumer Credit Act 1995*, the rights of borrower and lender do not change on the assignment of a consumer debt. Section 2(2) provides that:

“[i]n this Act a reference to a borrower, buyer, consumer, creditor, hirer, owner or seller includes a person to whom the borrower's, buyer's, consumer's, creditor's, hirer's, owner's or seller's rights or liabilities, as the case may be, under an agreement have passed by assignment or operation of law.”

Section 40 in turn provides that:

“Where a creditor's or owner's rights under an agreement are assigned to a third person, the consumer shall be entitled to plead against that third person any defence which was available to him against the original creditor including set-off.”

The 1995 Act also prohibits creditors, and by extension any agents of creditors or assignees of creditors' rights, from engaging in certain activities when collecting debts. Therefore section 45 imposes restrictions on the forms of written communication which can be sent to a consumer by a “creditor, owner or a person acting on his behalf”, and prohibits the sending of such written communications to a borrower's place of employment. Section 46 states that:

“A creditor, owner or a person acting on his behalf shall not visit or telephone—

(a) a consumer without his consent—

(i) at his place of employment or business unless the consumer resides at that place and all reasonable efforts to make contact with him have failed,

(ii) at any place,

(I) between the hours of 9 o'clock in the evening on any week day and 9 o'clock in the morning on the following day, or

(II) at any time on a Sunday or a public holiday (within the meaning of the *Holidays (Employees) Act, 1973*),

<sup>4</sup> Chapter 1, paragraphs 1 and 2 of the *IFSRA Consumer Protection Code*.

<sup>5</sup> Chapter 2, paragraph 23 of the Code. This is also being reviewed in the review of the Consumer Protection Code: see CP 47 of October 2010 (Chapter 3, para 10 of the Review).

<sup>6</sup> Chapter 2, paragraph 32 of the Code.

(b) a consumer's employer or any member of the consumer's family unless that employer or family member is a party to the agreement, without the consent of the consumer, given in writing and separate from any other term of agreement,

for any purposes connected with an agreement other than the service of a document in connection with legal proceedings.”

Finally, section 49 provides that:

“(1) A person shall not make a demand for payment or assert a present or prospective right to payment in respect of an agreement which is unenforceable under this Act.

(2) A person shall not, with a view to obtaining payment in respect of an agreement which is unenforceable under this Act—

(a) threaten to bring any legal proceedings,

(b) place or cause to be placed the name of any person on a list of defaulters or debtors or threaten to do so, or

(c) invoke or cause to be invoked any other collection procedure or threaten to do so.

(3) In any proceedings for an offence under this section, it shall be a defence for the person to show that he had reasonable cause to believe that there was a right to payment.”

6.07 Section 12(2)(a) of the 1995 Act provides that any person who contravenes sections 45, 46 or 49 shall be guilty of an offence, with section 13<sup>7</sup> providing for a fine of up to €3000 and/or a term of imprisonment of up to 12 months on summary conviction, and a fine of up to €100,000 and/or a term of imprisonment of up to 5 years on conviction on indictment. Where a person is convicted of an offence under this Act and there is a continuation of the offence by the person after his or her conviction, a person shall be guilty of a further offence on every day on which the contravention continues and shall be liable on summary conviction to a fine not exceeding €1,000, or on conviction on indictment to a fine not exceeding €10,000.<sup>8</sup>

## **(2) Provisional Recommendations and Invitations for Submissions**

6.08 Having outlined the current legal position in this area, the Consultation Paper presented a brief overview of the systems for the regulation of debt collection agencies operating in the European countries of the UK and Belgium,<sup>9</sup> and the Canadian province of Ontario.<sup>10</sup> The consideration given to the benefits of introducing a system for regulating debt collectors by the Hong Kong Law Reform Commission was also discussed.<sup>11</sup>

6.09 The Consultation Paper then presented the Commission's provisional conclusions on this issue. The Commission indicated that a strong case exists for the introduction of a licensing and regulatory system for debt collection agencies, based on the acute potential for consumer harm in this area, and the fact that Irish law fails to provide a level of protection to consumers which matches international standards. Therefore the Commission provisionally recommended that a licensing system should be introduced for the debt collection industry and that all debt collectors and debt collection agencies should be obliged to hold a licence before operating a debt collection business.<sup>12</sup> The Commission provisionally recommended that creditors collecting debts on their own behalf should be exempt from the licensing requirements, while inviting submissions as to whether there should be any

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<sup>7</sup> As amended by section 82 of the *Investment Funds, Companies and Miscellaneous Provisions Act 2005*.

<sup>8</sup> Section 13(2) of the 1995 Act, as amended by section of the *Investment Funds, Companies and Miscellaneous Provisions Act 2005*.

<sup>9</sup> (LRC 56 – 2009) at paragraphs 4.204 to 4.214.

<sup>10</sup> *Ibid* at paragraphs 4.215 to 4.216.

<sup>11</sup> (LRC 56 – 2009) at paragraphs 4.217 to 4.221.

<sup>12</sup> *Ibid* at paragraph 4.225.

other appropriate exemptions from the regulatory regime.<sup>13</sup> The Commission also invited submissions as to the criteria that should be taken into account when assessing whether an applicant qualifies for a debt collection licence.<sup>14</sup>

6.10 The Commission suggested that the Financial Regulator would be the most appropriate body to supervise this proposed licensing system, due to its existing indirect regulation of debt collection practices and its experience in the area of consumer protection. The Commission however also acknowledged that certain arguments arise against the appropriateness of attributing this role to the Financial Regulator, and suggested that the Irish Private Security Authority could also be considered as an appropriate supervisory body.<sup>15</sup> The Commission also provisionally recommended that the supervisory body ultimately chosen should be empowered to issue codes of practice which would be binding on all operators in this industry.<sup>16</sup>

### **(3) Response to Provisional Recommendations**

6.11 In October 2009, the Irish Government published its *Renewed Programme for Government*.<sup>17</sup> In this document, the Government indicated its intention to “reform debt enforcement in light of the deliberation of the Law Reform Commission”.<sup>18</sup> The programme also included a commitment by the Government to “regulate debt collection agencies”. The Commission welcomes this support for the provisional recommendations made in its Consultation Paper.

6.12 It should also be noted, as recognised in the Commission’s Interim Report, that since the publication of the Consultation Paper, efforts have been made by actors in the debt collection industry to establish best practice standards through voluntary self-regulation. In particular, the Irish Institute of Credit Management produced a Draft Code of Conduct for Debt Collection Agencies.<sup>19</sup> The Commission welcomes this development.

### **(4) Submissions Received**

6.13 The Commission received many insightful submissions on the subject of the proposed regulation of the debt collection industry, and wishes to acknowledge the contribution these submissions have made to the preparation of this final Report. The content of these submissions is now presented.

#### **(a) Should a licensing system be introduced for the debt collection industry?**

6.14 In relation to the question of whether a system of regulation should be introduced for the debt collection industry, a large majority of submissions were in favour of the introduction of such a system. This was seen as a necessary step for ensuring consumer protection and the establishment and maintenance of industry standards. The importance of balancing these objectives with the need to ensure that small businesses are not excessively regulated was also emphasised. The submissions suggested that a licensing regime should be introduced, whereby licences should only be issued to “fit persons”, who have been subject to rigorous vetting and scrutiny. It was suggested that such licences should be due for renewal regularly, in order to encourage debt collection undertakings to maintain high standards. One submission suggested that certain third parties should be permitted to make submissions to the appropriate regulatory authority in respect of an application for the renewal of the licence of a

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<sup>13</sup> (LRC 56 – 2009) at paragraphs 4.229 to 4.231.

<sup>14</sup> (LRC 56 – 2009) at paragraphs 4.231 to 4.232.

<sup>15</sup> (LRC 56 – 2009) at paragraphs 4.226 to 4.228.

<sup>16</sup> *Ibid* at paragraphs 4.233 to 4.234.

<sup>17</sup> *Renewed Programme for Government*, 10 October 2009. Available at:

[http://www.taoiseach.gov.ie/eng/Publications/Publications\\_2009/Renewed\\_Programme\\_for\\_Government,\\_October\\_2009.pdf](http://www.taoiseach.gov.ie/eng/Publications/Publications_2009/Renewed_Programme_for_Government,_October_2009.pdf)

<sup>18</sup> *Ibid* at 15.

<sup>19</sup> See *Interim Report on Personal Debt Management and Debt Enforcement* (LRC 96-2010) at paragraphs 2.24 to 2.25.



particular undertaking. Another submission suggested that fitness and competence should be assessed in relation to each individual activity, and that licences should only be issued to cover the activities for which the assessment has proved satisfactory. This submission also suggested that a higher degree of scrutiny could be applied to businesses reflecting a higher risk of consumer harm. One submission suggested that the regulatory system should include the regulation of fees charged by debt collection undertakings for their services, so that a legal maximum level of fees would be established. It was suggested that fees should be capped at such a level as to ensure the proper funding of debt collection activities, while also protecting debtors from unfair, excessive or unreasonable fees. In addition, this submission suggested that apart from fees, other aspects to be supervised should include the financial stability of an undertaking, the management of client funds by an undertaking, and the standards observed by an undertaking in its debt collection activities.

6.15 One submission received was strongly opposed to any proposals for licensing debt collection undertakings. The rationale behind this objection was that there is no need for a system of private debt collection undertakings in Ireland and that all debt recovery should be conducted only by official State procedures for the enforcement of judgment debts. This submission therefore objected to the introduction of a licensing system for the industry, as it felt this would give an imprimatur of legitimacy to private debt collection activities. Instead this submission argued that further legislation should be introduced to prohibit illegitimate practices in private debt collection. The submission concluded by indicating that if a licensing system is to be introduced, however, it would be important that it is limited to pre-judgment collection and that sole responsibility for post-judgment enforcement rests with official State agents.

**(b) Appropriate regulatory authority**

6.16 The majority of submissions received agreed that the Financial Regulator would be the most appropriate supervisory/regulatory authority for the debt collection industry. Submissions emphasised the importance of the supervision of the financial position of debt collection undertakings and of the standards for the management of client funds as reasons suggesting the Financial Regulator would be best placed to carry out this role.

6.17 In contrast, the view was also expressed that the Financial Regulator would not be the most appropriate regulatory authority for this industry. It was argued that such a role would not fit with the functions of the Financial Regulator, as a debt collection undertaking does not provide a financial product or service. Furthermore, a debt collection firm provides a service to a creditor and has no legal relationship with the consumer. The point was also made that a debt collection firm may collect many debts which are not owed to financial institutions, but to other bodies such as retailers and utility companies. For this reason it was argued that since such debts are not regulated by the Financial Regulator, it would be inappropriate for the Regulator to be given responsibility for the debt collection industry.

**(c) Exemptions from the regulatory regime**

6.18 A small majority of submissions were in favour of the inclusion of certain exemptions from licensing requirements as part of the regulatory regime. One submission argued that all agents collecting debts should be exempt if they are already subject to compliance with the Financial Regulator's *Code of Conduct on Mortgage Arrears* or any other statutory code of conduct on arrears management. This submission suggested that such an exemption should be extended to an undertaking that has been assigned a debt and so collects it on its own behalf only if such undertaking is subject to the aforementioned standards.

6.19 Another submission suggested that the proposed regulatory system should include exemptions for those collecting their own debts in the normal course of business, and for those who have been assigned debts, without any further qualifications or conditions required. This submission also suggested that exemptions should apply to individuals that are already subject to the supervision of the court or of the Law Society. Consideration should be given to excluding non-profit organisations from the licensing system also.

6.20 One final submission was opposed to the idea of any exemptions, and argued that even creditors collecting debts on their own behalf should be subject to the regulatory and licensing conditions.

**(d) Criteria to be taken into account in assessing whether an applicant is fit to hold a debt collection licence**

6.21 One submission argued that all applicants should be required to demonstrate compliance with the principle contained in Chapter 4, paragraph 5 of the Financial Regulator's *Consumer Protection Code*, requiring all regulated agencies to have procedures in place for handling arrears cases which must be standardised, compliant with "best practice" and transparently available to the public. This submission argued that applicants should be required to demonstrate compliance with the relevant provisions of the *Consumer Credit Act 1995* as described above, and to ensure their inclusion in the list of data controllers registered with the Data Protection Commissioner. Another submission suggested that all applicants should be required to produce a tax clearing certification and maintain a certificate during the currency of the licence.

6.22 A further submission suggested that in making a decision as to whether or not to award a licence, the appropriate authority should consider the length of experience in the debt collection industry held by the applicant or the employees of the applicant. All applicants should also be vetted by Gardaí. This submission proposed a number of positive factors which should indicate the appropriateness of granting a licence. These included the following:

- Membership of an approved consumer code scheme (as approved by the licensing authority) or membership of a trade association;
- Existing approval/authorisation by the Financial Regulator;
- A record of fair dealing in consumer relations over a significant period, such as evidence that no serious consumer complaints or enforcement action had been taken against the business; and appropriate policies and procedures for addressing consumer complaints.

**(e) Code of conduct**

6.23 A majority of submissions supported the empowerment of the appropriate regulatory authority with the ability to issue a binding code of practice for debt collection undertakings. One submission suggested that when drafting such a code the regulatory authority should take into account the prohibited practices included in the *Consumer Credit Act 1995* and the suggestions of industry representatives regarding best practices. Another submission suggested that there should be a prohibition on the use of false, confusing, deceptive or misleading representations or documentation by debt collection undertakings. An obligation should be imposed on undertakings to use plain language in all correspondence with clients. Furthermore, the code should require all debt collection undertakings, when making demands for repayment, to consider the means of the debtor and to have regard to the need to protect minimum basic income of debtors needed for a reasonable standard of living. Social welfare standards could be used to assess this level of income. Another submission suggested that the fees charged by undertakings, the standards of collection activity and the management of client funds are other aspects of debt collection business which should be regulated and supervised.

**C Comparative Approaches to the Regulation of Debt Collection Undertakings**

6.24 This chapter has so far outlined the Consultation Paper's provisional recommendations and the submissions received in response to them. The following paragraphs now present a comparative overview of various types of frameworks for the regulation of debt collection undertakings in a range of legal systems, before the chapter concludes with the Commission's conclusions and recommendations.

**(1) UK**

6.25 The system for the regulation of debt collection undertakings in the UK is discussed in the Commission's Consultation Paper.<sup>20</sup> Nonetheless it is useful to present this system once again as part of a wider discussion of the possible options for introducing a system regulating this industry in Ireland.

6.26 In the UK, debt collection agencies are subject to the same consumer credit licensing regime as all consumer lenders and debt management companies, as discussed in the Commission's

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<sup>20</sup> (LRC CP 56-2009) at paragraphs 4.209 to 4.214.

Consultation Paper.<sup>21</sup> Section 21 of the *Consumer Credit Act 1974* (UK) requires licenses to be held by those carrying on a wide range of “ancillary credit businesses”, including “a business so far as it comprises or relates to debt-collecting.”<sup>22</sup> Under section 145(7) of the 1974 Act as amended, debt-collecting is defined as “the taking of steps to procure payments of debts due under consumer credit agreements<sup>23</sup> or consumer hire agreements.”

6.27 The Office of Fair Trading (OFT), an independent regulatory office, is responsible for issuing all consumer credit licences in the UK under the *Consumer Credit Act 1974*. The OFT has wide-ranging powers and duties, including being responsible for competition policy and consumer protection.<sup>24</sup> It therefore is responsible for consumer credit regulation, the enforcement of competition law, and generally ensuring that markets function fairly and effectively. It conducts investigations under the *Competition Act 1998* and the *Enterprise Act 2002*, as well as carrying out market studies and enforcing consumer protection legislation such as the *Unfair Terms in Consumer Contracts Regulations 1999*. It can be seen therefore that the OFT carries responsibilities that in Ireland are shared between the Financial Regulator and the National Consumer Agency (including the Competition Authority).

6.28 The OFT will only issue a consumer credit licence if satisfied that the applicant is a fit person to engage in activities covered by the licence.<sup>25</sup> The OFT may take into account any circumstances which appear relevant in assessing a licence application, and will in particular have regard to whether the applicant has:<sup>26</sup>

- Committed any offence involving fraud or other dishonesty, or violence;
- Contravened any provisions of consumer credit law, either in the UK or in another Member State of the European Economic Area;
- Practised discrimination on grounds of sex, colour, race or ethnic or national origins in, or in connection with, the carrying on of any business, or
- Engaged in business practices appearing to the Office of Fair Trading to be deceitful or oppressive, or otherwise unfair or improper (whether unlawful or not).

6.29 The OFT has indicated in a guidance document that it will take into account other issues such as the insolvency, bankruptcy or disqualification as a director of any applicant; any complaints of consumers or adverse information from other regulators, professional bodies, trade bodies, or consumer organisations; and evidence relating to the skills and competence of the applicant to provide the service.<sup>27</sup> The OFT has categorised debt collection businesses as posing an exceptionally high potential risk to consumers, and for this reason additional conditions must be met when applying for a debt collecting licence. The applicant must provide evidence of its credit competence in a Credit Competence Plan, and should expect to be subject to an on-site inspection by the OFT.

6.30 Several exemptions to the licensing requirements are provided in the 1974 Act. Therefore section 146 provides for the following exceptions to the licensing requirement of section 145:

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<sup>21</sup> See Consultation Paper on Personal Debt Management and Debt Enforcement (LRC CP 56-2009) at paragraphs 4.100 to 4.103 for a discussion of the UK consumer credit licensing system in respect of consumer lenders. See (LRC CP 56-2009) at paragraphs 4.239 to 4.245 for a discussion of the licensing of debt management companies in the UK. See also Conway *Regulation of Debt Collection Companies* (House of Commons Library SN/HA/5138 2009).

<sup>22</sup> Section 24A(4)(f) of the *Consumer Credit Act 1974* (UK).

<sup>23</sup> A consumer credit agreement is “a personal credit agreement by which the creditor provides the debtor with credit not exceeding £15,000: section 8(2) of the 1974 Act.

<sup>24</sup> See e.g. Ramsay *Consumer Law and Policy* (2<sup>nd</sup> ed. Hart Publishing 2007) at 454.

<sup>25</sup> Section 25(1) of the 1974 Act.

<sup>26</sup> Section 25(2) of the 1974 Act.

<sup>27</sup> Office of Fair Trading *Do you need a credit licence? An introduction to consumer credit licensing* (2008) at 3.

- A barrister or advocate acting in that capacity is not to be treated as doing so in the course of any ancillary credit business.
- A solicitor engaging in contentious business (as defined in section 87(1) of the *Solicitors Act 1974*<sup>28</sup>) is not to be treated as doing so in the course of any ancillary credit business.
- A solicitor within the meaning of the *Solicitors (Scotland) Act 1933* engaging in business done in or for the purposes of proceedings before a court or before an arbiter is not to be treated as doing so in the course of any ancillary credit business.
- A solicitor in Northern Ireland engaging in contentious business (as defined in Article 3(2) of the *Solicitors (Northern Ireland) Order 1976*, is not to be treated as doing so in the course of any ancillary credit business.

6.31 In addition, section 146(6) states that “it is not debt-adjusting, debt-counselling or debt-collecting for a person to do anything in relation to a debt arising under an agreement if any of the following conditions is satisfied —

- that he is the creditor or owner under the agreement, or
- that he is the supplier in relation to the agreement, or
- that he is a credit-broker who has acquired the business of the person who was the supplier in relation to the agreement...”

6.32 Most importantly for present purposes, this provides that creditors or owners collecting debts on their own behalf are not required to obtain a consumer credit licence for this purpose.

6.33 Companies which merely collect debts owed to them, including (since October 2008) debts which have been assigned to them, need not apply for a licence.<sup>29</sup> It should be noted that the OFT also operates a group licensing regime whereby professional associations and other bodies can apply for a group licence to cover members of the group for specific credit activities.<sup>30</sup>

6.34 In 2003, the OFT published formal guidance on debt collection, which applies to all consumer credit licence holders and applicants.<sup>31</sup> The general content of the guidance is discussed further below.<sup>32</sup> The minimum standards expected of licensed debt collectors are set out, as are the types of behaviour which the OFT considers to constitute “unfair business practices”. As noted above, such unfair practices can render a licensee unfit to retain a licence.

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<sup>28</sup> Under section 87(1) of the *Solicitors Act 1974*, “contentious business” means business done, whether as solicitor or advocate, in or for the purposes of proceedings begun before a court or before an arbitrator . . . , not being business which falls within the definition of non-contentious or common form probate business contained in section 128 of the *Supreme Court Act 1981*.” This section of the *Supreme Court Act 1981* in turn states that “ non-contentious or common form probate business ” means the business of obtaining probate and administration where there is no contention as to the right thereto, including-

(a) the passing of probates and administrations through the High Court in contentious cases where the contest has been terminated,

(b) all business of a non-contentious nature in matters of testacy and intestacy not being proceedings in any action, and

(c) the business of lodging caveats against the grant of probate or administration ;

<sup>29</sup> *Ibid* at 24. See section 146(6)(aa) of the 1974 Act.

<sup>30</sup> Office of Fair Trading *Do you need a credit licence? An introduction to consumer credit licensing* (2008) at 8.

<sup>31</sup> Office of Fair Trading *Debt Collection Guidance* (OFT664 2003, updated December 2006). The guidance does not apply to the routine collection of debts as they fall due, but rather applies to the collection of a debt once an account is in default. It should be noted that the OFT is in the process of revising this guidance, and is due to publish a consultation document on the matter in January 2011.

<sup>32</sup> See paragraph 6.123 below.

6.35 In 2006, the OFT published a review into how the guidance had succeeded in raising awareness of the regulatory regime and in changing behaviour within the debt collecting sector. The main results of the review included the following findings:<sup>33</sup>

- The guidance was a success in terms of content.
- Awareness of debt collection standards had increased among collectors of debts, individual debtors and consumer advisors.
- There had been positive changes in industry behaviour.
- Nonetheless, more remained to be done to improve compliance levels.

6.36 Under the UK *Consumer Credit Act 1974*, it is an offence to engage in any licensed activities without a relevant licence.<sup>34</sup> Other civil sanctions also exist, and the OFT possesses powers to impose requirements on licensed businesses, as well as civil penalties of up to £50,000 on a licensee who fails to comply with such a requirement.<sup>35</sup> Civil sanctions also exist for operating without a licence, as all regulated agreements entered into by an unlicensed business will be unenforceable against the other party without an order of the OFT.<sup>36</sup>

6.37 In addition to the regulatory supervision of the OFT, a form of self-regulation also exists within the debt collecting industry in the UK. The Credit Services Association (CSA) is the national association in the UK for debt collection and tracing agencies. The CSA represents 200 of the estimated 500 debt collection businesses in the UK.<sup>37</sup> All members must comply with a code of practice which outlines the obligations of the members. This code includes obligations to avoid using oppressive or intrusive collection practices and to be circumspect and discreet when attempting to contact the debtor by telephone, email, SMS or personal visit.

## **(2) USA**

6.38 The system for the regulation of debt collection activities in the USA consists of a combination of federal and state law. The *Fair Debt Collection Practices Act* was first enacted in 1977 to establish certain minimum standards of consumer protection from harassment in debt collection at a federal level. This Act however does not prevent individual states from adopting laws and regulatory structures providing additional protection to consumers. Therefore certain individual states have adopted various different systems for regulating debt collection practices, and an example is discussed below.<sup>38</sup>

### **(a) Federal Law: the Fair Debt Collection Practices Act**

6.39 Before the 1960s, the regulation of consumer debt collection activities in the USA was a matter for state law, but as a national market for consumer credit began to develop, federal regulatory measures began to emerge.<sup>39</sup> First, in 1968 the Federal Trade Commission published guidelines describing explicit collection practices it deemed to be unfair or deceptive trade practices, and so liable to be the subject of prosecution under the *Federal Trade Commission Act*.<sup>40</sup> Almost a decade later, in 1977, the *Fair Debt Collection Practices Act* was passed. The rationale behind the enactment of this legislation can be seen in the statement of congressional findings and declaration of purpose found in the Act, which states that:

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<sup>33</sup> See Conway *Regulation of Debt Collection Companies* (House of Commons Library SN/HA/5138 2009) at 4.

<sup>34</sup> Section 39 *Consumer Credit Act 1974* (UK).

<sup>35</sup> Section 39A of the 1974 Act.

<sup>36</sup> Section 148 of the 1974 Act.

<sup>37</sup> See Conway *Regulation of Debt Collection Companies* (House of Commons Library SN/HA/5138 2009) at 5.

<sup>38</sup> See paragraphs 6.48 to 6.55 below.

<sup>39</sup> See Hunt "Collecting Consumer Debt in America" *Federal Reserve Bank of Philadelphia Business Review* Q2 2007 11.

<sup>40</sup> 15 U.S.C. §§ 41-58.

- There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.
- Existing laws and procedures for redressing these injuries are inadequate to protect consumers.
- Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.
- It is the purpose of this title to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

6.40 The Act therefore proceeds to prohibit certain practices in debt collection so as to prevent the harassment of debtors. Restrictions are placed on the permissible forms of communication between a collector and a debtor,<sup>41</sup> while collectors are prohibited from furnishing certain deceptive forms to consumers.<sup>42</sup> False or misleading representations,<sup>43</sup> harassment or abusive conduct<sup>44</sup> and unfair practices<sup>45</sup> are prohibited, with certain activities which constitute examples of this prohibited conduct are expressly identified as being unlawful. Obligations are also placed on debt collectors to provide evidence of the validity of the debt forming the object of the collection activity on the written request of the consumer.<sup>46</sup> The provisions of the Act can be enforced both through private litigation by an injured party<sup>47</sup> or through the administrative enforcement regime overseen by the Federal Trade Commission.<sup>48</sup>

6.41 A difficult question has arisen in relation to the scope of the operation of the Fair Debt Collection Practices Act, and in particular the extent to which lawyers or attorneys are bound by the terms of the Act. As originally enacted in 1977, the Act exempted lawyers from the definition of “debt collector”, and so made lawyers exempt from compliance with its terms. The reason for this exemption was based on an assumption that lawyers were only incidentally involved in debt collection, and that lawyers generally did not operate specialist debt collection agencies.<sup>49</sup> In 1986 however, an amendment was made to the Act in order to remove the exemption for attorneys.<sup>50</sup> This amendment was provoked by evidence illustrating that the assumption that lawyers were engaging in debt collection only incidentally was no longer true, as in fact more attorneys were involved in debt collection practices at the time than non-attorneys.<sup>51</sup> It was also noted during the debates on this amendment that many attorneys advertised their exemption from the Act’s obligations as a selling point to attract creditors to use their services. It was stated that:

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<sup>41</sup> 15 USC 1692c.

<sup>42</sup> 15 USC 1692j.

<sup>43</sup> 15 USC 1692e.

<sup>44</sup> 15 USC 1692d.

<sup>45</sup> 15 USC 1692f.

<sup>46</sup> 15 USC 1692g.

<sup>47</sup> 15 USC 1692k.

<sup>48</sup> 15 USC 1692l.

<sup>49</sup> HR Rep. No. 99-405, reprinted in 1986 USCCAN 1752, 1759. See the discussion of the legislative history of the Act in the case of *Schroyer v Frankel* 197 F.3d 1170 (6<sup>th</sup> Cir. 1999), 1174-6, per Circuit Judge Clay.

<sup>50</sup> Public Law 99-361, 100 Stat. 768.

<sup>51</sup> HR Rep. No. 99-405, reprinted in 1986 USCCAN 1752, 1752. It was observed in the House of Representatives debates that by 1985, 5,000 attorneys were engaged in debt collection industry as compared to 4,500 lay debt collection firms.

"[i]n recent years, a large number of law firms have gone into specialized debt collection, and many of these firms use persons full time to collect debts. Repeal of the exemption will require these firms to comply with the same standards of conduct as lay debt collection firms."<sup>52</sup>

6.42 Therefore, since this amending legislation, attorneys are regulated by the provisions of the *Fair Debt Collection Practices Act* provided that they fall within the definition of "debt collector" contained in the Act. The Act provides that:

"The term 'debt collector' means any person who uses any instrumentality of interstate commerce or the mails in any business *the principal purpose of which is the collection of any debts*, or who *regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another...*"<sup>53</sup>

6.43 A complex issue in relation to the interpretation of this definition has been the question of the appropriate criteria to be taken into account in determining whether an attorney or law firm *regularly collects or attempts to collect* debts so as to fall within the scope of the Act. In effect, two diverging tests have been applied to the interpretation of the requirement of regularity, which have been termed the "frequency approach" and the "aggregate approach".<sup>54</sup>

6.44 Under the frequency approach, the term "regularly" is taken as referring to the frequency and consistency of the debt collection activities undertaken by a firm, regardless of the overall amount of debt collection activity in relation to other business activities. Under this approach, the percentage of a firm's work taking the form of debt collection activities is irrelevant. Therefore, "services may be rendered 'regularly' even though these services amount to a small fraction of the firm's total activity",<sup>55</sup> with some cases finding a law firm to fall within the status of debt collector where less than 1% of its gross revenues came from debt collection.<sup>56</sup> Under the alternative "aggregate" approach, certain courts have essentially established threshold percentages of how much debt collection activity qualifies an attorney or law firm as "regularly" engaging in collecting or attempting to collect debts. For example, in *Schroyer v Frankel*,<sup>57</sup> the United States Court of Appeals, Sixth Circuit held that:

"a plaintiff must show that that the attorney or law firm collects debts as a matter of course for its clients or for some clients, or collects debts as a substantial, but not principal, part of his or its general law practice."<sup>58</sup>

6.45 The above discussion may suggest that a test of whether an individual, whether a law firm or otherwise, "regularly" collects debts owed to another or attempts to collect such debts, may not be an appropriate test for delimiting the scope of the application of any regulatory system. This is because the test of regularity has given rise to much confusion and conflicting case law. On the other hand, this test would provide a certain degree of flexibility in that it would not rigidly define the scope of debt collection regulation.

6.46 It should be noted that the definition of "debt collector" provided by the *Fair Debt Collection Procedures Act* provides for further exceptions.<sup>59</sup> The definition itself is limited to those who have as their principal purpose the collection of, or who regularly collect, "debts owed or due or asserted to be owed or due *another*" (emphasis added). The position therefore is that creditors collecting debts on their own

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<sup>52</sup> HR Rep. No. 99-405, reprinted in 1986 USCCAN 1752, 1759.

<sup>53</sup> 15 USC 1692a (6).

<sup>54</sup> See the discussion of these approaches in *Oppong v First Union Mortgage Corporation and Ors* 407 F.Supp.2d 658 (2005), 662-667, per District Judge Robreno (United States District Court, E.D. Pennsylvania).

<sup>55</sup> *Silva v Mid Atlantic Management Corporation* 227 F.Supp.2d 460, (United States District Court, E.D. Pennsylvania 2003), 466, per Judge Kelly.

<sup>56</sup> *Ibid.*

<sup>57</sup> Above fn49.

<sup>58</sup> 197 F.3d 1170, 1176 (6<sup>th</sup> Cir. 1999), per Circuit Judge Clay.

<sup>59</sup> 15 USC 1692a (6).

behalf will not be subject to the requirements of the Act. The Act then continues to state that the term “debt collector” does not include:

- any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;
- any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;
- any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;
- any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;
- any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and
- any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity:
  - is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement;
  - concerns a debt which was originated by such person;
  - concerns a debt which was not in default at the time it was obtained by such person; or
  - concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

6.47 Therefore it can be seen that any public officer or employee who collects debts in the performance of official duties is exempt from the requirements of the legislation. Such a provision in Irish law would for example exempt Revenue Sheriffs, Sheriffs and County Registrars from the obligations of the regulatory system. Similarly, non-profit debt counselling organisations which receive debtor money and distribute it to creditors are exempted under the US statute. As is seen below, this is not the case under the laws of many Canadian provinces and territories, where such organisations must be licensed as debt collectors.<sup>60</sup>

**(b) State Law and Regulation: the example of Maryland**

6.48 In addition to the federal *Fair Debt Collection Practices Act*, which serves to prohibit certain practices and establish certain basic standards in debt collection, state laws also exist which establish regulatory and licensing regimes for debt collection agencies. An example of such a regulatory system is now presented.

6.49 For example, the Maryland Code establishes a system for the licensing of “collection agencies”, whereby such agencies are only authorised to engage in the collection business if licensed by the Maryland Collection Agencies Licensing Board.<sup>61</sup> “Collection agency” is defined as meaning “a person who engages directly or indirectly in the business of:

- (1) (i) collecting for, or soliciting from another, a consumer claim; or
- (ii) collecting a consumer claim the person owns, if the claim was in default when the person acquired it;

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<sup>60</sup> For a discussion of some of the substantive obligations imposed on debt collectors and the practices prohibited under the *Fair Debt Collection Practices Act*, see paragraph 6.124 below.

<sup>61</sup> Maryland Code Annotated, Business Regulations § 7-101 et seq, available at: <http://michie.lexisnexis.com/maryland/lpext.dll?f=templates&fn=main-h.htm&cp>.



- (2) collecting a consumer claim the person owns, using a name or other artifice that indicates that another party is attempting to collect the consumer claim;
- (3) giving, selling, attempting to give or sell to another, or using, for collection of a consumer claim, a series or system of forms or letters that indicates directly or indirectly that a person other than the owner is asserting the consumer claim; or
- (4) employing the services of an individual or business to solicit or sell a collection system to be used for collection of a consumer claim.<sup>62</sup>

6.50 The term “consumer claim” is in turn defined as meaning a claim that:

- is for money owed or said to be owed by a resident of the State; and
- arises from a transaction in which, for a family, household, or personal purpose, the resident sought or got credit, money, personal property, real property, or services.<sup>63</sup>

6.51 This Title of the Maryland Code proceeds to outline certain exceptions to its scope, so that banks, credit unions, mortgage lenders and brokers are not required to obtain licenses in order to engage in debt collection activities. In addition, a lawyer who is collecting a debt for a client is exempt from the licensing requirement, unless the lawyer has an employee who is not a lawyer, and “who is engaged primarily to solicit debts for collection or primarily makes contact with a debtor to collect or adjust a debt through a procedure identified with the operation of a collection agency”.<sup>64</sup> An exception also exists to cover a situation where a debt is being collected by one person for another person and a relationship of common ownership exists between the two persons.<sup>65</sup> This exemption is however limited to circumstances where the collecting person only collects for those persons to whom it is related by common ownership, and where the principal business of the collecting person is not the collection of debts. The collecting person must also file with the Board certain information in advance of collecting a debt.

6.52 The licensing of collection agencies is overseen by the State Collection Agency Licensing Board, which forms part of the Office of the Commissioner of Financial Regulation in the Department of Labor, Licensing and Regulation.<sup>66</sup> The Board consists of five members, including a Commissioner as an *ex officio* member, and four other members appointed by the Governor of Maryland.<sup>67</sup> These four members are to be composed of two representatives of collection agencies and two representatives of consumers, the latter two being either members of a recognised consumer group in the State or employees of a local consumer protection unit in the State.

6.53 A licence is required by a person whenever the person does business as a collection agency in the State.<sup>68</sup> To qualify for a licence, an applicant must satisfy the Licensing Board that it is of good moral character and has sufficient financial responsibility, business experience and general fitness to:

- Engage in business as a collection agency;
- Warrant the belief that the business will be conducted lawfully, honestly, fairly and efficiently; and
- Command the confidence of the public.<sup>69</sup>

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<sup>62</sup> 7 Maryland Code §101(c).

<sup>63</sup> 7 Maryland Code §101(e).

<sup>64</sup> 7 Maryland Code §102(b)(9).

<sup>65</sup> 7 Maryland Code §102(b)(10).

<sup>66</sup> 7 Maryland Code §201.

<sup>67</sup> 7 Maryland Code §202.

<sup>68</sup> 7 Maryland Code §301.

<sup>69</sup> 7 Maryland Code §303.

6.54 Applicants for licenses are further required to execute a surety bond for the benefit of any member of the public who suffers a loss due to a breach of the relevant legislative provisions governing collection activities.<sup>70</sup>

6.55 A person who knowingly and wilfully does business as a collection agency in the State without a licence is guilty of a misdemeanour, and on conviction is subject to a fine of up to \$1,000 and/or imprisonment for up to 6 months.<sup>71</sup>

### **(3) Canada**

6.56 Several Canadian provinces and territories possess licensing regimes for the regulation of the debt collection industry. Examples of these regulatory systems are now presented.

#### **(a) Alberta**

6.57 The *Fair Trading Act Collection and Debt Repayment Practices Regulation* establishes a licensing system for debt collection and debt repayment agencies in Alberta. The regime for the licensing of debt collection and debt repayment agencies is overseen by the Director of Fair Trading.<sup>72</sup> This office forms part of Service Alberta, a Government Ministry. This department is responsible for regulating a wide range of industries, including auctioneers, payday lenders (similar to moneylenders), employment agencies and direct (door-to-door) sellers. It should be noted that in Alberta, the regulation of financial institutions falls within the responsibility of a different government department, the Department of Finance and Enterprise. The regulatory authority responsible for supervising financial services is the Alberta Superintendent of Financial Institutions.<sup>73</sup> Credit unions, loan and trust corporations, banks, insurance companies, securities companies and insurance companies all fall under the supervision of the Superintendent. Therefore in Alberta debt collection and debt repayment agencies are not regulated by the body responsible for regulating financial institutions.

6.58 The Regulations establish four classes of licence, including a collection agency licence, a collector's licence, a debt repayment agency licence and a debt repayment agent's licence.<sup>74</sup> The Regulation defines the term "collection agency" as meaning "A person, other than a collector or debt repayment agent,

- who carries on the activities of collecting or attempting to collect a debt or debts from a debtor in Alberta under any name that differs from that of the creditor to whom the debt is or was originally owed, regardless of to whom or where the payment is made,
- on behalf of another person, or
- where the person has purchased a debt or debts that is or are in arrears".<sup>75</sup>

6.59 Exceptions to this definition are provided in the Regulation however, and so the term collection agency does not include:

- a person who is collecting or attempting to collect a debt of which the person is the original creditor or owner;
- a business that purchases a debt or debts through acquiring or merging with a business in a transaction that includes the transfer of accounts receivable;
- a business that acquires a debt or debts through the seizure of accounts receivable under a security agreement;

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<sup>70</sup> 7 Maryland Code §304.

<sup>71</sup> 7 Maryland Code §401.

<sup>72</sup> As established under section 173 of the *Fair Trading Act* (Alberta).

<sup>73</sup> See [http://www.finance.alberta.ca/business/fin\\_inst/regulatory\\_framework.html](http://www.finance.alberta.ca/business/fin_inst/regulatory_framework.html).

<sup>74</sup> Section 3(1) of the *Fair Trading Act Collection and Debt Repayment Practices Regulation*.

<sup>75</sup> Section 1(b) of the Regulation.

- a person to whom the contract that gave rise to the debt was assigned for the purpose of financing the transaction, or
- who carries on the activities of a debt repayment agency.<sup>76</sup>

6.60 The term “collector” is in turn defined as meaning as “an individual employed or authorised

- by a collection agency to carry on the activities of a collector by
- collecting or attempting to collect a debt or debts from a debtor,
- locating debtors in Alberta, or
- acting for or dealing with a debtor, or
- by a debt repayment agency to carry on the activities of a debt repayment agent”.<sup>77</sup>

6.61 The Regulation prohibits any person from carrying on the activities described above unless the person holds the requisite licence.<sup>78</sup> The Regulation also prohibits a person from simultaneously holding a collection agency and debt repayment agency licence,<sup>79</sup> and prevents an individual from simultaneously holding a collector’s and a debt repayment agent’s licence.<sup>80</sup> Licences expire annually and so must be renewed after 12 months.<sup>81</sup>

6.62 A licence may not be issued by the Director of Fair Trading unless a security is submitted to the Director in a form and amount approved by the Director. The other conditions which must be established in order to qualify for a licence are contained in the *General Licensing and Security Regulation*.

6.63 As well as establishing this licensing regime, the *Fair Trading Act Collection and Debt Repayment Practices Regulation* also prohibits certain specific practices for both collection agencies<sup>82</sup> and debt repayment agencies.<sup>83</sup> In addition to these prohibitions, certain obligations are imposed on debt collection and debt repayment agencies regarding the maintenance of trust accounts and the receipt of money collected on behalf of another person. The Regulation provides that an agency is the trustee of any money collected on behalf of another person,<sup>84</sup> and must deposit such money within three days of its receipt into a trust account.<sup>85</sup> Each agency must establish a complete and accurate register for the trust accounts it maintains, setting out all money received and paid out.<sup>86</sup> This register must be available for inspection and must be maintained in respect of a debtor for at least three years after the last entry respecting that debtor is made. Certain other detailed obligations are imposed by the Regulation

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<sup>76</sup> Section 1(g) of the Regulation defines “debt repayment agency” as meaning “debt repayment agency” means a collection agency that carries on the activities of offering or undertaking to act for a debtor in Alberta in arrangements or negotiations with the debtor’s creditors or receiving money from a debtor for distribution to the debtor’s creditors in consideration of a fee, commission or other remuneration that is payable by the debtor”. Section 1(h) of the Regulation in turn defines a “debt repayment agent” is defined as a “collector employed or authorised by a debt repayment agency to act for or deal with debtors”.

<sup>77</sup> Section 1(c) of the Regulation.

<sup>78</sup> Section 2(2)-(5) of the Regulation.

<sup>79</sup> Section 2(7) of the Regulation.

<sup>80</sup> Section 2(8) of the Regulation.

<sup>81</sup> Section 5(1) of the Regulation.

<sup>82</sup> Section 12(1) of the Regulation.

<sup>83</sup> Section 12.1(1) of the Regulation.

<sup>84</sup> Section 15 of the Regulation.

<sup>85</sup> Section 16(1) of the Regulation.

<sup>86</sup> Section 20 of the Regulation.

regarding the provision of receipts<sup>87</sup> and reports to both creditors<sup>88</sup> and debtors.<sup>89</sup> Accounting and auditing requirements are also specified,<sup>90</sup> and detailed requirements are specified relating to the records which must be kept by all agencies.<sup>91</sup>

**(b) Newfoundland and Labrador**

6.64 In the Canadian province of Newfoundland and Labrador, the debt collection industry is regulated by the *Collections Act*. This legislation establishes a Registrar of Collection Agencies with responsibility for overseeing a registration system for all collection agencies and agents. The Registrar of Collection Agencies is part of the Trade Practices Division of the Department of Government Services in Newfoundland and Labrador.<sup>92</sup> This department is responsible for a regulating a very wide range of industries and legal areas, ranging from the registration of births, deaths and marriages and the licensing of lotteries to landlord and tenant law and consumer protection. It also is responsible for regulating insurance, pension and securities as well as real estate and mortgage brokers, thus including responsibility for the regulation of a selection of financial services. Its consumer protection functions also include the licensing and regulation of consumer credit lenders under the *Consumer Protection and Business Practices Act*.<sup>93</sup> Therefore it can be seen that in Newfoundland and Labrador the body responsible for regulating consumer credit lenders and enforcing consumer credit legislation also assumes responsibility for the regulation of debt advice and debt management companies.

6.65 The Act is notable for the very detailed definition it provides of what constitutes a “collection agency” for the purposes of the regulatory regime, and similarly detailed list of persons who are exempt from the regime. Section 2(a) provides that “collection agency” means a person who:

- collects debts for others;
- offers or undertakes to collect debts for others;
- solicits accounts for collection;
- collects debts owed to him or her under a name which is different from the name of the creditor;
- mails to debtors or offers or undertakes to mail to debtors, on behalf of a creditor, collection letters;
- for consideration or hope or promise of consideration, enters into an agreement under the terms of which the person agrees to pay to a vendor an amount in respect of goods or services sold or supplied by the vendor to a person other than the collection agency;
- offers or undertakes to act for a debtor in arrangements or negotiations with the debtor’s creditors;
- receives money periodically from a debtor for distribution to his or her creditors;
- sells or offers for sale a collection system, device or scheme intended to be used to collect debts;  
or
- acts as an independent court agent;
- and includes a person who takes an assignment of a debt due at the date of assignment from a specified debtor.

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<sup>87</sup> Section 21 of the Regulation.

<sup>88</sup> Section 22 of the Regulation.

<sup>89</sup> Section 23 of the Regulation.

<sup>90</sup> Sections 21.2 and 23.2 of the Regulation.

<sup>91</sup> Section 23.3 of the Regulation.

<sup>92</sup> See <http://www.gs.gov.nl.ca/index.html>.

<sup>93</sup> SNL Chapter C-31.1.

6.66 Section 2 defines a “collector” as “an individual employed, appointed or authorised by a collection agency registered under this Act to solicit business or collect debts for the collection agency or to deal with or trace debtors for the collection agency and includes private bailiffs and independent court agents.”<sup>94</sup> It can be seen that this is a detailed and broad account of the persons subject to the regulatory system. Of particular note is the inclusion within the system of a person who “offers or undertakes to act for a debtor in arrangements or negotiations with the debtor’s creditors” or who “receives money periodically from a debtor for distribution to his or her creditors”. These provisions appear to include debt management agents and money advisors within the scope of the regime, therefore requiring such actors to register with the Registrar of Collection Agencies. The wording used is similar to that used to define “debt repayment agencies” under the Albertan legislation described above,<sup>95</sup> which imposed licensing requirements on such agencies, though of a slightly different kind to those imposed on collection agencies. The approach in Newfoundland and Labrador however is to include such debt management agencies within the definition of collection agencies, thus imposing an identical regulatory regime on these two types of operators.

6.67 Section 3 of the Act then details the exemptions from the licensing requirements by stating that the Act does not apply to:

- an insurer or agent or employee of an insurer or agent in respect of the collection of insurance premiums;
- a real estate broker or his or her employee, in respect of the collection of money incidental to the broker's business as a real estate broker;
- a person acting as an officer of or under the process or authority of a court;
- a person appointed under an Act, in respect of the collection of debts in the performance of his or her duty;
- a bank to which the Bank Act ( Canada ) applies, or employees of the bank in the regular course of their employment;
- a loan company, trust company or finance company licensed under the Loan Companies and Finance Companies Licensing Act, or which meets the requirements of section 3 of the Trust and Loan Corporations Act or employees of the company in the regular course of their employment;
- an isolated collection made by a person whose usual business is not collecting debts for other persons; or
- a person exempted from the application of this Act by the regulations.

6.68 In addition, the Act continues to state that it applies to a barrister or solicitor “carrying on a collection agency in a name other than his or her own and in respect to the collection agency”, but that it does not apply to a barrister or solicitor “in the practice of his or her profession”.<sup>96</sup> Furthermore, creditors seeking to collect debts on their own behalf “who engage in collecting their own accounts” are not bound

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<sup>94</sup> Section 2(b) of the *Collections Act* (Newfoundland). Section 2(b.1) defines an “independent court agent” as a person who initiates or undertakes legal proceedings in a court, including a person who starts an action, appears in court or enforces a judgment to collect debts on behalf of another person, for consideration given or promised, but does not include:

a barrister or solicitor, or

an articulated clerk who is under the direction of a barrister or solicitor.

An “articled clerk” is a student, as defined in the Newfoundland and Labrador *Law Society Act* (SNL1999 C L-9.1).

<sup>95</sup> See paragraph 6.57 above.

<sup>96</sup> Section 3(2) of the *Collections Act* (Newfoundland).

by the Act. Nonetheless where a Code of Practice is made under the Act, creditors engaging in collecting their own debts must comply with the requirements of that code.<sup>97</sup>

6.69 Section 12 of the Act provides that a person shall not carry on business as a collection agency in the province unless he or she is registered. An applicant for registration is entitled to be granted registration except where:

- The applicant's financial responsibility or record of past conduct is such that it would not be, in the opinion of the registrar, in the public interest for the registration to be granted; or
- The applicant is or proposed to be in contravention of the Act or regulations made under it.<sup>98</sup>
- A registration may be made subject to such terms and conditions as the Registrar imposes.

6.70 The Act also specifies certain restricted activities in which a collection agency is prohibited from engaging. An agency therefore shall not:

- collect or attempt to collect for a person for whom the collection agency acts money in addition to the amount owing by the debtor;
- make charges against a person for whom the collection agency acts in addition to those contained in the agreement with that person;
- send a telegram or make a telephone call, for which the charges are payable by the addressee or the person to whom the call is made, to a debtor for the purpose of demanding payment of a debt;
- enter into an agreement with a person for whom the collection agency acts unless a copy of the form of the agreement is filed with the registrar;
- deal with a debtor in a name other than that authorized by the registration;
- use a form or form of letter to collect or attempt to collect money from a debtor unless a copy of the form or form of letter is filed with the registrar; or
- use, without lawful authority, a summons, notice, or demand, or other document, expressed in language of the general style or purport of a form used in a court of the province, or printed or written or in the general appearance or format of that form.<sup>99</sup>

6.71 In addition, obligations are placed on agencies regarding the keeping of records and books of account;<sup>100</sup> auditing requirements<sup>101</sup> and the preparation of an annual report on the affairs of the business.<sup>102</sup> A violation of any of these obligations or prohibitions may lead to the suspension or cancellation of the agency's licence,<sup>103</sup> and constitutes a criminal offence, punishable by a fine of up to \$5,000 and/or imprisonment for up to 12 months.<sup>104</sup>

6.72 The Act empowers the Lieutenant-Governor in Council to make regulations under the Act for specified purposes, including for the introduction of bonding requirements, for the regulation of advertising by collection agencies and for prescribing the details of the reports and returns to be made by such agencies.<sup>105</sup> The Act provides that the registration system is to be overseen by the Registrar of Collection

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<sup>97</sup> Section 3(3) of the *Collections Act* (Newfoundland).

<sup>98</sup> Section 12(2) of the *Collections Act* (Newfoundland).

<sup>99</sup> Section 11 of the *Collections Act* (Newfoundland).

<sup>100</sup> Section 21 of the *Collections Act* (Newfoundland).

<sup>101</sup> Section 22 of the *Collections Act* (Newfoundland).

<sup>102</sup> Section 23 of the *Collections Act* (Newfoundland).

<sup>103</sup> Section 19 of the *Collections Act* (Newfoundland).

<sup>104</sup> Section 25 of the *Collections Act* (Newfoundland).

<sup>105</sup> Section 31 of the *Collections Act* (Newfoundland).

Agencies and Collection Agencies and a Deputy Registrar. The duties and powers of the Registrar are specified in the Act. These range from duties to conduct studies and publish information relating to the debt collection industry,<sup>106</sup> to extensive powers to conduct investigations.<sup>107</sup>

**(c) Ontario**

6.73 The rules relating to the regulation of the debt collection industry in Ontario are found in the *Collection Agencies Act*. This Act provides for the appointment of a Registrar of Collection Agencies, and no person may carry out the business of a collection agency or act as a collector without first registering with the Registrar.<sup>108</sup> In addition, creditors are prohibited from using the services of a collection agency that is not registered,<sup>109</sup> and a registered collection agency may not employ a collector or authorise a collector to act on its behalf unless that collector is registered.<sup>110</sup> An application for registration will be refused if the past conduct of the applicant affords reasonable grounds to believe that the applicant will not carry on business in accordance with law and with integrity and honesty.<sup>111</sup> The applicant must also prove that it possesses sufficient financial resources to run the business, and that its activities have not, or will not in the future, contravene the rules of the Act. The Act also specifies certain prohibited practises, and as a result collection agencies must not collect any more money than that owed under the original credit agreement, and may not use any means of communication which lead to additional charges for the debtor.<sup>112</sup>

6.74 The Act provides that an offence will be committed by any person who knowingly contravenes the Act or regulations made under it, or fails to comply with any order, direction or other requirement made under the Act.<sup>113</sup> It is also an offence to provide false information when applying for registration or when making any statement or return under the Act. In addition to a criminal conviction, an offender may also be ordered to pay compensation or make restitution.<sup>114</sup> The Act also provides for the power to make regulations containing detailed rules relating to the operation of a debt collection business.<sup>115</sup> These regulations may cover such matters as the conditions governing applications for registration, the accounting requirements of collection agencies and additional prohibited practices not specified in the Act itself.

**D Conclusions and Recommendations**

6.75 Following the provisional recommendations made in its Consultation Paper, and the general agreement indicated in the submissions received in response, the Commission recommends that a system for the licensing and regulation of the debt collection industry should be introduced in Ireland.

6.76 *The Commission recommends that a system for the licensing and regulation of the debt collection industry should be introduced in Ireland.*

6.77 From the above analysis of comparative systems, the Commission has identified seven key elements which should be included in legislation establishing a licensing and regulatory system for debt collection undertakings. These are as follows:

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<sup>106</sup> Section 7(e)-(g) of the *Collections Act* (Newfoundland).

<sup>107</sup> Section 9 of the *Collections Act* (Newfoundland).

<sup>108</sup> Sections 3 and 4 of the *Collection Agencies Act* (Ont.).

<sup>109</sup> Section 24(1) of the Act.

<sup>110</sup> Section 24(2) of the Act.

<sup>111</sup> Section 6 of the Act.

<sup>112</sup> Section 22 of the *Collection Agencies Act* (Ont.).

<sup>113</sup> Section 28(1) of the Act.

<sup>114</sup> Section 28(3) of the *Collection Agencies Act* (Ont.).

<sup>115</sup> Section 30 of the Act.

- i) Definitions: the legislative framework must clearly identify the entities which are to be regulated.
- ii) Licence/registration required: the relevant undertakings must obtain a licence or be registered before operating in the regulated industry or engaging in regulated activities.
- iii) Licensing authority: the legislation must specify the relevant licensing authority.
- iv) Conditions for obtaining a licence: the legislation must set out clearly the conditions that must be satisfied before an undertaking becomes eligible to be granted a licence/registration.
- v) Exemptions from licensing requirements: the legislative regimes surveyed provide for exceptions to the licensing and regulatory requirements, for example, members of professional bodies who are already subject to regulatory oversight and who engage in debt collection activities as part of their professional practices.
- vi) Substantive obligations imposed on licence holders: the legislative regimes contain detailed duties and standards imposed on regulated entities. In addition, regulated undertakings are often precluded from engaging in certain specified unfair business practices. These rules or standards may be contained in primary legislation, in codes of practice and/or in administrative guidance notes.
- vii) Enforcement: the various enforcement regimes include a mixture of administrative sanctions, civil liability and criminal liability.

6.78 The Commission's recommendations in respect of these elements of a legislative framework are now presented.

**(1) Definitions**

6.79 The Commission acknowledges that an important first step for the establishment of a licensing and regulatory system for the debt collection industry is to define the scope of such a system and the types of bodies that should be subject to regulation. An examination of the approaches adopted to this question in the legal frameworks described above shows that there is no simple definition which has been universally adopted, and that each regulatory regime has a somewhat different scope.

6.80 The Commission's Interim Report, building on the examples discussed above, lists the following activities as falling within the scope of the activities recognised as being traditionally carried out by a debt collection undertaking:<sup>116</sup>

- taking of steps to procure payments of debts due under contracts;<sup>117</sup>
- collecting or attempting to collect, directly or indirectly, consumer debts owed or due or asserted to be owed or due another;<sup>118</sup>
- offering or undertaking to collect debts for others;<sup>119</sup>
- soliciting accounts for collection;<sup>120</sup>
- posting to debtors or offering or undertaking to post to debtors, on behalf of a creditor, collection letters;<sup>121</sup>
- selling or offering for sale a collection system, device or scheme intended to be used to collect debts;<sup>122</sup>

<sup>116</sup> *Interim Report on Personal Debt Management and Debt Enforcement* (LRC 96-2010) at paragraph 2.21.

<sup>117</sup> See 145(7) of the UK *Consumer Credit Act 1974*.

<sup>118</sup> 15 USC 1692a (6) (section 803(6) of the US *Fair Debt Collection Practices Act*).

<sup>119</sup> Section 2(a) of the Newfoundland and Labrador *Collections Act*.

<sup>120</sup> Section 2(a) of the Newfoundland and Labrador *Collections Act*.

<sup>121</sup> Section 2(a) of the Newfoundland and Labrador *Collections Act*.



- collecting a consumer debt the person owns, using a name or other artifice that indicates that a party other than the owner of the debt is attempting to collect the consumer claim;<sup>123</sup>
- carrying on the activities of collecting or attempting to collect a debt or debts from a debtor under any name that differs from that of the creditor to whom the debt is or was originally owed, on behalf of another person, or where the person has purchased a debt or debts that is or are in arrears.<sup>124</sup>

6.81 The Commission believes that a combination of the above activities could be used to provide an appropriate definition of the type of activities which should fall under the scope of the proposed regulatory regime. The Commission however considers that references to “consumer debts” should not be used in the definition, as the collection activities seeking to recover amounts from individuals arising from business activities may also be deserving of regulatory supervision. The Commission therefore believes that all activities involving the collection of debts from individual natural persons should fall within the regulatory regime. The term “debtor” as used in the context of the regulatory regime should therefore include all natural persons. In addition, as the regulation of debt collection undertakings seeks to protect the clients of such undertakings (creditors) as well as to protect debtors, there may be an argument for requiring even those undertakings engaged in the collection of debts owed by legal persons to be regulated. This would ensure, for example, that standards of financial stability and for the management of client funds are observed by undertakings collecting debts from businesses as well as those collecting debts from individuals. Therefore the Commission takes the view that the proposed regulatory regime should apply to all debt collection agencies, irrespective of the types of debt being collected.

6.82 The Commission therefore proposes that the term “debt collection undertaking” should simply consist of the following, based on the definitions discussed above:

“Debt collection undertaking” means any person (legal or natural) who engages in debt collection activities.

The term “debt collection activities” should in turn consist of the following:

“Debt collection activities” means the following:

- Collecting, offering, undertaking or attempting to collect, directly or indirectly, debts owed or asserted to be owed or due by a debtor to a creditor;
- Soliciting accounts for collection;
- Communicating or undertaking, offering or attempting to communicate, debt collection demands to debtors by post, telephone or electronic means;
- Collecting a debt owed to that person, using a name or other artifice that indicates that another party is attempting to collect the debt; or
- Collecting, attempting, undertaking or offering to collect a debt owed by a debtor to the collecting person where the debt was purchased by that person at a time when it was already in default.

6.83 *The Commission recommends that the following definition of “debt collection undertaking” should be adopted:*

*“Debt collection undertaking” means any person who engages in debt collection activities.*

6.84 *The Commission recommends that the following definition of “debt collection activities” should be adopted:*

*“Debt collection activities” includes the following:*

- *Collecting, offering, undertaking or attempting to collect, directly or indirectly, debts owed or asserted to be owed or due by a debtor to a creditor;*

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<sup>122</sup> *Ibid.*

<sup>123</sup> See 7 Maryland Code Annotated, Business Regulations, section 101(c).

<sup>124</sup> Section 3(1) of the Albertan *Fair Trading Act Collection and Debt Repayment Practices Regulation*.

- *Soliciting accounts for collection;*
- *Communicating or undertaking, offering or attempting to communicate, debt collection demands to debtors by post, telephone or electronic means;*
- *Collecting a debt owed to that person, using a name or other artifice that indicates that another party is attempting to collect the debt; or*
- *Collecting, attempting, undertaking or offering to collect a debt owed by a debtor to the collecting person where the debt was purchased by that person at a time when it was already in default.*

**(2) Licence/Registration Required**

6.85 A fundamental aspect of the regulation of the debt collection industry is that any undertakings operating in the industry should be licensed or registered. This is a feature of all of the regulatory regimes discussed above. The Commission therefore recommends that a legal requirement should be introduced requiring all persons to obtain a debt collection undertaking licence in order to carry on business as a debt collection undertaking. The Commission recommends that it should be a criminal offence to carry on business as a debt collection undertaking or to hold oneself out as a debt collection undertaking without obtaining a debt collection undertaking licence. A further means of ensuring compliance with this licensing requirement could be for legislation to provide expressly that any monies collected or fees charged by an unlicensed debt collector must be refunded to the person who has paid over such monies.

6.86 *The Commission recommends that legislation should be introduced requiring all persons to obtain a debt collection licence in order to carry on business as a debt collection undertaking and/or to engage in debt collection activities. The Commission recommends that legislation should provide that any person who, without holding a debt collection licence, carries on business as a debt collection agency or holds himself/herself/itself out as a debt collection undertaking commits an offence. The Commission recommends that legislation should provide expressly that any monies collected by or paid over to an unlicensed debt collection undertaking are liable to be refunded to the person who has paid over such monies.*

6.87 *The Commission also recommends that licences should become due for renewal at regular intervals, so that the fitness of an undertaking to engage in debt collection activities is regularly reassessed. Thus a licence granted to a debt collection undertaking should be valid for a period of approximately 12 to 24 months.*<sup>125</sup>

6.88 *The Commission recommends that debt collection licences should become due for renewal at regular intervals, and should remain valid only for a period of 24 months.*

6.89 The Commission takes the view that once an undertaking obtains a debt collection licence in respect of its undertaking, it should not be necessary that each employee of the undertaking engaged in collection activities should be licensed. In this regard the regulatory authority could establish standards in recruitment, supervision and discipline of employees to ensure that individual persons engaged in debt collection activities meet appropriate standards.

**(3) Licensing Authority**

6.90 A difficult question arises as to the appropriate licensing/regulatory authority for the debt collection industry. The Commission's Consultation Paper suggested that the Financial Regulator or another body such as the Irish Private Security Authority should fill this role.<sup>126</sup> The reasons in favour of assigning this function to the Financial Regulator cited in the Consultation Paper include its experience in protecting consumers of credit and its existing role as an indirect regulator of debt collection activities through its enforcement of the *Consumer Protection Code* and *Consumer Protection Code for Licensed Moneylenders* against regulated financial institutions employing debt collection undertakings as their

<sup>125</sup> See e.g. section 93(7) of the *Consumer Credit Act 1995*, which provides that a moneylender's licence shall be valid for a period of 12 months.

<sup>126</sup> (LRC CP 56-2009) at paragraph 4.228.

agents.<sup>127</sup> The fact that the Financial Regulator already regulates licensed moneylenders, whose activities for “collecting repayments”<sup>128</sup> largely resemble those of debt collection undertakings, was also a factor in favour of assigning the role to this body. The experience of the Financial Regulator in issuing codes of practice is also cited as a reason in favour of giving it this responsibility, as it is envisaged that any code issued in respect of debt collection undertakings would be based on similar principles as the existing codes issued by the Regulator, such as the *Consumer Protection Code*.

6.91 The Consultation Paper also recognises that certain arguments exist against assigning this role to the Financial Regulator.<sup>129</sup> The regulation of this industry may be seen as a departure from the core function of the Financial Regulator, of regulating financial services. The objection has also been made that debt collection undertakings are employed by many creditors operating outside of the area of financial services, such as retailers or utility service providers. The Commission however believes that this argument is not compelling, as the entire purpose of the proposed new regulatory regime is to regulate the activities of debt collection undertakings, irrespective of the creditor who hires such undertakings. The activity of debt collection itself is the activity to be directly regulated under the proposed new framework, and the creditor who hires the debt collector is not relevant for this purpose. A further objection which has been made to assigning the role of regulatory supervision to the Financial Regulator is that debt collection undertakings provide a service to creditors rather than to consumers, and so have no direct contractual relationship with consumers. This contrasts with the other entities regulated by the Financial Regulator, all of which provide services to consumers. Against this argument it can be said that debt collection undertakings interact and communicate directly with consumers/debtors, and it is consumers/debtors who pay over money to debt collection undertakings, including charges for the services provided to creditors. Therefore significant issues of consumer protection are raised by the activities of debt collection undertakings, and there is potential for considerable consumer harm caused by the interaction of such undertakings with consumers. The fact that the undertakings are providing services to creditors, and not consumers, may therefore not be as significant as first appears.

6.92 The Commission however considers that the choice of the appropriate regulatory body raises questions of regulatory policy and resource allocation. The Commission therefore does not make a recommendation as to the appropriate regulatory body, but limits itself to recommending that a body should be assigned this role of regulating debt collection undertakings.

6.93 The Commission notes that one concern raised by submissions relates to the goal of regulating this area, and the type of conduct against which the regulatory system would be designed to guard. In particular, there were concerns that a regulatory body would be ill-equipped to address any potential breaches of the criminal law (in particular section 11 of the 1997 Act). In this regard the Commission notes that while the criminal law, as enforced by the Garda Síochána, applies to prohibit certain activities on the part of those engaged in collecting debts, the purpose of the proposed regulatory regime is not confined to such activities. Therefore the proposed regulatory regime also has the aim of licensing undertakings and introducing conduct of business standards in the industry and ensuring that these standards are followed by undertakings. The Commission considers that the supervisor of the industry would be primarily responsible for achieving these latter aims, while any suspected serious breaches of the criminal law could be referred by the regulatory body to the Garda Síochána.

6.94 *The Commission recommends that a body should be assigned the role of the regulatory authority responsible for supervising the proposed regulatory regime for the debt collection industry.*

6.95 *The Commission recommends that as part of the regulatory powers given to the body ultimately chosen, legislation should provide for a procedure for the body to refer suspected serious criminal conduct on the part of debt collection undertakings to the Garda Síochána.*

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<sup>127</sup> *Ibid* at paragraph 4.226.

<sup>128</sup> Section 2 of the *Consumer Credit Act 1995* defines “collecting repayments” as meaning, “in respect of a moneylending agreement, the collection of repayments in respect of the agreement at a place other than a business premises of the moneylender”.

<sup>129</sup> (LRC CP 56-2009) at paragraph 4.227.

#### **(4) Conditions for Obtaining a Licence**

6.96 The Commission takes the view that while the assessment of whether or not an undertaking should be awarded a debt collection licence should be a matter for the regulatory body, certain basic criteria for obtaining a licence should be specified in legislation. It may be appropriate for the regulatory body to develop detailed guidelines in relation to the requirements of fitness and probity that must be met by applicants for licences. Therefore the conditions established in legislation could be relatively wide, so as to allow the regulatory body to take into account the factors outlined in these guidelines when assessing applications.

6.97 The above discussion of the regulatory regimes operating in other countries illustrates that various criteria are established in legislation for applicants seeking to obtain a debt collection licence. These generally involve conditions relating to the fitness and probity of an applicant and its record of compliance with relevant legislative and administrative rules.<sup>130</sup> Conditions relating to the financial security of the applicant and its ability to operate a viable debt collection business are also contained in some of the legislative schemes examined above, with some systems requiring a bond or security to be provided by the applicant to the regulatory authority.<sup>131</sup>

6.98 In addition to the requirements drawn from the comparative discussion above, the Commission also notes the conditions for obtaining a moneylending licence under section 93 of the *Consumer Credit Act 1995*. As the business activities of moneylenders and debt collection undertakings share certain similar features, these conditions provide a useful precedent for establishing licensing conditions for the debt collection industry.

6.99 The Commission therefore proposes the following conditions which must be met by an applicant seeking to be awarded a debt collection licence. The applicant must demonstrate that it is, in the opinion of the regulatory body, a fit and proper person to carry on the business of a debt collection undertaking.<sup>132</sup> This assessment could be applied to all Directors/Managers of the applicant undertaking where the undertaking is incorporated, or to the Principal(s)/Manager(s) of the undertaking where it is unincorporated.<sup>133</sup> Where the applicant undertaking is a partnership, the test could be applied to each Partner. Finally, where the applicant undertaking is a sole trader, the test could be applied only to the Principal/Manager. A licence should be awarded to an undertaking only if these relevant individuals are, in the regulatory body's opinion, fit and proper persons to operate a debt collection undertaking.

6.100 The regulatory body should be permitted to take into account any circumstances which appear relevant in assessing a licence application, and should in particular have regard to factors such as whether the applicant has:

- Contravened any provisions of this Act [the Act establishing the debt collection regulatory regime] or of Regulations made under it.
- Committed any offence under the *Non-Fatal Offences against the Person Act 1997* or the *Consumer Credit Act 1995* or any other offence involving fraud, dishonesty or violence;<sup>134</sup>
- Contravened any provisions of consumer protection law, either in Ireland or in another Member State of the European Economic Area;<sup>135</sup>

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<sup>130</sup> See e.g. section 25 of the *Consumer Credit Act 1974* (UK); 7 Maryland Code §303; Section 12(2) of the *Collections Act* (Newfoundland); Section 6 of the *Collection Agencies Act* (Ont.).

<sup>131</sup> See e.g. 7 Maryland Code §304; Regulation 6 of the *Consolidated Newfoundland and Labrador Regulation 986/96 (Collections Regulations under the Collections Act (OC 96-156))*;

<sup>132</sup> See e.g. section 93(10)(f) of the *Consumer Credit Act 1995*.

<sup>133</sup> See for example the similar approach adopted by the Financial Regulator when making licensing assessments: *Fit and Proper Requirements* (Financial Regulator Instructions Paper 2008) at 6, available at: <http://www.financialregulator.ie/processes/authorisation/Documents/F%20and%20P%20Instructions%20Paper%20Dec%202008.pdf>.

<sup>134</sup> Section 25(2) of the *Consumer Credit Act 1974* (UK). See also *Fit and Proper Requirements* (Financial Regulator Instructions Paper 2008) at 16.

- Practised discrimination on grounds of sex, colour, race or ethnic or national origins in, or in connection with, the carrying on of any business,<sup>136</sup> or
- Engaged in business practices appearing to the regulatory authority to be deceitful or oppressive, or otherwise unfair or improper (whether unlawful or not).<sup>137</sup>
- Reasonably demonstrated a capacity to comply with the substantive obligations imposed on debt collection undertakings by legislation and codes of practice. For example, all applicants should be required to demonstrate compliance with a relevant code of practice.<sup>138</sup>

6.101 In addition, an applicant should be required to demonstrate that it has sufficient financial resources to run a debt collection business. The legislation should contain rules regarding the provision by applicants of a surety or bond to the regulatory body in order to guarantee the financial security of the undertaking. An applicant should also be required to provide a current Revenue Commissioners tax clearance certificate in respect of its business affairs, and his/her personal affairs if the applicant is an individual.<sup>139</sup> Furthermore, applicants should be required to commit to registering as a data controller under the *Data Protection Acts 1988 and 2003*.<sup>140</sup> Under Regulation 4(d) of the *Data Protection Act 1988 (Section 16(1)) Regulations 2007*, a person whose business consists wholly or mainly in collecting debts must register as a data controller under the Acts and cannot claim an exemption from this requirement, even if that person meets the other conditions for an exemption. Furthermore, submissions have argued that applicants for debt collection licences should be vetted by the Garda Síochána, and this is a further factor that could be considered as part of the assessment of the applicant's fitness to obtain a licence.

6.102 Regarding the procedure for applications for a debt collection licence, the Commission takes the view that recommendations relating to the detailed procedural steps involved lies outside the scope of this Report. The Commission however notes that legislation should specify the procedures involved, and steps of the type now outlined may be appropriate for consideration for inclusion in such legislation. A person who intends to apply to the regulatory authority for a debt collection licence could be required to advertise in a national newspaper or via other appropriate means notice of this intention. Third parties could then be permitted to make objections to the granting of a licence.<sup>141</sup> The regulatory authority could also be entitled to take into account any complaints of consumers or adverse information from other regulators, professional bodies, trade bodies, money advice undertakings or consumer organisations; and evidence relating to the skills and competence of the applicant to provide the service.<sup>142</sup> The regulatory authority should be given the power to grant, refuse to grant, extend, revoke, vary or suspend a licence. Where the regulatory authority proposes to vary, suspend, revoke or refuse to grant a licence, it may be appropriate to require the authority to notify the applicant in writing within a specified time period in order to allow the applicant to make submissions as to why a licence should be granted.<sup>143</sup> Having reviewed

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<sup>135</sup> *Ibid.*

<sup>136</sup> Section 25(2) of the *Consumer Credit Act 1974* (UK).

<sup>137</sup> *Ibid.*

<sup>138</sup> In this regard it should be noted that one submission suggested that debt collection undertakings should be required to comply with an obligation similar to that contained in Chapter 4, paragraph 5 of the Financial Regulator's *Consumer Protection Code*, requiring all regulated agencies to have procedures in place for handling arrears cases which must be standardised, compliant with "best practice" and transparently available to the public

<sup>139</sup> See section 93(10)(d) of the *Consumer Credit Act 1995*. See also *Fit and Proper Requirements* Financial Regulator Instructions Paper 2008) at 16-17.

<sup>140</sup> Section 1(1) of the 1988 and 2003 Acts defines a "data controller" as "a person who, either alone or with others, controls the contents and use of personal data". Under section 19(1) of the Acts, a data controller shall not keep personal data unless it has registered with the Data Protection Commissioner.

<sup>141</sup> See section 93(1) of the *Consumer Credit Act 1995*.

<sup>142</sup> Office of Fair Trading *Do you need a credit licence? An introduction to consumer credit licensing* (2008) at 3.

<sup>143</sup> See section 93(12) of the *Consumer Credit Act 1995*.

these submissions, if the regulatory authority decides to vary, suspend, revoke or refuse to grant a licence, this decision should be notified to the applicant and the grounds for such decision should be provided. The decision of the regulatory authority could be capable of being appealed first to an internal tribunal within the authority, and/or subsequently to the Circuit Court.<sup>144</sup>

6.103 *The Commission recommends that an applicant for a debt collection licence must demonstrate that it is, in the opinion of the regulatory authority, a fit and proper person to carry on the business of a debt collection undertaking.*

6.104 *The Commission recommends that the regulatory authority should be permitted take into account any circumstances which appear relevant in assessing a licence application, and should in particular have regard to factors such as whether the applicant has:*

- *Contravened any provisions of this Act [the Act establishing the debt collection regulatory regime] or of Regulations made under it;*
- *Committed any offence under the Non-Fatal Offences against the Person Act 1997 or the Consumer Credit Act 1995 or any other offence involving fraud, dishonesty or violence;*
- *Contravened any provisions of consumer protection law, either in Ireland or in another Member State of the European Economic Area;*
- *Practised discrimination on grounds of sex, colour, race or ethnic or national origins in, or in connection with, the carrying on of any business, or*
- *Engaged in business practices appearing to the regulatory authority to be deceitful or oppressive, or otherwise unfair or improper (whether unlawful or not)*

6.105 *The Commission recommends that an applicant should also be required to demonstrate reasonably a capacity to comply with the substantive obligations imposed on debt collection undertakings by legislation and codes of practice; and that it has sufficient financial resources to conduct business as a debt collection undertaking.*

6.106 *The Commission recommends that an applicant should also be required to provide a Revenue tax clearance certificate.*

6.107 *The Commission recommends that an applicant should be required to demonstrate that it has registered as a data controller under the Data Protection Acts 1988 and 2003; or to commit to registering on being granted a licence.*

##### **(5) Exemptions from Licensing Requirements**

6.108 It is a notable feature of the various regulatory regimes described in the above paragraphs that despite the fundamental rule that all undertakings operating in the debt collection industry must hold a licence, exemptions from this requirement exist for certain categories of undertakings. Certain common categories of actors are recognised as being exempt from regulation in several regimes, including actors who are already subject to regulatory regimes and recognised as operating to high standards of professionalism. These exemptions may however be limited to those professionals who provide debt collection services as part of their wider professional practices, and whose activities do not consist exclusively of debt collection. By contrast, if a member of a profession provides debt collection services exclusively or independently from his or her professional practice, he or she is usually required to obtain authorisation from the relevant regulator in order to provide such services.

6.109 For example, the *Investment Intermediaries Act 1995* provides for exemptions from the requirements of its regulatory framework for practising solicitors under section 2(7) of the Act, and for “certified persons” under Part VII of the Act. The “certified persons” category consists of members of an accountancy or similar organisation approved by the Financial Regulator as an “approved professional body”. These exemptions however only apply in respect of solicitors or members of approved bodies who provide investment advice and investment business services in a manner *incidental* to the services provided as part of their professions. It should be noted that in 1998 the Law Society made statutory

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<sup>144</sup> See section 93(13) of the *Consumer Credit Act 1995*.

Regulations specifying the conditions relating to investment business which must be satisfied by a solicitor wishing to obtain a practising certificate from the Society.<sup>145</sup> Chartered Accountants Ireland has also issued guidance regarding the limits on the extent to which its members can carry on investment business activities while remaining exempt from the regulatory regime.<sup>146</sup> This guidance indicates that to remain subject to the oversight of the professional body alone, a firm's main business must be the practice of the profession of accountancy, meaning that at least 50% of the firm's gross income must come from accountancy; and the income of the firm arising from commission for investment business and fees charged for investment business services should not normally be greater than 20% of the firm's gross income from all sources in one year.

6.110 Similarly, the proposals of the Company Law Review Group for the introduction of a regulatory framework for liquidators in corporate windings-up provides that members of certain professional bodies, including the Law Society of Ireland and recognised accountancy bodies, automatically qualify to act as a liquidator. These proposals are discussed further above in CHAPTER 3. The Commission believes that this approach of relying on existing regulatory systems for members of such professions, which is adopted in a large majority of the systems studied above, has much merit, and should be adopted in establishing a regulatory system in Ireland.

6.111 Other actors whose conduct may otherwise cause them to fall within the definition of debt collection undertaking posited above, but who are widely exempt from regulatory requirements, are creditors who engage in such conduct in the process of seeking to recover their own debts. This is to ensure that every creditor who seeks to recover a debt owed to him or her in the normal course of its business as a lender or trader should not be required to obtain a debt collection licence. Similarly, some of the legislative regimes exempt an undertaking that collects debts for another, where both undertakings are related by common corporate ownership or are affiliated by corporate control. The Commission shares this view that it would be excessive to require all such creditors to obtain a debt collection licence, when the collection of debts owed to them is only a peripheral aspect of their business practices. The proposed regulatory regime is designed to supervise the conduct of specialist debt collection undertakings, and not to apply to debt collection activities of such creditors who seek to recover money owed to them from their other business activities.

6.112 Another related exemption applies to undertakings engaging in collection activities that are subject to other licensing regimes, such as banks, credit unions and other lenders supervised by financial regulatory regimes. In Ireland such institutions are subject to the supervision of the Financial Regulator and the provisions of the *Consumer Protection Code* and *Consumer Credit Act 1995* outlined above.<sup>147</sup> The means that may be deployed by other creditors such as utility service providers are also subject to regulatory control.<sup>148</sup> Therefore the Commission takes the view that undertakings that are already licensed by appropriate statutory regulatory bodies and who may engage in debt collection activities in order to recover monies owed to them as part of their regulated business activities, should not be required to obtain debt collection licences. The Commission recommends, however, that where the regulatory authority issues a code of practice governing debt collection activities, similar standards should be adopted by the Financial Regulator and the Commission for Energy Regulation and applied to the debt collection activities of the undertakings under their supervision.

6.113 In addition, many legal systems provide that officers or employees of the State that collect or attempt to collect any debt in the course of their official duties are exempt from the requirement to hold a debt collection licence.<sup>149</sup> The Commission agrees with the logic of this requirement, as such officers or

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<sup>145</sup> *Solicitors Acts 1954 to 1994 (Investment Business & Investor Compensation) Regulations 1998.*

<sup>146</sup> *Investment Business Regulations - Investment Intermediaries Act 1995: Volume I Interpretation, Authorisation and Discipline* (Institute of Chartered Accountants in Ireland, Updated 2007), Schedule 1 to Chapter 2.

<sup>147</sup> See paragraphs 6.04 to 6.07 above.

<sup>148</sup> See e.g. *Code of Practice Supplier Handbook Proposed Guidelines* (Commission for Energy Regulation Consultation Paper CER/10/012 2010); *Electricity and Gas Codes of Practice Guidance for Suppliers* (Commission for Energy Regulation 2010).

<sup>149</sup> See e.g. the *US Fair Debt Collection Practices Act* 15 USC 1692a (6).

employees are most often subject to other controls and forms of accountability. Therefore Sheriffs and County Registrars, or the enforcement officers under the Commission's proposed new enforcement system,<sup>150</sup> who engage in conduct similar to debt collection activities for the purposes of their official duties of enforcing court judgments should be exempt from a requirement to hold a licence. Similarly, Revenue Sheriffs who engage in such activities for the purposes of enforcing certificates of tax liabilities should not be required to obtain a debt collection licence.<sup>151</sup>

6.114 A difficult question arises in relation to the problem of the assignment of debts to debt collection undertakings. Debt collection undertakings can operate through two different methods, either as agents of the creditors whose debts they collect, or alternatively as debt purchasers, who buy debts from original creditors for the purpose of then collecting them from the original debtors. Where a debt collection undertaking purchases a debt in this manner, the debt is assigned to the undertaking from the original creditor, who retains no interest in the debt. The debt is then owed to the debt collection undertaking, who becomes the creditor under the credit agreement. As the Commission has indicated above that creditors collecting their own debts should not be required to obtain a licence, this exemption has the potential to exclude from the regulatory framework a large number of the very undertakings the framework is designed to supervise. While it is therefore desirable to include within the regulatory framework debt collection undertakings that purchase debts for the purposes of collecting them, the framework also must be careful not to affect commercial practices such as factoring, discounting, securitisation and the purchasing of accounts receivable. Therefore a balance must be struck between ensuring that those debt collection undertakings that purchase debts for the purposes of collecting them fall within the regulatory regime, while also ensuring that the commercial practices identified above, which are necessary for the effective flow of credit in the economy, are not impeded. The Commission understands that organisations engaging in factoring and discounting services are of particular importance to the provision of working capital to small and medium enterprises by taking an assignment of the business' debt book as security for credit advances.

6.115 Various methods of approaching this problem can be seen in the legal regimes surveyed above.<sup>152</sup> First, the US *Fair Debt Collection Practices Act* provides exemptions addressing these issues.<sup>153</sup> The legislation provides that a purchaser of a debt which was not in default at the time of purchase may be collected by the subsequent owner without the need to obtain a debt collection licence, and in this way draws a distinction between a purchaser of debts which are in default and debts which are not. This US legislation also provides that a person may without a licence collect a debt obtained by that person as a secured party in a commercial credit transaction involving the original creditor, therefore ensuring that the regulatory framework does not infringe on the collection of debts assigned as part of a financing mechanism. In Maryland, a person who seeks to collect a debt which it owns itself may nonetheless be subject to the regulatory regime if the debt was in default when the person acquired it, thus addressing the problem of debt purchasers potentially falling outside of the regime.<sup>154</sup>

6.116 In Alberta, under the *Fair Trading Act Collection and Debt Repayment Practices Regulation*, provisions exempt from the regulatory requirements "a business that purchases a debt or debts through acquiring or merging with a business in a transaction that includes the transfer of accounts receivable, "a business that acquires a debt or debts through the seizure of accounts receivable under a security agreement", or "a person to whom the contract that gave rise to the debt was assigned for the purpose of financing the transaction".<sup>155</sup> These exemptions therefore seek to ensure that financing activities of the type described above will not be impeded by the debt collection regulatory regime.

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<sup>150</sup> See CHAPTER 4 above.

<sup>151</sup> See section 962 of the *Taxes Consolidation Act 1997* and (LRC CP 56-2009) at paragraph 6.55.

<sup>152</sup> See paragraphs 6.25 to 6.74 above.

<sup>153</sup> 15 USC 1692a (6).

<sup>154</sup> 7 Maryland Code §101(c).

<sup>155</sup> Section 1(b)(C)-(F) of the *Fair Trading Act Collection and Debt Repayment Practices Regulation*.



6.117 Having considered these approaches, the Commission recommends that the legislation establishing a regulatory framework for the debt collection industry should include undertakings collecting a debt which has been assigned to them (possibly only where such debt is in default at the time of the assignment). The Commission recommends however that those undertakings that are collecting debts which have been assigned to them as part of a financing transaction should be exempt from the requirement to obtain a debt collection licence.

6.118 In conclusion, the Commission recommends that a number of exceptions to the definition of “debt collection undertaking” proposed above should be adopted, so that the following persons would be excluded from this definition, and hence from the requirement to obtain a debt collection licence:

- i) A person<sup>156</sup> who is the creditor under the agreement giving rise to the debt which that person seeks to collect; or any employee or officer of such creditor.<sup>157</sup>
- ii) A person who collects debts for another person, both of whom are related by common ownership and/or affiliated by corporate control, if the person collecting debts does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts.<sup>158</sup>
- iii) A person who is licensed by the Financial Regulator and who collects debts arising as a result of the activities which it is licensed to perform by the Financial Regulator.
- iv) A person who is licensed by a regulatory authority [approved by the debt collection regulatory authority as a “competent regulatory authority”] under statutory powers and who collects debts arising as a result of the activities which it is licensed to perform by that regulatory authority.<sup>159</sup>
- v) An officer or employee of the State to the extent that collecting or attempting to collect any debt is in the performance of his or her official duties.<sup>160</sup>

6.119 Notwithstanding category i) above, an undertaking requires a licence where it collects a debt on its own behalf if the debt was in default when the undertaking acquired it, or if the debt was acquired for the principal purpose of collecting the debt for commercial gain. This proposal should not however operate to include within the regulatory regime any of the following persons:

- i) A person that collects a debt that has been obtained by that person as a secured party in a commercial credit transaction involving the original creditor.<sup>161</sup>
- ii) A person that purchases a debt or debts through acquiring or merging with a business in a transaction that includes the transfer of accounts receivable.<sup>162</sup>
- iii) A business that acquires a debt or debts through the seizure of accounts receivable under a security agreement,<sup>163</sup> or

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<sup>156</sup> The term “person” when used in this paragraph refers to both a legal or natural person.

<sup>157</sup> See section 146(6) of the UK *Consumer Credit Act 1974*.

<sup>158</sup> See the US *Fair Debt Collection Practices Act*, 15 USC 1692a (6).

<sup>159</sup> This category is intended to include undertakings such as utility service providers who may collect debts owed to them in respect of utility services provided, and who are licensed and regulated by bodies such as the Commission for Energy Regulation. As the principal business of such undertakings is not the collection of debts, and as they are subject to regulatory rules in relation to the methods by which arrears are managed and debts collected, it is seen as unnecessary to require such undertakings to be subject to an additional debt collection regulatory regime.

<sup>160</sup> See the US *Fair Debt Collection Practices Act* 15 USC 1692a (6).

<sup>161</sup> 15 USC 1692a (6).

<sup>162</sup> Section 1(b)(D) of the *Fair Trading Act Collection and Debt Repayment Practices Regulation*.

<sup>163</sup> Section 1(b)(E) of the *Fair Trading Act Collection and Debt Repayment Practices Regulation*.

- iv) A person to whom the contract that gave rise to the debt was assigned for the purpose of financing the transaction.<sup>164</sup>

6.120 *The Commission recommends that the following persons should be excluded from the definition of “debt collection undertaking”, and hence from the requirement to obtain a debt collection licence:*

- i) *A person who is the creditor under the agreement giving rise to the debt which that person seeks to collect; or any employee or officer of such creditor.*
- ii) *A person who collects debts for another person, both of whom are related by common ownership and/or affiliated by corporate control, if the person collecting debts does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts.*
- iii) *A person who is licensed by the Financial Regulator and who collects debts arising as a result of the activities which it is licensed to perform by the Regulator.*
- iv) *A person who is licensed by a regulatory authority [approved by the debt collection regulatory authority as a “competent regulatory authority”] under statutory powers and who collects debts arising as a result of the activities which it is licensed to perform by that regulatory authority.*
- v) *An officer or employee of the State to the extent that collecting or attempting to collect any debt is in the performance of his or her official duties.*

6.121 *Notwithstanding category i) above, the Commission recommends that a person who collects a debt on its own behalf should be categorised as a debt collection undertaking and should not be exempt from the requirement to obtain a licence if:*

- *the debt being collected was in default when the person acquired it, or*
- *if the debt was acquired for the principal purpose of collecting the debt for commercial gain.*

6.122 *The Commission recommends that the following additional persons should not be considered to fall within the definition of “debt collection undertaking”, and so should be exempt from the requirement to obtain a debt collection licence:*

- i) *A person that collects a debt that has been obtained by that person as a secured party in a commercial credit transaction involving the original creditor.*
- ii) *A person that purchases a debt or debts through acquiring or merging with a business in a transaction that includes the transfer of accounts receivable.*
- iii) *A business that acquires a debt or debts through the seizure of accounts receivable under a security agreement, or*
- iv) *A person to whom the contract that gave rise to the debt was assigned for the purpose of financing the transaction.*

## **(6) Conduct of Business Standards/Substantive Obligations Placed on Licence Holders**

6.123 As can be seen from the above discussion, the various regimes for regulating debt collection undertakings in other legal systems generally include standards of business conduct that will be expected of licensed undertakings. The substantive obligations imposed on debt collection undertakings may be specified in legislation or regulatory codes or guidance. In the UK, the Office of Fair Trading (OFT) has issued formal guidance on debt collection practices,<sup>165</sup> which outlines conduct that would be considered to amount to unfair business practices in relation to the following areas:

- Communication with debtors

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<sup>164</sup> Section 1(b)(F) of the *Fair Trading Act Collection and Debt Repayment Practices Regulation*.

<sup>165</sup> Office of Fair Trading *Debt Collection Guidance* (OFT664 2003, updated December 2006). It should be noted that the OFT is in the process of revising this Guidance, and will publish a consultation document in January 2011 as part of this process.

- False representations of authority and/or legal position
- Physical/psychological harassment
- Deceptive and/or unfair methods of collection
- Charges for debt collection
- Standards and unfair practices in debt collection visits

The purpose of this guidance is to establish and clarify the type of behaviour that the OFT considers to fall within the category of unfair business practices which call into question fitness to retain or to be given a licence.<sup>166</sup> The guidance does not contain advice regarding best practice and does not constitute a code of conduct, but rather outlines examples of conduct amounting to unfair business practices, based on complaints received by the OFT and information supplied by organisations representing consumers, businesses and other regulators.

6.124 Similar issues are addressed by the other legislative and regulatory systems discussed above. Thus, the US *Fair Debt Collection Practices Act* prohibits certain practices (and provides examples of such prohibited conduct) in debt collection in the areas of:

- Communication between collectors and debtors<sup>167</sup>
- Communication between collectors and third parties for the purpose of acquiring location information about the debtor<sup>168</sup>
- Sending deceptive forms to debtors<sup>169</sup>
- False or misleading representations<sup>170</sup>
- Harassment or abusive conduct<sup>171</sup>
- Other unfair practices<sup>172</sup>

This legislation also requires debt collectors, when requested in writing by the debtor, to provide evidence of the validity of the debt forming the object of the collection activity.<sup>173</sup>

6.125 The Albertan *Fair Trading Act Collection and Debt Repayment Practices Regulation* also prohibits certain specific practices for collection agencies,<sup>174</sup> as well as imposing certain positive obligations on such undertakings. The prohibited practices addressed include the following areas:

- Communication between the debt collection agency/collector and the debtor and the debtor's employer, relatives or friends.
- Standard of service provided to creditors, including issues such as the fees charged; the provision of a report on the status of a collection account; and the entry into settlements only under the authority of the creditor.
- Harassing and/or threatening contact with the debtor
- Provision of false or misleading information to any person

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<sup>166</sup> *Ibid* at 2.

<sup>167</sup> 15 USC 1692c.

<sup>168</sup> 15 USC 1692b.

<sup>169</sup> 15 USC 1692j.

<sup>170</sup> 15 USC 1692e.

<sup>171</sup> 15 USC 1692d.

<sup>172</sup> 15 USC 1692f.

<sup>173</sup> 15 USC 1692g.

<sup>174</sup> Section 12(1) of the Albertan *Fair Trading Act Collection and Debt Repayment Practices Regulation*.

- False representations of authority or legal status
- Advertising (prohibition on false, misleading or deceptive statements)

This legislation provides that a collection agency is the trustee of any money collected on behalf of another person,<sup>175</sup> and the positive obligations imposed on debt collection undertakings under this legislation include detailed requirements relating to the management of such monies and the maintenance of trust accounts.<sup>176</sup> Requirements are also imposed on debt collection undertakings regarding the provision of receipts for any money collected,<sup>177</sup> and regarding the making of reports to creditors.<sup>178</sup> Obligations to keep certain records, to provide the regulatory authority with financial reports and to make audited books of account available to the regulator are also contained in the legislation.<sup>179</sup>

6.126 Similar obligations and prohibitions are contained in the legislation governing this area in Newfoundland and Labrador and Ontario, as described above.<sup>180</sup> The rules in these Canadian provinces primarily seek to regulate the fees charged by collection undertakings, and provide that no undertaking may collect money from the debtor in addition to the amount owing by the debtor. In addition, an undertaking may not use any means of communication that would lead to additional charges for the debtor.

6.127 In addition to the useful precedents provided by these legislative and regulatory measures, further guidance can be found from the voluntary Draft Code of Conduct for Debt Collection Agencies produced by the Irish Institute of Credit Management.<sup>181</sup> This draft code seeks to establish standards representing best practice for the debt collection sector in relation to the following issues:

- General conduct
- Confidentiality
- Complaints handling
- Debt collection, trace and debt purchase guidelines
- Trace guidelines
- Purchased debt guidelines
- Conduct regarding clients.

6.128 In addition, it should be noted that Irish legislation, in the form of section 11 of the *Non-Fatal Offences Against the Person Act 1997* and sections 45, 46 and 49 of the *Consumer Credit Act 1995*, prohibits certain conduct in debt collection.<sup>182</sup> Similarly, the Financial Regulator's *Consumer Protection Code* establishes certain general standards to be observed by regulated financial institutions and their agents, which are applicable in all activities of these institutions, including debt collection.<sup>183</sup> These provisions therefore serve to provide a certain degree of statutory protection for debtors and the clients of debt collection undertakings. The Commission nonetheless takes the view that debt collection activities require closer regulation, and so additional rules may be required to prohibit certain unfair practices not covered by these provisions. The Commission understands that particular causes for concern may arise

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<sup>175</sup> Section 15(1) of the Regulation.

<sup>176</sup> Sections 16 to 20 of the Regulation.

<sup>177</sup> Section 21 of the Regulation.

<sup>178</sup> Section 22 of the Regulation.

<sup>179</sup> Section 21.2 and 23.3 of the Regulation.

<sup>180</sup> See paragraphs 6.70 to 6.71 and 6.73 above.

<sup>181</sup> See *Interim Report on Personal Debt Management and Debt Enforcement* (LRC 96-2010) at paragraphs 2.23 to 2.25.

<sup>182</sup> See paragraphs 6.03 to 6.07 above.

<sup>183</sup> See paragraph 6.04 above.

in relation to the fees charged by collection agencies, the handling of money collected on behalf of clients, and misleading and/or intimidating communication between undertakings and debtors.

6.129 The Commission takes the view that the recommendation of detailed rules and guidelines concerning the standards and practices to be followed by debt collection undertakings lies beyond the scope of this Report. Such rules should be drawn up by the debt collection regulatory authority in consultation with the industry, and should be incorporated into a statutory code. Therefore legislation should provide the regulatory authority with the power to issue a binding code in respect of debt collection activities. A code of this type also benefits from the fact that it can be readily and quickly amended to take account of problems arising in the debt collection industry. Based on the discussion of comparative legislation, regulatory guidelines and voluntary codes above, the code issued by the regulatory authority should include, among other content to be decided by the authority, rules relating to the following general areas:

- Communication between the debt collection undertaking and the debtor, and the employers, relatives and friends of the debtor (subject to the provisions of sections 45, 46 and 49 of the *Consumer Credit Act 1995*).
- Conduct of undertaking employees in visiting debtors' premises.
- Confidentiality standards.
- Rules regarding tracing and efforts to ascertain a debtor's location.
- Complaints handling procedures.
- General prohibitions on false, misleading or deceptive practices.
- Furnishing of receipts and reports to clients.
- Handling of client money and the maintenance of trust accounts.
- Accounting and reporting practices.

In addition, it may be useful for the code to include mention of the practices prohibited by section 11 of the *Non-Fatal Offences Against the Person Act 1997* and sections 45, 46 and 49 of the *Consumer Credit Act 1995*, as well as standards similar to relevant provisions of the *Consumer Protection Code*, in order to provide a single clear and comprehensive guide of all of the standards applicable to debt collection activities.

6.130 Legislation should also give the regulatory authority powers to regulate the fees charged by debt collection agencies.

6.131 In addition, the Commission takes the view that no person should engage or use the services of a debt collection undertaking that is not licensed and regulated. In addition the Commission considers it should be an offence, as under the UK *Consumer Credit Act 1974*, to carry on licensed activity under a name not specified in the licence. Therefore the Commission recommends that legislation should create a criminal offence of knowingly engaging or using the services of a debt collection undertaking that is not licensed under the proposed regulatory regime or to carry on licensed activity under a name not specified in the licence. Such a provision would assist in ensuring the integrity of the regulatory regime by targeting the demand side of the debt collection market as well as the supply side, and preventing creditors from engaging unlicensed undertakings. For the avoidance of confusion, the Commission recommends that the legislation should also provide for an offence where a creditor knowingly sells a debt to an unlicensed debt collection undertaking where the creditor has reason to believe that the unlicensed undertaking is purchasing the debt for the purposes of collecting it. The abovementioned exceptions should ensure that such a prohibition would not interfere with financing transactions such as factoring, discounting and securitisation.<sup>184</sup>

6.132 *The Commission recommends that legislation should require the debt collection regulatory authority to publish, following consultation with industry representatives, a statutory code specifying in*

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<sup>184</sup> See paragraphs 6.119 and 6.122 above.

detail the standards and obligations to be observed by debt collection undertakings, and prohibiting certain unfair practices.

6.133 The Commission recommends that the content of the proposed statutory code should be a decision for the regulatory authority, but that it should at least include provisions relating to the following areas:

- Communication between the debt collection undertaking and the debtor, and the employers, relatives and friends of the debtor (subject to the provisions of sections 45, 46 and 49 of the Consumer Credit Act 1995).
- Conduct of undertaking employees in visiting debtors' premises.
- Confidentiality standards.
- Rules regarding tracing and efforts to ascertain a debtor's location.
- Complaints handling procedures.
- General prohibitions on false, misleading or deceptive practices.
- Furnishing of receipts and reports to clients.
- Handling of client money and the maintenance of trust accounts.
- Accounting and reporting practices.

6.134 The Commission recommends that legislation should empower the regulatory authority to regulate the fees charged to debtors by debt collection undertakings. The Commission also recommends it be an offence for a licence holder to carry on licensed activity under a name not specified in the licence.

6.135 The Commission recommends that legislation should create a criminal offence of knowingly engaging or using the services of a debt collection undertaking that is not licensed, or knowingly selling/assigning a debt to such an unlicensed undertaking where the creditor has reason to believe that the unlicensed undertaking is purchasing the debt for the purposes of collecting that debt.

## **(7) Enforcement**

6.136 The discussion of comparative approaches to the regulation of debt collection undertakings above illustrates that various methods are typically used to enforce rules regulating this industry, including administrative and both civil and criminal judicial sanctions. The primary sanction in most legal systems for non-compliance with regulatory requirements is the revocation of, or refusal to renew, an undertaking's licence.<sup>185</sup> Thus in the UK for example, the guidance on debt collection issued by the OFT does not provide for sanctions in the event of non-compliance, but such non-compliance with the guidance will be considered by the OFT when assessing an application for a licence or a renewal thereof, and may result in such an application being refused. In addition, administrative sanctions exist in some of the systems discussed. In the UK, the OFT may impose requirements on licensed undertakings, and may impose significant civil monetary penalties in the event of non-compliance with such requirements.<sup>186</sup> In addition, the civil liability sanctions contained in the systems discussed may take the form of legislative provisions rendering void any contract or contractual term that breaches legislative and/or regulatory requirements;<sup>187</sup> or providing for civil liability in damages under certain circumstances for breaches of such requirements that result in a person sustaining damage.<sup>188</sup> Most of the systems discussed above also provide that breaches of certain legislative and/or regulatory requirements constitute criminal

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<sup>185</sup> See e.g. Section 19 of the *Collections Act* (Newfoundland).

<sup>186</sup> Section 39A of the *Consumer Credit Act 1974* (UK).

<sup>187</sup> See e.g. Section 148 of the *Consumer Credit Act 1974* (UK); section 12(2) of the *Alberta Fair Trading Act Collection and Debt Repayment Practices Regulation*.

<sup>188</sup> See e.g. section 813 of the USA *Fair Debt Collection Practices Act*, 15 USC 1692k.

offences.<sup>189</sup> As noted above, under Irish law the *Non-Fatal Offences Against the Person Act 1997* and the *Consumer Credit Act 1995* also provide for criminal liability in the event of the commission of certain specified prohibited debt collection practices.<sup>190</sup>

6.137 Following the models provided above, the Commission recommends that a similar assorted approach to the enforcement of regulatory requirements in respect of debt collection undertakings. The primary sanction for non-compliance with regulatory requirements should be the revocation or suspension of, or the refusal to renew, the licence required to act as a debt collection undertaking. The Commission believes that the limited duration of such licences and the consequent regular renewal assessments will provide a strong incentive for compliance.<sup>191</sup> The Commission nonetheless takes the view that other enforcement mechanisms should exist to facilitate high levels of compliance with the regulatory regime.

6.138 Criminal liability should continue to exist for the more serious misconduct on the part of such undertakings, as is the case under the current law. As noted above, legislation could provide for a procedure for the debt collection regulatory authority to refer suspected serious criminal conduct on the part of debt collection undertakings, such as harassment, violence or other potential breaches of section 11 of the *Non-Fatal Offences Against the Person Act 1997*, to the Gardaí Síochána. Legislative provisions could however be included specifying that other offences that are arguably less serious and more “regulatory” in nature could be prosecuted summarily by the regulatory authority.<sup>192</sup> An example of a similar conferral of such a power to a regulator to prosecute offences of this nature summarily can be seen in the *European Communities (Consumer Credit Agreements) Regulations 2010*. Regulation 25(5) provides that summary proceedings in relation to an offence under the Regulations may be prosecuted by the Central Bank and Financial Services Authority of Ireland.

6.139 *The Commission recommends that as part of the regulatory powers given to the debt collection regulatory authority, legislation should provide for a procedure for the authority to refer suspected serious criminal conduct on the part of debt collection undertakings to the Garda Síochána.*

6.140 *The Commission recommends that as part of the regulatory powers given to the regulatory authority, legislation should empower the authority to prosecute summarily offences contained in sections 45, 46 and 49 of the Consumer Credit Act 1995, as well as any new regulatory offences contained in the new legislation.*

6.141 In addition, the Commission takes the view that certain civil sanctions, of both an administrative and judicial nature, should also exist. As noted above, any money advanced to an unlicensed debt collection undertaking should be liable to be refunded,<sup>193</sup> and any contracts or contractual terms that contravene the relevant legislative or regulatory requirements should be unenforceable without an order of the regulatory authority providing for its enforcement.<sup>194</sup>

6.142 *The Commission recommends that any money advanced to a person carrying on debt collection activities without a debt collection licence should be liable to be refunded to the payer.*

6.143 *The Commission recommends that any contracts or contractual terms that contravene legislative or regulatory requirements relating to debt collection activities should be unenforceable, unless the regulatory authority has made an order permitting enforcement.*

6.144 *The Commission recommends that the regulatory authority’s existing investigatory powers and administrative sanctions mechanisms under Part IIIC of the Central Bank Act 1942 should be applicable*

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<sup>189</sup> See e.g. section 24 of the *Albertan Fair Trading Act Collection and Debt Repayment Practices Regulation*; Section 28(1) of the *Collection Agencies Act* (Ontario.).

<sup>190</sup> See paragraphs 6.03 to 6.07 above.

<sup>191</sup> See paragraphs 6.85 to 6.89 above.

<sup>192</sup> Such offences could for example include those arising under sections 45, 46 and 49 of the *Consumer Credit Act 1995*: see paragraphs 6.06 to 6.07 above.

<sup>193</sup> See paragraphs 6.85 to 6.86 above.

<sup>194</sup> See e.g. Section 148 of the *Consumer Credit Act 1974* (UK).

*in the event of suspected breaches of regulatory and/or legislative requirements by debt collection undertakings. The Commission also recommends that summary proceedings in relation to an offence may be brought and prosecuted by the Financial Regulator.*

6.145 Finally, the Commission takes the view that debt collection undertakings, once regulated by the regulatory authority, should fall under the remit of the Financial Services Ombudsman.<sup>195</sup> Under existing legislation, eligible consumers<sup>196</sup> may bring complaints about the conduct of a regulated financial service provider involving (a) the provision of a financial service by the financial service provider; an offer by the financial service provider to provide such a service; or (c) a failure by the financial service provider to provide a particular financial service that has been requested.<sup>197</sup> The Commission recommends that the scope of the Ombudsman's jurisdiction should be widened to allow individual debtors<sup>198</sup> to bring complaints in relation to the conduct of a debt collection undertaking in relation to the debtor. As the Ombudsman has extensive powers to require regulated service providers to act, or refrain from acting, in a certain manner; or to award compensation, this could be an effective means of providing redress for debtors who have suffered as a result of non-compliance with legislative and/or regulatory requirement by a debt collection undertaking. Legislation could also provide for a procedure for the Ombudsman to refer cases of suspected serious criminality to the Garda Síochána, such as where it is suspected that an undertaking used harassing or violent conduct towards a debtor.

6.146 *The Commission recommends that debt collection undertakings, once regulated by the debt collection regulatory authority, should fall under the remit of the Financial Services Ombudsman. The Commission recommends that legislation should provide for a procedure for the Financial Services Ombudsman to refer cases of suspected serious criminality to the Garda Síochána.*

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<sup>195</sup> For a discussion of the role and powers of the Financial Services Ombudsman, see *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 4.131 to 4.134.

<sup>196</sup> 'eligible consumer', in relation to a regulated financial service provider, means a consumer—

- (a) who is a customer of the financial service provider, or
- (b) to whom the financial service provider has offered to provide a financial service, or
- (c) who has sought the provision of a financial service from the financial service provider; while

'consumer' means—

- (a) a natural person when not acting in the course of, or in connection with, carrying on a business, or
- (b) a person, or group of persons, of a class prescribed by Council regulations: section 57BA of the *Central Bank Act 1942*, as inserted by section 16 of the *Central Bank and Financial Services Authority Act 2004*.

<sup>197</sup> Section 57BX of the *Central Bank Act 1942*, as inserted by section 16 of the *Central Bank and Financial Services Authority Act 2004*.

<sup>198</sup> The scope of this definition may need to be wider than that of "eligible consumer", so as to include individuals who have incurred debts in the course of carrying on a business, and are now being pursued by a debt collection undertaking in respect of those debts.



## CHAPTER 7 SUMMARY OF RECOMMENDATIONS

This Chapter contains a summary of the Commission's recommendations for reform in this Report.

### **A Personal Insolvency Law: Institutional Issues and Debt Settlement Arrangements**

#### **(1) *Structural and Institutional Issues.***

7.01 The Commission recommends that a non-judicial debt settlement mechanism known as the Debt Settlement Arrangement procedure should be established under Irish law. [Paragraph 1.19]

7.02 The Commission recommends that the role of Personal Insolvency Trustee should not be confined to money advisors/money advice undertakings. The Commission recommends that a licensing system for Personal Insolvency Trustees should be introduced under the supervision of the Debt Settlement Office, and that any persons meeting the requisite standards for such a licence should be eligible to act as a Personal Insolvency Trustee. [Paragraph 1.41]

7.03 The Commission recommends that the role of Personal Insolvency Trustee should incorporate what are sometimes described as the intermediary role (the role before a Debt Settlement Arrangement is agreed) and also the administrator role (the role after a Debt Settlement Arrangement is agreed and is being implemented). [Paragraph 1.53]

7.04 The Commission recommends that the role of Personal Insolvency Trustee in the context of Debt Settlement Arrangements should be capable of being held by (suitably licensed and regulated) private sector commercial operators. [Paragraph 1.58]

7.05 The Commission recommends that the role of Personal Insolvency Trustee should involve two sets of functions in a Debt Settlement Arrangement. The first set of functions should apply before the Debt Settlement Arrangement is agreed and require that the Trustee should: (a) confirm in writing that he or she has consented to act in the role of Personal Insolvency Trustee for the purposes of the Debt Settlement Arrangement, and has entered into an agreement with the debtor to make the payments to creditors ("individual debt settlement agreements") comprising the Debt Settlement Arrangement; (b) hold a meeting with the debtor and provide information to the debtor about his or her options for addressing his or her situation of financial difficulty, and certify that such information has been provided; (c) receive a full disclosure of the debtor's financial affairs, and, if such a step has not already been taken, assist the debtor in completing a Standard Financial Statement; (d) make a statutory declaration to the effect that the Trustee has reasonable grounds to believe that the information contained in the debtor's statement of affairs is complete and accurate; (e) prepare a proposal to be considered and voted upon at a creditors' meeting; (f) consider the likely viability of the proposal, its fairness to all parties involved, whether it is an acceptable alternative to bankruptcy or a Debt Relief Order, and whether it is otherwise fit to be considered by creditors; (g) submit a report to the Debt Settlement Office stating whether the proposed Debt Settlement Arrangement has a reasonable prospect of being accepted by creditors and completed sustainably by the debtor; and whether a creditors' meeting should be summoned to consider the proposal; and (h) summon a creditors' meeting. [Paragraph 1.64]

7.06 In turn, the Commission recommends that the second set of functions given to the Personal Insolvency Trustee should apply after the Debt Settlement Arrangement is agreed and require that the Trustee should: (a) ensure that the Debt Settlement Arrangement proceeds in accordance with its accepted terms; (b) maintain regular contact with the debtor, obtaining reports and conducting reviews as may be required; (c) monitor any problems that may arise and, where a default appears likely to take place, discuss the issue with the debtor; (d) if a variation in the terms of the a Debt Settlement Arrangement is required, take appropriate action to achieve a variation; (e) comply with any requirements under the proposed legislation or Regulations made under the legislation concerning his or her

remuneration, including maintaining a separate record of money received, payments made and the balance of money held in relation to any Debt Settlement Arrangement; (f) notify creditors of any increase in his or her remuneration occurring during the course of the administration of the Debt Settlement Arrangement; (g) deal with the debtor's property in the manner specified in the Debt Settlement Arrangement; (h) respond in a timely manner to reasonable requests from creditors about the progress of individual debt settlement agreements; (i) respond in a timely manner to reasonable requests from a debtor for information; (j) ensure that creditors and the Debt Settlement Office are informed where the debtor defaults in prescribed circumstances; (k) handle and properly account for money including paying all money received from debtors under individual debt settlement agreements to the credit of a single interest-bearing bank account and keeping such accounts, books and records as are necessary to give a full and correct account of the administration of the individual debt settlement agreements; and (l) answer any inquiries about the individual debt settlement agreements and cooperate with any inquiry or investigation made by the Debt Settlement Office or court. [Paragraph 1.65]

7.07 The Commission recommends that the Debt Settlement Office establish a panel of persons by public tender to act as Personal Insolvency Trustees for a 3 year period in the Debt Settlement Arrangement, and that the Debt Settlement Office would set out indicative fees to be charged by Trustees as part of the licensing regime. [Paragraph 1.68]

## **(2) Regulation of Personal Insolvency Trustees**

7.08 The Commission recommends that a licence should be required in order to operate as a Personal Insolvency Trustee in a Debt Settlement Arrangement. The Commission recommends that an offence should be created where a person acts as Personal Insolvency Trustee without holding such a licence. [paragraph 1.138]

7.09 The Commission recommends that a licence should be required to act as a Personal Insolvency Trustee in bankruptcy proceedings. The Commission recommends that a single Personal Insolvency Trustee licence system should be established by the Debt Settlement Office, and that, subject to relevant qualifications criteria to be published by the Debt Settlement Office, licence holders may be eligible to act as Personal Insolvency Trustee in both the Debt Settlement Arrangement process and in bankruptcy proceedings. [Paragraph 1.140].

7.10 The Commission recommends that the proposed Debt Settlement Office should be responsible for licensing and supervising all Personal Insolvency Trustees and that a person who performs the functions of a Personal Insolvency Trustee must be in possession of a current Personal Insolvency Trustee licence issued by the Debt Settlement Office. The Commission also recommends that summary proceedings in relation to an offence may be brought and prosecuted by the Debt Settlement Office. [Paragraph 1.144]

7.11 The Commission recommends that legislation should provide for the establishment of conditions that must be satisfied by applicants for a licence to act as a Personal Insolvency Trustee. The Commission recommends that primary legislation should specify certain basic conditions and principles to be considered as part of the licensing application assessment, with detailed conditions to be specified in secondary legislation following consultation with the Debt Settlement Office (which shall publish a related Code of Practice) and industry representatives. [Paragraph 1.148]

7.12 The Commission recommends that the conditions for obtaining a licence should include requirements relating to factors such as the following:

- The applicant's general fitness and good character;
- The honesty of the applicant: whether the applicant has been convicted of any offence of a commercial nature, or involving fraud, dishonesty or violence;
- The applicant's record of compliance with insolvency legislation;
- The applicant's record of not engaging in any practice considered to be deceitful, oppressive or otherwise unfair or improper, which casts doubt upon his probity or competence for discharging duties of an insolvency practitioner;

- The prior conduct of the applicant in carrying out any insolvency practice: the applicant's independence, skill, integrity and compliance with generally accepted professional standards; adequate systems of control; disclosure of conflicts of interests; previous cancellation of registration or other disciplinary sanctions;
- The applicant's education and training: examinations, qualifications, work experience.
- The skills and relevant knowledge of the applicant (regarding the relevant legislation, procedures and debt management techniques etc.) and his/her ability to carry out the role and to comply with all of the duties and obligations required of the role;
- The applicant's duty to obtain insurance against liabilities that the applicant may incur working in this role or to provide security for the proper performance of his or her functions;
- The solvency of the applicant and any previous bankruptcies or insolvencies within a certain recent period;
- If the applicant is a member of any professional body, the applicant's standing within that organisation, and any current disciplinary action by the organisation against the applicant. [Paragraph 1.149].

7.13 The Commission recommends that the Debt Settlement Office, in its role as regulator of Personal Insolvency Trustees, must prepare and publish a Code of Practice on Standards for Personal Insolvency Trustees to provide guidance on the standards expected of a Personal Insolvency Trustee in carrying out his or her duties and functions. The Commission recommends that such codes of conduct should be drawn up in consultation with relevant industry representatives and professional bodies. The Commission recommends that the Code will cover: (a) continuing professional development activities; (b) maintenance in force of a bond or security for losses caused by the fraud or dishonesty of the Personal Insolvency Trustee; (c) general best practice standards in relation to the preparation and supervision of Debt Settlement Arrangements (including the provision of advice to debtors); (d) duties to assess the debtor's income and the repayments that the debtor can reasonably make or is obliged to make towards his or her creditors, and to monitor the payment of contributions by the debtor to his/her creditors; (e) making of annual returns relating to all cases worked on during a year; (f) records to be maintained by a Personal Insolvency Trustee; (g) a duty to act honestly and impartially; (h) a duty to notify creditors, the Debt Settlement Office or the court (as appropriate) if it becomes apparent that a conflict of interests exists, and to take steps to avoid the conflict of interest; (i) a duty to respect any data protection legislation and privacy rights when dealing with information relating to an insolvency; (j) details of the obligatory preliminary inquiries and actions that must be taken by the Personal Insolvency Trustee in any process or proceedings under this Bill; (k) details of the approach to be taken by the Personal Insolvency Trustee in investigating matters affecting any process or proceedings under this Bill; (l) details of the approach to be taken by the Personal Insolvency Trustee in identifying, protecting, realising, or determining the ownership of, assets, or in obtaining advice about an interest or value, and disposing of property; (m) standards regarding remuneration and costs; (n) standards and duties regarding the holding of meetings of creditors; (o) standards and duties regarding the keeping of Personal Insolvency Trustee accounts; (p) duties to provide information to creditors; (q) duties to report to creditors; (r) duties regarding the distribution of dividends; (s) advertising practices of a Personal Insolvency Trustee; and (t) duties relating to the reporting of offences or the sanctioning of debtors or directors. [Paragraph 1.158]

7.14 The Commission recommends that the Debt Settlement Office should be given powers to monitor the conduct of regulated Personal Insolvency Trustees and to investigate any complaints or suspected violations of legislation, codes of practice or other regulatory rules. The Commission recommends that the powers should be to: (a) issue licences to suitably qualified persons to carry out the functions of Personal Insolvency Trustee, (b) receive and review annual reports from licensed Personal Insolvency Trustees, (c) enter and inspect any places where a Personal Insolvency Trustee conducts his or her business as licensed by the Debt Settlement Office, (d) investigate any complaints or suspected violation of this Act, Regulations made under the Act or codes of practice issued under it, and (e) develop and publish Codes of Practice in accordance with this Act to provide guidance on the requirements of the functions of Personal Insolvency Trustee. [Paragraph 1.165]

7.15 The Commission recommends that legislation should provide the Debt Settlement Office with powers of investigation in order to examine complaints or suspected cases of misconduct, including powers, among others, to compel a regulated Personal Insolvency Trustee to provide books of account or records. [Paragraph 1.166]

7.16 The Commission recommends that the Debt Settlement Office should be empowered with significant sanctions, including the power to: (a) impose restrictions or conditions on the licence of a Personal Insolvency Trustee; (b) in cases of serious breaches, revoke the licence of a Personal Insolvency Trustee; (c) without prejudice to paragraphs (a) and (b), refer a breach to a professional body, if any, of a Personal Insolvency Trustee where the breach raises issues as to the Personal Insolvency Trustee's continued fitness to be a member of such body; (d) impose a financial sanction by way of penalty on a Personal Insolvency Trustee, (e) order a Personal Insolvency Trustee to pay monetary compensation to any individual who has suffered financial loss arising from any such breach. [Paragraph 1.167]

7.17 The Commission recommends that the Debt Settlement Office should produce an annual report, part of which should include a statistical analysis of the complaints received and cases investigated during each year. [Paragraph 1.168]

### **(3) Debt Settlement Office**

7.18 The Commission recommends that the proposed Debt Settlement Office should take the form of an independent unit within the Debt Enforcement Office. [Paragraph 1.177]

7.19 The Commission recommends that the proposed Debt Settlement Office should be at least partly funded by the private sector, with the appropriate means of funding to be specified in legislation. [Paragraph 1.178]

### **(4) The role of the court in the Debt Settlement Arrangement Procedure**

7.20 The Commission recommends that court supervision of the Debt Settlement Arrangement procedure should be limited to hearing objections by a creditor to a Debt Settlement Arrangement that has been accepted a creditors' meeting and approved by the Debt Settlement Office. [Paragraph 1.196]

7.21 The Commission recommends that the grounds on which a creditor may challenge before a court the Debt Settlement Arrangement accepted by the creditors' meeting and the Debt Settlement Office should be limited to situations where:

- The procedural requirements specified in the legislation were not followed.
- A material inaccuracy or omission exists in the debtor's statement of affairs/Standard Financial Statement, which causes detriment to the creditor.
- The debtor did not satisfy the eligibility requirements to enter the Debt Settlement Arrangement procedure at the initiation of the procedure.
- The arrangement unfairly prejudices the interests of a creditor.
- The debtor has committed an offence under the legislation. [Paragraph 1.197]

7.22 The Commission recommends that at any time during the operation of a Debt Settlement Arrangement a creditor or the Personal Insolvency Trustee should be empowered to apply to court to have a Debt Settlement Arrangement terminated on the grounds that:

- The procedural requirements specified in the legislation were not followed.
- A material inaccuracy in the debtor's statement of affairs/Standard Financial Statement, which causes detriment to the creditor.
- The debtor did not satisfy the eligibility requirements to enter the Debt Settlement Arrangement procedure at the initiation of the procedure.
- The debtor did not comply with the duties and obligations imposed under the Debt Settlement Arrangement process;
- The continuation of the arrangement would lead to injustice and/or undue delay.

- The debtor has committed an offence under the legislation.
- A three-month arrears default has occurred. [Paragraph 1.198]

7.23 The Commission recommends that a three-month arrears default should be defined as occurring at a particular time (the “test time”) in relation to a Debt Settlement Arrangement if:

- at the beginning of the 3 month period ending immediately before the test time, one or more payments in respect of provable debts became due and payable by the debtor under the debt agreement; and
- throughout that 3 month period, the debtor was in arrears in respect of any or all of those payments. [Paragraph 1.199]

7.24 The Commission recommends that following a designated 6-month arrears default, a Debt Settlement Arrangement should be deemed to have failed, and on the application of a creditor or the Personal Insolvency Trustee, the Debt Settlement Office should formally recognise the failure of the arrangement and record the failure in the Personal Insolvency Register. [Paragraph 1.200]

7.25 The Commission recommends that a designated 6-month arrears default occurs where both of the following apply:

- (i) before the particular time, one or more payments in respect of provable debts became due and payable by the debtor under the Debt Settlement Arrangement;
- (ii) at no time during the 6 month period ending immediately before the test time were any obligations in respect of those payments discharged. [Paragraph 1.201]

#### **(5) Debt Settlement Arrangements: Procedural Rules**

7.26 The Commission recommends that a Personal Insolvency Trustee must, prior to a debtor initiating a Debt Settlement Arrangement process, advise the debtor as to (a) any alternative options available to the debtor, including a Debt Relief Order or bankruptcy, and the general effect of such options, and (b) the general effect of initiating, and entering into, a Debt Settlement Arrangement process. [Paragraph 1.205]

7.27 The Commission recommends that a procedure should exist for a debtor seeking to enter into a Debt Settlement Arrangement to apply to the Debt Settlement Office for a protective order in order to prevent enforcement while attempts are made to reach an arrangement. [Paragraph 1.207]

7.28 The Commission recommends that a debtor must inform his or her creditors of the making of a protective order. The Commission also recommends that any creditor on whom notice of the making of a protective order has been served must, if commencing proceedings against the debtor for the recovery of a debt, notify the court of the making of such an order, and the court shall, without prejudice to any other order it may deem appropriate, make an order staying the proceedings for such period it deems appropriate pending the outcome of attempts to reach a Debt Settlement Arrangement. [Paragraph 1.208]

7.29 The Commission recommends that officers of the Debt Enforcement Office should refrain from taking any steps to enforce a judgment against a debtor who is the subject of a protective order. [Paragraph 1.209]

7.30 The Commission recommends that the debtor should be required to provide the Debt Settlement Office with draft terms of the arrangement when applying for a protective order. [Paragraph 1.210]

7.31 The Commission recommends that the Personal Insolvency Trustee should prepare the following documents in advance of the application for entry to the Debt Settlement Arrangement procedure: (a) a statement by the Personal Insolvency Trustee indicating his or her consent to act as Personal Insolvency Trustee; (b) a completed statement of the debtor’s financial affairs, showing the debtor’s position of insolvency, in the form of the Standard Financial Statement; (c) the terms of the proposal to be sent to creditors for consideration; (d) a report of the Personal Insolvency Trustee stating whether, in the opinion of the Personal Insolvency Trustee: (i) the proposal of the debtor has a reasonable prospect of being accepted by creditors, (ii) the proposal of the debtor is viable and that the

debtor is reasonably likely to be able to comply with its terms, (iii) a meeting of the debtor's creditors will be held on a specific date to consider the proposal, and (iv) the proposal is reasonably fair to all parties involved, and is an acceptable alternative to bankruptcy or a Debt Relief Order; (e) a statement to the effect that the debtor has been appropriately advised by the Personal Insolvency Trustee of his or her options for managing his or her debt difficulty; (f) a statement to the effect that the Personal Insolvency Trustee has reasonable grounds to believe that the information contained in the debtor's statement of affairs is complete and accurate; and (g) a statement to the effect that the Personal Insolvency Trustee has reasonable grounds to believe that the debtor is eligible to enter the Debt Settlement Arrangement procedure. [Paragraph 1.212]

7.32 The Commission recommends that procedures should allow for the creditors' meeting to be held otherwise than in the form of a physical meeting, and that procedures should permit the communication of creditors' votes to the Personal Insolvency Trustee by electronic or telephonic means. [Paragraph 1.214]

7.33 The Commission recommends that detailed procedural rules for the holding of a creditors' meeting and the voting process should be specified in secondary legislation. [Paragraph 1.215]

7.34 The Commission recommends that where a proposed Debt Settlement Arrangement is approved at a creditors' meeting by a majority of 60% in value of actual votes cast at the meeting, the proposed Debt Settlement Arrangement shall become a Debt Settlement Arrangement and shall, subject to other conditions recommended below, then be binding on every creditor who was entitled to vote at the creditors' meeting. The Commission also recommends that where a Debt Settlement Arrangement is approved at a creditors' meeting, the Personal Insolvency Trustee must forthwith send a copy of the Debt Settlement Arrangement to the Debt Settlement Office. [Paragraph 1.222]

7.35 The Commission recommends that where the creditors' meeting rejects the proposed arrangement, the Debt Settlement Arrangement procedure should come to an end and the protective order issued by the Debt Settlement Office should cease to have effect. [Paragraph 1.224]

7.36 The Commission recommends that where a qualified majority of creditors accepts the proposed arrangement, the Debt Settlement Office should send a copy of the proposed arrangement to the debtor's local Circuit Court for approval. The Commission recommends that the court approval should not involve a court hearing unless a creditor objects to the approval of the arrangement within a specified period of 30 days from the communication of the result of the creditors' meeting to the Debt Settlement Office. The Commission recommends that where a creditor objects to the approval of the arrangement on specified limited grounds, a court hearing should take place, with procedural rules for this hearing to be specified in Rules of Court. [Paragraph 1.225]

7.37 The Commission recommends that (a) where the Circuit Court upholds the objection to the Debt Settlement Arrangement, the Debt Settlement Arrangement procedure shall be deemed to have come to an end, and any protective order issued by the Debt Settlement Office shall cease to have effect; but that (b) where the Circuit Court rejects the objection to the Debt Settlement Arrangement, the Debt Settlement Arrangement procedure shall be deemed to have effect from the making of the Court's order. The Commission also recommends that where a Debt Settlement Arrangement is deemed to have effect because of the court decision, it must be registered by the Debt Settlement Office in the Personal Insolvency Register which is to be maintained by the Debt Settlement Office. [Paragraph 1.226]

7.38 The Commission recommends that the effect of the coming into force and the entering in the Personal Insolvency Register of a Debt Settlement Arrangement should be that:

- No creditor may present a bankruptcy petition against the debtor;
- No creditor may commence legal proceedings for the recovery of a debt covered by the arrangement;
- No action may be taken by an enforcement officer to enforce a judgment debt owed by the debtor. [Paragraph 1.228]

7.39 The Commission recommends that: (a) a Debt Settlement Arrangement may be varied at a creditors' meeting by a majority of 60% in value of actual votes cast at the meeting and such variation

shall, subject to the other relevant recommendations on this matter, then be binding on every creditor who was entitled to vote at the creditors' meeting; (b) where a Debt Settlement Arrangement is varied, the Personal Insolvency Trustee must forthwith send a copy of the variation of the Debt Settlement Arrangement to the Debt Settlement Office; (c) when the Debt Settlement Office receives the variation of a Debt Settlement Arrangement it must forthwith register the variation in the Personal Insolvency Register; and (d) a variation comes into effect in the same manner as the original Debt Settlement Arrangement, and that a creditor may challenge the variation in the same manner. [Paragraph 1.231]

7.40 The Commission recommends that the Personal Insolvency Trustee should provide information to the debtor concerning his or her right to apply for a variation where his or her circumstances have changed. [Paragraph 1.232]

7.41 The Commission recommends that a Debt Settlement Arrangement may be terminated at a creditors' meeting by analogy with the procedure for variation of a Debt Settlement Agreement, and that a creditor may challenge the termination in the same manner. [Paragraph 1.234]

7.42 The Commission recommends that the failure or termination of a Debt Settlement Arrangement should not lead automatically to bankruptcy proceedings being brought against the debtor. The Commission recommends instead that legislation should empower a creditor and the Personal Insolvency Trustee to bring bankruptcy proceedings against the debtor where a Debt Settlement has failed, or has been terminated by order of court. The Commission recommends that creditors and Trustees should be empowered to apply to court for an adjudication of bankruptcy against a debtor in the same proceedings as an application for termination of the Debt Settlement Arrangement. [Paragraph 1.239]

#### **(6) Debt Settlement Arrangements: Substantive Rules**

7.43 The Commission recommends that while the terms of Debt Settlement Arrangements should primarily be a matter for agreement between the debtor and his or her creditors, certain core mandatory terms of Debt Settlement Arrangements should be specified in legislation. [Paragraph 1.253]

7.44 The Commission recommends that the maximum duration of a Debt Settlement Arrangement should be limited to five years. The Commission recommends that in order to qualify as a statutory Debt Settlement Arrangement, a proposal must provide for the performance of its obligations within a period of five years. [Paragraph 1.259]

7.45 The Commission recommends that legislation should state expressly that on completion of the obligations specified under a Debt Settlement Arrangement the debtor should be discharged from the remainder of the debts covered by the arrangement. [Paragraph 1.263]

7.46 The Commission recommends that (consistently with the Commission's approach to reform of the *Bankruptcy Act 1988*) the Revenue Commissioners should not have preferential status in an accepted Debt Settlement Arrangement but that, otherwise, the Debt Settlement Arrangement should not release the debtor from any of the following debts and/or liabilities unless the proposal for the arrangement explicitly provides for the compromise of that debt or liability and the creditor in relation to that debt or liability voted for the acceptance of the arrangement:

- Any liability arising out of a court order made in family law proceedings;
- Any liability arising out of damages awarded in respect of personal injuries or wrongful death arising from the tort of the debtor;
- Any debt or liability arising from a loan (or forbearance of a loan) obtained through fraud, misappropriation, embezzlement or fraudulent breach of trust. [Paragraph 1.278]

7.47 The Commission recommends that any debt or liability arising under a court order made under the Proceeds of Crime Acts 1996 and 2005 or under a fine ordered to be paid by a court in respect of a criminal offence should not be capable of being discharged under a Debt Settlement Arrangement. [Paragraph 1.279]

7.48 The Commission recommends that legislation should provide that a Debt Settlement Arrangement may not contain any terms requiring the debtor to sell any assets of the debtor that are necessary to ensuring a reasonable standard of living for the debtor. [Paragraph 1.285]

7.49 The Commission recommends that primary legislation should establish certain general categories of assets that are deemed essential to ensuring a reasonable standard of living for the debtor, while detailed guidelines should be established in secondary legislation or in codes published by the Debt Settlement Office. [Paragraph 1.286]

7.50 The Commission recommends that the categories of goods listed in secondary legislation could include the following (among others):

- Such household goods as are necessary for maintaining a reasonable standard of living for the debtor and his or her family;
- Such material items as are necessary to the debtor for use personally by him in his employment, business or vocation. [Paragraph 1.287]

7.51 The Commission recommends that while the amount of repayments under a Debt Settlement Arrangement is primarily a matter to be agreed by the creditors' meeting, primary legislation should establish the principle that the terms of a Debt Settlement Arrangement should not require such repayments as would leave the debtor with insufficient income to maintain a reasonable standard of living for the debtor and his or her family. [Paragraph 1.295]

7.52 The Commission recommends that, in drafting detailed reasonable expenditure and essential income guidelines, the Debt Settlement Office (or other appropriate body) should take into account:

- the structural framework of the MABS Standard Financial Statement;
- the definition of "poverty" in the National Anti-Poverty Strategy (2007) and National Action Plan for Social Inclusion 2007-2016: "people are living in poverty if their income and resources (material, cultural and social) are so inadequate as to preclude them from having a standard of living regarded as acceptable by Irish society generally."
- the amount of the Basic Supplementary Welfare Allowance, subject to the conditions below regarding the need to incentivise the debtor to seek and maintain employment;
- the need to incentivise the debtor to seek and maintain employment and to cooperate in the completion of his or her obligations under the Debt Settlement Arrangement as far as possible, in particular by:
  - ensuring that the reasonable essential income permitted to be maintained by a debtor is higher than that which the debtor would receive if he or she was unemployed and reliant on social welfare payments for income;
  - ensuring that the debtor is allowed to retain a significant portion of any income increase;
  - providing for proportionate reductions in the amount of payments to be made by the debtor as a "reward" for completing certain stages of the repayment plan;
  - ensuring that the level of income allowed to the debtor under a Debt Settlement Arrangement is greater than that exempted under an instalment order, attachment of earnings mechanism or other method for the enforcement of judgment debts. [Paragraph 1.296]

7.53 The Commission recommends that the Central Bank should amend the Consumer Protection Code to prohibit regulated entities from engaging the practice of setting "hurdle rates" for the approval of proposed Debt Settlement Arrangements, and to require creditors to accept the information contained in the Standard Financial Statement as evidence of the debtor's true ability to make repayments, unless the creditors have reasonable grounds to believe that the information supplied is incomplete or inaccurate. [Paragraph 1.299]

7.54 The Commission recommends that the Central Bank should introduce regulatory rules to prohibit credit unions from engaging the practice of setting "hurdle rates" for the approval of proposed Debt Settlement Arrangements, and to require credit unions to accept the information contained in the Standard Financial Statement as evidence of the debtor's true ability to make repayments, unless the creditors have reasonable grounds to believe that the information supplied is incomplete or inaccurate. [Paragraph 1.300]



7.55 The Commission recommends that the Commission for Energy Regulation should introduce regulatory rules to prohibit credit unions from engaging the practice of setting “hurdle rates” for the approval of proposed Debt Settlement Arrangements, and to require credit unions to accept the information contained in the Standard Financial Statement as evidence of the debtor’s true ability to make repayments, unless the creditors have reasonable grounds to believe that the information supplied is incomplete or inaccurate. [Paragraph 1.301]

7.56 The Commission recommends that the following duties should be imposed on debtors participating in the Debt Settlement Arrangement procedure, (from the time of applying for entry to the completion of the procedure): (a) to cooperate fully in the process, and in particular to comply with any reasonable request from the Personal Insolvency Trustee to provide assistance, documents and information necessary for the application of the process to the debtor’s case; (b) to inform the Personal Insolvency Trustee as soon as reasonably practicable of any material change in the debtor’s circumstances, particularly an increase in the level of the debtor’s assets or income, which would affect the debtor’s ability to make repayments under the Debt Settlement Arrangement; (c) not to obtain credit above a prescribed amount without disclosing the fact that the debtor is party to a Debt Settlement Arrangement; and (d) not to engage directly or indirectly in any business under a name other than that in which the Debt Settlement Arrangement has been registered (in the Personal Insolvency Register) without disclosing the name in which the arrangement was registered to all persons with whom the debtor enters into a business transaction. [Paragraph 1.305]

7.57 The Commission recommends that, unless the relevant preferential creditors agree otherwise, the terms of a Debt Settlement Arrangement must provide for the payment of debts identified as preferential under the bankruptcy system in priority to such of the debtor’s debts as are not preferential debts. [Paragraph 1.311]

7.58 The Commission recommends that the Debt Settlement Arrangement procedure a secured creditor should be free to decide between the three options of:

- Realising its security and claiming for the balance due, if any, after deducting the net amount realised;
- Surrendering its security to the debtor and claiming for the full amount of the debt owed as if it was unsecured; or
- Valuing the security when proving its debt, and claiming alongside unsecured creditors for the balance due after deducting the amount of the valuation. [Paragraph 1.316]

7.59 The Commission recommends that the Personal Insolvency Trustee’s report to the Debt Settlement Office, as part of an application for a Debt Settlement Arrangement, should include a statement by reference to cash flow and balance sheet that, in the Trustee’s opinion, as verified by a completed Standard Financial Statement:

- The value of his/her assets is less than the amount of his/her liabilities, and it is unforeseeable that at any stage within a five year period the value of the assets will be equal to, or larger than, the value of the liabilities; or
- The debtor is unable to pay his/her debts as they fall due, and it is unforeseeable that over the course of a five year period the debtor will be able to pay his/her debts in full. [Paragraph 1.334]

7.60 The Commission recommends that access to the Debt Settlement Arrangement procedure should be open to all insolvent individual debtors, including both those whose indebtedness arises from debts incurred for consumption and debts incurred for the purposes of the debtor’s trade or profession. Such debts should be defined as those for a definite (liquidated) sum or sums payable either immediately or at some certain future time, and which are not secured or excluded debts. [Paragraph 1.346]

7.61 The Commission recommends that a primary rule should exist to the effect that a debtor may only access the Debt Settlement Arrangement procedure once during a ten-year period, subject to a proviso that a debtor may exceptionally access the procedure a second time more sooner if his or her difficulties have been caused by external factors outside of the debtor’s control. [Paragraph 1.353]

7.62 The Commission recommends however that all debtors, even those who have accessed the procedure within this ten-year period, should be presumed to be eligible to propose a Debt Settlement Arrangement to creditors on multiple occasions, subject to:

- the approval of the creditors' meeting; and
- a right for a creditor to challenge the debtor's eligibility where the debtor has previously proposed a Debt Settlement Arrangement within the ten years prior to proposing another arrangement to creditors;
- and that it is for the debtor to establish the existence of the exceptional factors or other external factors outside his or her control. [Paragraph 1.354]

7.63 The Commission recommends that, in any application for a Debt Settlement Arrangement, the debtor or his or her Personal Insolvency Trustee shall make a statutory declaration as to the debtor's previous participation, if any, in a Debt Settlement Arrangement. [Paragraph 1.355]

7.64 The Commission recommends that it should be a criminal offence for a debtor participating in the Debt Settlement Arrangement procedure to engage in fraudulent or dishonest conduct, including, inter alia, engaging in the following activities:

- Fraudulently making a false or incomplete representation for the purposes of obtaining the acceptance by creditors' meeting and/or court approval of a proposed Debt Settlement Arrangement;
- Knowingly concealing or refusing to produce documents or information when required to do so by the Personal Insolvency Trustee, Debt Settlement Office or court, or producing falsified documents;
- Concealing or disposing of property with the intention of defrauding creditors;
- Fraudulently dealing with property obtained on credit;
- Obtaining credit above a certain limit without disclosing that the debtor is a party to a Debt Settlement Arrangement;
- Carrying on business in a name other than the debtor's own without disclosing the name under which the Debt Settlement Arrangement has been registered in the Personal Insolvency Register. [Paragraph 1.362]

7.65 The Commission recommends that where the Personal Insolvency Trustee has reasonable grounds to believe that the debtor may have committed a criminal offence, the Trustee should be required to notify the Debt Settlement Office of this. The Trustee should also be under a duty to cooperate with any criminal investigation being conducted by the relevant authorities. [Paragraph 1.363]

## **B Debt Relief Orders**

7.66 The Commission recommends that a low-cost "No Income, No Assets" procedure should be introduced to provide debtors with a Debt Relief Order, which would grant debt discharge after a short waiting period to individuals whose income and assets are so limited as to make bankruptcy proceedings or a repayment plan inappropriate. [Paragraph 2.46]

7.67 The Commission recommends that access to the proposed Debt Relief Order procedure should be limited to insolvent debtors whose disposable income, non-essential assets and total debts fall below thresholds specified by law. Secondary legislation should provide for the precise amounts of these thresholds, which should be index-linked to allow for inflation. [Paragraph 2.50]

7.68 The Commission recommends that secured debts should be excluded from the proposed Debt Relief Order procedure, and should be incapable of being discharged. [Paragraph 2.54]

7.69 The Commission recommends that family maintenance debts, fines for criminal offences, and tort liabilities should be excluded from the proposed Debt Relief Order procedure, and should be incapable of being discharged. [Paragraph 2.55]

7.70 The Commission recommends that applications for Debt Relief Orders should only be made through money advisors of the Money Advice and Budgeting Service. The Commission also recommends that the Money Advice and Budgeting Service, in consultation with the debtor, is to prepare and complete a prescribed application form for a Debt Relief Order, based on the Standard Financial Statement, and must confirm that, having regard to the information supplied by the debtor, the debtor appears to comply with the conditions for a Debt Relief Order. [Paragraph 2.59]

7.71 The Commission recommends that a small fee should be payable by debtors seeking to access the Debt Relief Order procedure, provided that this fee is set at such a level as not to operate as an obstacle to access to the procedure. The level of the fee should be specified in secondary legislation, and should be index-linked to take inflation rates into account. [Paragraph 2.61]

7.72 The Commission recommends that the Debt Relief Order procedure should be purely administrative in nature, and should generally not involve court involvement. The Commission recommends that applications for Debt Relief Orders should be made to the Debt Settlement Office, and that such office should be empowered to adjudicate on these applications. Creditors should be given the right, on limited grounds, to petition the court to object to the making of a Debt Relief Order. [Paragraph 2.63]

7.73 The Commission recommends that applications for a Debt Relief Order should, in general, be made online. [Paragraph 2.65]

7.74 The Commission recommends that a primary rule should exist to the effect that a debtor may only access the Debt Relief Order procedure once, subject to a proviso that a debtor may exceptionally access the procedure a second time if his or her debt difficulties have been caused by external factors outside of the debtor's control. The Commission recommends that a presumption should exist to the effect that a debtor's circumstances are not sufficiently exceptional to warrant recourse to the procedure for a second time where less than six years have expired since a Debt Relief Order was granted in respect of the debtor. [Paragraph 2.69]

7.75 The Commission recommends that the Debt Settlement Office's adjudication of an application for a Debt Relief Order should involve assessing the debtor's application to ensure that the financial conditions relating to the debtor's assets, income and debts are met. The Debt Settlement Office should also assess whether the conditions concerning the debtor's previous use of the Debt Relief Order procedure are satisfied.<sup>1</sup> A further condition to be assessed should be that the debtor has resided in the State for a period of one year prior to the application for the Order, or that the debtor's centre of main interests is in Ireland. The Commission recommends that the Office must make a Debt Settlement Order if these conditions are met. [Paragraph 2.76]

7.76 The Commission recommends that the Debt Settlement Office may however refuse to make a Debt Relief Order where the Office is of the opinion, based on reasonable grounds, that any of the following conditions exist:

- the debtor is an undischarged bankrupt;
- a bankruptcy petition is pending against the debtor, and the financial outcome for the petitioning creditor would be materially better if the debtor is adjudicated bankrupt than if the debtor is admitted to the Debt Relief Order procedure;
- the debtor has made any false representation in making the application or on supplying any information or documents in support of it;
- the debtor has entered into a transaction with any person at an undervalue during the period between the start of the period of three months ending with the application date; and the determination date;
- the debtor has concealed assets with the intention of defrauding creditors;
- the debtor has engaged in conduct that would, if the debtor were adjudicated bankrupt, constitute an offence; or

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<sup>1</sup> See paragraph 2.69 above.

- the debtor has incurred a debt or debts knowing that the he or she does not have the means to repay them. [Paragraph 2.77]

7.77 The Commission recommends that if the Debt Settlement Office refuses an application, it should be required to give reasons for this refusal. [Paragraph 2.78]

7.78 The Commission recommends that the Debt Settlement Office should be empowered to request further information from the debtor where the Office has reasonable grounds to believe that such information is necessary in order to reach a conclusion in relation to the existence of the above conditions. The Commission recommends that a failure of the debtor to provide such information when requested should entitle the Office to refuse to make a Debt Relief Order. [Paragraph 2.79]

7.79 The Commission recommends that the Debt Settlement Office should presume that all of the relevant conditions are satisfied if that appears to be the case from the debtor's application and the Office has no reasonable grounds to believe that the information supplied is inaccurate or incomplete. [Paragraph 2.80]

7.80 The Commission recommends that the effect of the Debt Relief Order should be to impose a moratorium on the enforcement or recovery of any debts included in the Order for a period of 12 months. During this time, creditors should be prevented from commencing any legal proceedings for the recovery of an included debt except with the permission of the court and on such terms as the court sees fit. If proceedings for the recovery of an included debt have already been commenced, the court should be permitted to make an order staying the proceedings or allowing them to continue only subject to such terms as the court thinks fit. [Paragraph 2.85]

7.81 The Commission recommends that legislation should expressly state that creditors and their agents are prohibited from taking any action to collect, or undertake or attempt to collect, directly or indirectly, debts owed by a debtor which have been included in a Debt Relief Order. [Paragraph 2.86]

7.82 The Commission recommends that legislation should expressly clarify that the moratorium on the recovery of debts included in a Debt Relief Order shall not affect the power of a secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if no Debt Relief Order had been made. [Paragraph 2.87]

7.83 The Commission recommends that on the expiry of the 12 month moratorium period, the debts included in the Debt Relief Order should be discharged. [Paragraph 2.88]

7.84 The Commission recommends that the following duties should be imposed on debtors participating in the Debt Relief Order procedure, (from the time of applying for entry to the completion of the procedure):

- A duty to cooperate fully in the process, and in particular to comply with any reasonable request of the Office to provide assistance, documents and information necessary for the application of the procedure to the debtor's case;
- A duty to inform the Debt Settlement Office as soon as reasonably practicable of any material change in his or her circumstances, particularly an increase in the level of the debtor's assets or income, which would affect (or would have affected) the adjudication of the debtor's application and/or which influences the debtor's ability to repay an amount towards the debts included in the Debt Relief Order;
- A duty not to obtain credit above a certain amount without disclosing the fact that a Debt Relief Order or a Debt Relief Restrictions Order in respect of the debtor;
- A duty not to engage directly or indirectly in any business under a name other than that in which the order was made without disclosing the name in which the order was made to all persons with whom the debtor enters into a business transaction. [Paragraph 2.93]

7.85 The Commission recommends that the Debt Settlement Office should be empowered to revoke or amend a Debt Relief Order where:

- The disqualifying factors described above are found to have come into existence (or are found to have always existed, i.e. the Order should never have been granted);

- The debtor has not complied with the duties imposed on debtors under the procedure. [Paragraph 2.99]

7.86 The Commission recommends that creditors should be empowered to object to the debtor's participation in the Debt Relief Order procedure at any point throughout the 12-month duration of the procedure. The Debt Settlement Office should be empowered to carry out an investigation of the debtor's affairs in response to a complaint, and to amend or terminate the Order if sufficient grounds are found to exist. The Commission recommends that the Debt Settlement Office should be permitted to suspend the debtor's discharge for a reasonable period of time in order to conduct such an investigation. [Paragraph 2.100]

7.87 The Commission recommends that the effect of the termination of a Debt Relief Order should be to lift the moratorium on the enforcement/recovery of debts owed by the participating debtor, and to make the debtor liable once again for these debts, including any arrears, charges and interest that have accrued. [Paragraph 2.101]

7.88 The Commission recommends that if the legislature decides to provide for the termination of a Debt Relief Order where a debtor's income has increased since the making of the Order, legislation should provide that such termination should not take effect until a debtor has been given reasonable time to come to an arrangement, including a Debt Settlement Arrangement, with his or her creditors. [Paragraph 2.104]

7.89 The Commission recommends that any affected party should be empowered to apply to court to challenge a decision of the Debt Settlement Office in relation to a Debt Relief Order or an application for such an order in a manner comparable to those applicable to Debt Settlement Arrangements. [Paragraph 2.109]

7.90 The Commission recommends that it should be a criminal offence for a debtor participating in the Debt Relief Order procedure to engage in fraudulent or dishonest conduct, including, inter alia, engaging in the following activities:

- Knowingly concealing or refusing to produce documents, or producing falsified documents;
- Fraudulently disposing of property;
- Fraudulently dealing with property obtained on credit;
- Obtaining credit above a certain limit without disclosing that a Debt Relief Order or restriction order has been made in respect of him or her;
- Carrying on business in a name other than his or her own without disclosing the name under which the Debt Relief Order or restriction order has been made. [Paragraph 2.112]

7.91 The Commission recommends that where a Debt Relief Order is made, it must be registered by the Debt Settlement Office in the Personal Insolvency Register (as with Debt Settlement Arrangements). [Paragraph 2.115]

## **C Personal Insolvency Law: Reform of the Bankruptcy Act 1988**

7.92 The Commission recommends that the minimum debt level of €1900 required to found a creditor's petition of bankruptcy under section 11(1) of the Bankruptcy Act 1988 should be raised to €50,000. [Paragraph 3.19]

7.93 The Commission recommends that the pre-condition in section 15 of the Bankruptcy Act 1988 that a debtor's available estate must be capable of realising at least €1,900 before he or she may petition for his or her bankruptcy should be removed. The Commission suggests that this condition should be replaced with a provision to the effect that the value of the debtor's assets available for distribution to creditors should be considered by the court when assessing whether it may be appropriate to stay proceedings for the purposes of allowing the debtor to attempt to reach a Debt Settlement Arrangement. [Paragraph 3.25]

7.94 The Commission recommends that the Consumer Debt Claims Pre-Action Protocol proposed in the Interim Report should be extended to creditor petitions for bankruptcy. [Paragraph 3.30]

7.95 The Commission recommends that where a debtor petitions for bankruptcy, the court should be given discretion to stay proceedings where it considers it appropriate that the debtor and his or her creditors should consider whether the case could be resolved by alternative means, and particularly through a Debt Settlement Arrangement. [Paragraph 3.31]

7.96 The Commission recommends that, as part of the introduction of an automatic bankruptcy discharge, the condition that a debtor's estate must be fully realised before a debtor may be discharged should be abolished. The debtor's unrealised property should remain vested in the Official Assignee after discharge, and the debtor should be placed under a duty after discharge to cooperate with the Official Assignee in the realisation and distribution of such of his or her property as is vested in the Official Assignee. [Paragraph 3.50]

7.97 The Commission recommends that an automatic discharge from bankruptcy should be introduced, which should come into effect to release a debtor from bankruptcy after a much shorter period of time than the 12 year waiting period for conditional discharge existing under the current law. [Paragraph 3.54]

7.98 The Commission recommends that bankrupt debtors should be automatically discharged on the expiry of a period of three years from the adjudication of bankruptcy. [Paragraph 3.61]

7.99 The Commission recommends that the court should be given discretion to make an order requiring the bankrupt debtor to make payments from his or her income to the Official Assignee/Personal Insolvency Trustee for the benefit of his or her creditors for a period lasting up to five years. [Paragraph 3.62]

7.100 The Commission recommends that the Official Assignee/Personal Insolvency Trustee should be empowered to apply to the court, on his/her own motion or under the request of a creditor, to object to the debtor's discharge on the grounds of the debtor's lack of cooperation, dishonesty or other wrongful conduct. The Commission recommends that under such circumstances the court should be empowered to suspend the discharge pending a further investigation of the debtor's affairs, or to extend the discharge waiting period for a period of a further two years. The Commission recommends that where a debtor entering the bankruptcy process has previously availed of bankruptcy discharge, a presumption of dishonesty or wrongdoing should exist, but that this presumption should be capable of being rebutted where the debtor proves to the court that he or she has acted honestly and responsibly, or where the Official Assignee/Personal Insolvency Trustee, having examined the debtor's affairs, provides the court with a certificate to that effect. [Paragraph 3.63]

7.101 The Commission recommends that, as part of the introduction of an automatic discharge from bankruptcy, the condition for discharge under section 85(4) of the 1988 Act that all the expenses, fees, costs and preferential payments must be paid before a debtor may be discharged, should be abolished. [Paragraph 3.88]

7.102 The Commission recommends that (while ultimately this a policy matter for the Oireachtas) the number of priority debts under the bankruptcy system should be significantly reduced, and that Revenue debts should no longer be given preferential status. [Paragraph 3.94]

7.103 The Commission recommends that, as a counterpoint to the introduction of an automatic discharge after a period of three years, procedures comparable to the restriction and disqualification of culpable directors of insolvent companies should be introduced into the bankruptcy regime as a means of sanctioning bankrupts who have been found to have acted dishonestly and/or irresponsibly, while not subjecting honest and responsible debtors to such sanctions. [Paragraph 3.110]

7.104 The Commission recommends the introduction of a process whereby a debtor's petition for bankruptcy could be processed, and an order of bankruptcy could be made, administratively, without recourse to court proceedings. The administrative decision-making process could then be made subject to a review process in the courts, in order to reinforce the protection of the rights of debtors and creditors. Applications for bankruptcy could also be made electronically in order to lower the costs of bankruptcy proceedings. [Paragraph 3.129]

7.105 The Commission recommends that the provisions of section 45(1) of the Bankruptcy Act 1988 providing for the exemption of certain assets of the debtor from liquidation should be amended to reflect

modern reasonable living standards, and should mirror those proposed in this Report for Debt Settlement Arrangements. [Paragraph 3.135]

## **D Enforcement of Judgments: Institutional and Structural Reform**

### **(1) Debt Enforcement Office: Structure**

7.106 The Commission recommends that the Debt Enforcement Office should take the form of an office modelled on the Office of the Collector General of the Revenue Commissioners, which engages in comprehensive supervision and management of the enforcement activities of the Revenue Sheriffs. The Commission recommends that the office should be responsible for the centralised oversight and management of the entire enforcement system nationwide, as well as providing mechanisms for resolving complaints arising in respect of enforcement activities. [Paragraph 4.28]

7.107 The Commission recommends that private sector actors should be responsible, under the supervision and management of the Debt Enforcement Office, for performing the actual work of collecting sums owed from debtors through the various enforcement mechanisms such as execution against goods and garnishee orders. The Commission recommends that these private sector actors, provided they meet conditions specified by the Debt Enforcement Office, should be appointed through an open and competitive tendering system and should be remunerated on a poundage or commission basis, retaining a certain portion of any amounts collected. The Commission recommends that a single position of Enforcement Officer should be established in each of a specified number of geographical areas. The Commission recommends that these positions of enforcement officers should be capable of being filled by existing Sheriffs and Revenue Sheriffs, but that the positions should not necessarily be limited to these existing officers. [Paragraph 4.29]

7.108 The Commission recommends that fees should be payable by judgment creditors when applying for the enforcement of a court judgment, and that these fees should be used to contribute to funding the operating costs of the proposed Debt Enforcement Office. [Paragraph 4.30]

### **(2) Debt Enforcement Office: Functions**

7.109 The Commission recommends that the functions of the proposed Debt Enforcement Office should consist of the following:

- Oversight of the tendering process and the appointment of enforcement officers
- Establishment of conditions that must be met by applicants for the position of enforcement officer
  - Regard could be had to the conditions applicable to debt collection undertakings and insolvency trustees
- Management and supervision of enforcement officers
  - Monitoring of performance
  - Complaints handling (including enforcement of conduct of business rules of enforcement officers)
  - Preparation of code of practice
- Obtaining information on the debtor's means: Enforcement Information Disclosure Orders<sup>2</sup>
- Deciding whether enforcement is possible in a given case and choosing the most appropriate enforcement mechanism.<sup>3</sup>
- Establish and maintain an internal appeals mechanism for dealing with challenges to its decisions.

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<sup>2</sup> See paragraphs 4.48 to 4.64 below.

<sup>3</sup> See paragraphs 4.68 to 4.73 below.

- Ensure that an enforcement order is adequately implemented (monitoring performance of enforcement officer in a given case).
- Maintain register of judgments and enforcement proceedings.<sup>4</sup> [Paragraph 4.31]

### **(3) Information on Debtors' Means**

7.110 The Commission recommends that the procedures for obtaining information concerning the debtor's financial circumstances via declarations of the debtor should be comprehensively reformed. The Commission recommends that the reformed procedure should include the following elements:

- The Debt Enforcement Office should communicate with the debtor, indicating that an enforcement application has been made, and requiring the debtor to complete a Standard Financial Statement within a specified period;
- If the debtor does not comply with this obligation, the local enforcement officer should be permitted/directed to visit the home of the debtor for the purposes of interviewing the debtor as to his or her means, and completing the Standard Financial Statement. The enforcement officer should be permitted to dispense with this visit where reasonable grounds to believe that the process would be unsuccessful or unjustified, for example due to impracticalities, unjustifiable cost, or a lack of debtor cooperation;
- If this procedure is unsuccessful, the local enforcement officer should be empowered to request the debtor to attend the office of the Enforcement Officer, where the debtor must make a statutory declaration as to his or her means. This examination should be held in private, but the judgment creditor should be entitled to attend in order to question the debtor;
- It should be a criminal offence for the debtor to make a statement that he or she knows to be untrue, to conceal knowingly information or documents, or to produce false documents knowingly.
- The Commission recommends that following this initial interview/examination process, the enforcement officer should make a report of the information gathered to the Debt Enforcement Office for the purposes of facilitating the office in making a decision as to the appropriate method of enforcement. This report should contain a recommendation of the officer regarding the most appropriate method of enforcement, if any, in the particular case. The report should also indicate whether the enforcement officer is of the opinion that further information is required, and whether the enforcement officer has reasonable grounds to be of the opinion that further relevant information may be obtained through accessing tax or social welfare databases, credit history or bank records. Creditors and debtors should be empowered to challenge any factual statements made in the enforcement officer's report, and to make representations as to the most appropriate method of enforcement.
- The Commission recommends that detailed procedural rules regarding the interview and/or examination of debtors by enforcement officers, and the contents of the enforcement officer's report, should be specified in a Code of Practice prepared and published by the Debt Enforcement Office. [Paragraph 4.47]

7.111 The Commission recommends that, subject to a consideration of the requirements of data protection legislation and the protection of debtors' right to privacy, the Debt Enforcement Office should be permitted under certain conditions to make an Enforcement Information Disclosure Request requesting a Government department (and/or the Revenue Commissioners) or requiring another specified person, to disclose specified information concerning the debtor necessary for the effective enforcement of a judgment. The conditions under which such a Request could be made should include a finding by the Debt Enforcement Office that it is reasonably necessary for the effective enforcement of a judgment and that other less restrictive mechanisms have failed or are inappropriate. The Commission recommends that local enforcement officers should include in their reports their opinions as to whether such a request

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<sup>4</sup> See paragraphs 4.76 to 4.81 below.



is necessary. The Commission recommends that creditors should be permitted to make submissions to the Debt Enforcement Officer requesting that such a Request should be made. [Paragraph 4.60]

7.112 The office should be empowered to make an Enforcement Information Disclosure Request for specified data to Government departments such as the Department of Social Protection and the Revenue Commissioners. The information capable of being obtained in this manner should be limited to categories such as the following:

- the full name of the debtor;
- the address of the debtor;
- the date of birth of the debtor;
- the PPS number of the debtor;
- whether or not the debtor is employed;
- the name and address of the employer (if the debtor is employed).

The Commission recommends that other residual categories of information, such as the amount of income being received by the debtor from his or her employment or in social welfare benefits, should be specified in secondary legislation. Secondary legislation should in this regard follow the principles of proportionate enforcement and the least invasive interference with the privacy rights of debtors as is necessary in order to achieve the aim of effective enforcement of court judgments. [Paragraph [Paragraph 4.61]

7.113 The Commission recommends that the Debt Enforcement Office should also be empowered to make Enforcement Information Disclosure Requests requiring other bodies such as banks, credit unions and credit reporting companies to disclose specified information concerning the debtor's means. Secondary legislation should be enacted to specify the details of the information capable of being disclosed under such an order, along similar lines to the categories listed in the preceding paragraph. The recipient of such a Request should be obliged to obey, except where circumstances mean that it would be impossible to do so, or that it would be unreasonable to require the recipient to do so. [Paragraph 4.62]

7.114 The Commission recommends that the information received in response to a Request should not be passed by the Debt Enforcement Office to a creditor, but should be used by the Debt Enforcement Office to decide what method of enforcement, if any, is appropriate in the given case. Information should only be disclosed to an enforcement officer to the extent that it is necessary for the implementation of the enforcement order made by the office. This would for example involve the disclosure to the enforcement officer of the debtor's employment details in order to facilitate an attachment of earnings, or the disclosure of the debtor's bank account details in order to facilitate an attachment of the debtor's bank account. [Paragraph 4.63]

7.115 The Commission recommends that secondary legislation should be introduced to specify the details of the procedures for information sharing. The Commission recommends that primary legislation should provide for a criminal offence of the unauthorised use or disclosure of information obtained under an Enforcement Information Disclosure Request. [Paragraph 4.64]

#### **(4) Decision as to the Appropriate Enforcement Mechanism**

7.116 The Commission recommends that the choice of enforcement method should be allocated to the Debt Enforcement Office. The Commission recommends that the local enforcement officer should include his or her opinion as to the appropriate method of enforcement in the report provided to the Debt Enforcement Office, and his or her opinion as to whether an Enforcement Information Disclosure Order/Request is required to make a decision as to the appropriate method. The Commission recommends that creditors and debtors should be entitled to make representations to the office as to the appropriate enforcement mechanism, and that creditors should be entitled to argue that an Enforcement Information Disclosure Order/Request is necessary for effective enforcement. The Commission recommends that creditors and debtors should be permitted to appeal the decision of the office through the office's internal appeals mechanisms, and that the decision of the enforcement office should

ultimately be capable of being challenged in the courts by a party who remains aggrieved after this internal appeals process. [Paragraph 4.72]

7.117 The Commission recommends that enforcement orders made by the central Debt Enforcement Office should be implemented by the local enforcement officer in the debtor's region. [Paragraph 4.73]

#### **(5) Register of Judgments**

7.118 The Commission recommends that a comprehensive register should be established and maintained by the Debt Enforcement Office to record specified information in relation to:

- all court judgments in respect of which an enforcement application has been brought;
- all enforcement proceedings in respect of which a stay of enforcement or certificate of unenforceability has been issued on the grounds of the inability of the debtor to pay the amount owed;
- all enforcement orders made by the Debt Enforcement Office, subject to the removal of information relating to such orders after a specified period of time following the satisfaction of the order. [Paragraph 4.79]

7.119 The Commission recommends that the register of judgments and enforcement proceedings should be publicly accessible and searchable. The Commission recommends that a fee should be payable in order to access the register, in order to deter spurious searches and to assist in meeting the costs of maintaining the register. [Paragraph 4.80]

7.120 The Commission recommends that this register should be integrated with the Personal Insolvency Register discussed in previous chapters. [Paragraph 4.81]

#### **(6) General Procedural Issues**

7.121 The Commission recommends that, in order to promote the resolution of debt disputes outside of the legal process in appropriate cases, the recommendations for a Pre-Action Protocol in consumer debt claims and Model Rules of Court proposed in the Commission's Interim Report should be implemented at High Court, Circuit Court and District Court levels. [Paragraph 4.91]

7.122 The Commission recommends that a court judgment should be a necessary precondition for an application to the Debt Enforcement Office for enforcement action. [Paragraph 4.97]

7.123 The Commission recommends that enforcement proceedings should be commenced by a single application procedure, irrespective of the method of enforcement which is ultimately chosen by the Debt Enforcement Office, and irrespective of the enforcement mechanism favoured by the judgment creditor in the given case. The Commission recommends that the application procedure should however permit judgment creditors to indicate which enforcement mechanism they consider should be adopted in a given case, and to provide the grounds on which they consider that mechanism to be appropriate. The Commission recommends that secondary legislation should specify the procedure for making an application for the enforcement of a judgment, as well as the documentation required. [Paragraph 4.104]

7.124 The Commission recommends that the procedure for enforcement under the proposed new system should require the submission of reports by the enforcement officers to both the Debt Enforcement Office and the judgment creditor within a specified period detailing the progress of the enforcement process and the efforts made to enforce the judgment debt in question. [Paragraph 4.108]

7.125 The Commission recommends that the procedure for enforcement under the proposed new system should require the submission of reports by the enforcement officers to both the Debt Enforcement Office and the judgment creditor within a prescribed period of time detailing the progress of the enforcement process. [Paragraph 4.109]

## **E Enforcement of Judgments: Reform of Individual Enforcement Mechanism**

### **(1) Instalment Orders**

7.126 The Commission recommends that an express statutory rule should be included in legislation to the effect that the Debt Enforcement Office, when deciding on the appropriate method of enforcement in a given case, should have regard to the principle of proportionality and the need to ensure that the enforcement method chosen is the mechanism that is least restrictive of the debtor's rights in the given case. [Paragraph 5.16]

7.127 The Commission recommends that suspended execution orders against goods, garnishee orders and attachment of earnings orders should be capable of being made in conjunction with instalment orders, so that these suspended orders could come into effect automatically in the case of a failure to comply with an instalment order. [Paragraph 5.18]

7.128 The Commission recommends that a procedure should be introduced whereby a debtor who receives notice of impending legal proceedings for the recovery of a debt may admit the claim and make an offer to pay the amount owed by instalments, with such offer capable of being made into a consensual court order on the agreement of the creditor. The Commission recommends that the introduction of this procedure should build upon the Pre-Action Protocol in Consumer Debt Cases proposed by the Commission in its Interim Report on Personal Debt Management and Debt Enforcement. The Commission recommends that Rules of Court should be introduced to specify the detailed format of this procedure. [Paragraph 5.20]

7.129 The Commission recommends that where a debtor's financial circumstances are such as to permit his or her multiple judgment debts to be repaid by instalment orders within a reasonable period (of five years), a consolidated instalment order mechanism should be introduced, and that these consolidated orders should provide for the sharing of the instalment payments made by the debtor amongst his or her relevant judgment creditors on a pro rata basis. [Paragraph 5.26]

### **(2) Attachment of debts Orders (Garnishee Orders)**

7.130 The Commission recommends that the term "garnishee order" should be replaced with the term "attachment of debts order". [Paragraph 5.40]

7.131 The Commission recommends that, as part of the introduction of a comprehensive new system for the enforcement of judgments, the law relating to attachment of debts orders should be consolidated into a single set of legislative provisions. The Commission recommends that the respective scopes of attachment of debts orders and attachment of earnings orders should be clarified, with Order 38 Rule 10 of the Circuit Court Rules 2001 to 2010 (or an equivalent replacement procedural rule under the new non-court-based enforcement system) amended to achieve this result. [Paragraph 5.42]

7.132 The Commission recommends that it should be possible for the Debt Enforcement Office, subject to the principles of appropriate and proportionate enforcement, to make an attachment of debts order without first requiring enforcement by execution against the debtor's goods to be attempted. [Paragraph 5.47]

7.133 The Commission recommends that legislation should ensure that attachment of debts orders do not deprive debtors of the funds necessary to maintain a minimum standard of living for debtors and their dependents. The Commission recommends that the most appropriate means of achieving this aim is to provide that a minimum balance in the debtor's bank account should be protected from attachment, and that the level of this balance should be equivalent to the level of monthly income exempted from attachment under an attachment of earnings order. The Commission recommends that a similar approach should apply where the debt being attached is one other than a bank account balance, and that the Debt Enforcement Office should in all cases ensure that the debtor's income is not reduced below the level of income exempted under an attachment of earnings order. [Paragraph 5.53]

7.134 The Commission recommends that a debt owed to the judgment debtor in the form of a bank account held jointly by the judgment debtor with another should be capable of being attached in order to satisfy the judgment debt. [Paragraph 5.57]

7.135 The Commission recommends that the amount of a balance held in a joint bank account capable of being attached should be limited to 50% (or a proportionately lower amount where the account is held jointly by more than two people). [Paragraph 5.58]

7.136 The Commission recommends that a presumption should exist to the effect that a bank account held jointly is held in 50-50 shares, subject to the right of the non-debtor account holder to provide evidence that the funds in the account are proportioned differently. The Commission recommends that the Debt Enforcement Office should notify the non-debtor account holder of its provisional decision to issue an attachment of debts order in respect of the account, and that the non-debtor account holder should then be given the opportunity, within a specified deadline, to provide evidence to the office that the account is held otherwise than in equal shares. [Paragraph 5.59]

7.137 The Commission recommends that a procedure should then exist for the determination, by the Debt Enforcement Office, of the shares in which the account is held before a final order is made by the office. The Commission recommends that the appropriate procedural rules should be specified in secondary legislation, with an emphasis on ensuring that the process is carried out in an efficient and time-effective manner. [Paragraph 5.60]

### **(3) Receiver by Way of Equitable Execution**

7.138 The Commission recommends that there should be no requirement for legal execution to be attempted before equitable execution is permitted, but that a receiver should be appointed by way of equitable execution only where it is appropriate and proportionate in a given case. [Paragraph 5.65]

7.139 The Commission recommends that the law relating to the appointment of a receiver by way of equitable execution should be codified in legislation, and that the power to appoint a receiver should be given to the proposed Debt Enforcement Office. [Paragraph 5.67]

### **(4) Attachment of Earnings**

7.140 The Commission recommends that an attachment of earnings order mechanism should be introduced for the enforcement of all judgment debts against individuals receiving regular income. [Paragraph 5.91]

7.141 The Commission recommends that under the proposed attachment of earnings system, the amount of a debtor's income that may be subject to attachment should be limited in order to ensure that the debtor has sufficient means to maintain a reasonable standard of living. [Paragraph 5.94]

7.142 The Commission suggests that the reasonable income and expenditure guidelines proposed for the calculation of repayments under Debt Settlement Arrangements should be used by the Debt Enforcement Office when making assessments as to the appropriate protected income level in a given case, subject to the inclusion of discrete considerations that may be relevant specifically to attachment of earnings orders. [Paragraph 5.97]

7.143 The Commission recommends that legislation should provide that any employer who dismisses an employee or injures the employee in his or her employment, or alters the employee's position to his or her prejudice, by reason of the circumstances that an attachment of earnings order has been made in relation to the employee or that the employer is required to make payments under such an order in relation to the employee shall be guilty of an offence. [Paragraph 5.105]

7.144 The Commission recommends that legislation should empower employers to deduct a prescribed sum from the debtor's pay each time a deduction under an attachment of earnings order is made. The Commission recommends that this sum should be prescribed in secondary legislation, and should be set at a level reflecting the actual costs incurred by employers in making deduction. The Commission recommends that employees should be notified in writing of the making of any such deductions. [Paragraph 5.108]

7.145 The Commission recommends that if possible employers should be permitted to pay all deductions under attachment of earnings orders into a single office, in order to reduce the cost of administering such orders. The Debt Enforcement Office could then be responsible for distributing the collected funds to the relevant creditors. [Paragraph 5.109]

7.146 The Commission recommends that a debtor and creditor should be entitled to apply to the Debt Enforcement Office for a variation of an attachment of earnings order where the debtor's circumstances change materially. The Commission recommends that a debtor should be empowered to apply for the suspension of an attachment of earnings order where his or her circumstances have changed rendering him or her temporarily unable to comply with the order. The Commission recommends that both debtors and creditors should be provided with readily understandable documentation in plain language containing information on their entitlement to apply to the Debt Enforcement Office for a variation or suspension of an attachment of earnings order, and on the types of circumstances in which a variation or suspension is possible. [Paragraph 5.115]

7.147 The Commission recommends that the Debt Enforcement Office should be empowered to review an attachment of earnings order of its own motion where an application to enforce another judgment debt is made against a debtor who is subject to an attachment of earnings order. [Paragraph 5.116]

7.148 The Commission recommends that where a review of the debtor's changed circumstances (either on application of the debtor or creditor, or on the office's own motion) concludes that the debtor no longer possesses the means to satisfy a judgment debt through an attachment of earnings order, the Debt Enforcement Office should be empowered to discharge an order and provide the debtor with information of the relevant insolvency procedures that may be open to him or her. [Paragraph 5.117]

7.149 The Commission recommends that, in the first place, a duty should be placed on a debtor who is subject to an attachment of earnings order to inform the Debt Enforcement Office of any change in his or her employment status. The Commission recommends that a duty should also be placed on the debtor's new employer to notify the Debt Enforcement Office that it is the debtor's new employer where the new employee is subject to an attachment of earnings order. [Paragraph 5.121]

7.150 The Commission recommends that where attachment of earnings deductions have stopped, and the debtor has failed to comply with a request for the voluntary disclosure of details concerning his or her employment status, a procedure should be introduced to allow information held in the records of the Revenue Commissioners and the Department of Social Protection to be shared with the Debt Enforcement Office. This recommendation is made subject to the requirements of data protection law and the capability of information technology systems to allow such data sharing. [Paragraph 5.122]

7.151 The Commission recommends that where a debtor's financial circumstances are such as to permit his or her multiple judgment debts to be repaid by attachment of earnings orders within a reasonable period (of five years), a consolidated attachment of earnings order mechanism should be introduced. The Commission recommends that a consolidated attachment of earnings order should consist of the distribution of a single amount deducted from the debtor's income amongst the relevant creditors on a pro rata basis. [Paragraph 5.126]

7.152 The Commission recommends that only where deductions from a debtor's income for the payment in full of an attachment of earnings order made in respect of a family maintenance obligation leave sufficient income for further deductions should attachment of earnings orders for the enforcement of other judgment debts be capable of being made. [Paragraph 5.130]

#### **(5) Goods Seizure Order (Execution against Goods incl. Charging and stop orders)**

7.153 The Commission recommends that guidelines should be prepared by the Debt Enforcement Office indicating the types of circumstances in which the use of execution against goods would be appropriate and proportionate. Such guidelines could include factors such as the following:

- Whether other more appropriate and/or less restrictive methods of enforcement are likely to be successful in recovering a reasonable amount of the judgment debt owed within a reasonable time;
- Whether the proceeds raised from the sale and seizure of a debtor's assets would exceed the costs incurred in the process by a reasonable amount. [Paragraph 5.140]

7.154 The Commission recommends that a Code of Practice should be introduced to regulate the conduct of enforcement officers when carrying out the process of execution against goods. The

Commission recommends that the proposed Code of Practice could be modelled on the current code operated by the Revenue Commissioners regulating the enforcement activity of Revenue Sheriffs, while consideration should also be given to best practice in other countries when drafting the code. The Commission recommends that the code should be drafted by the Debt Enforcement Office in collaboration with enforcement officers and representatives of creditor and debtor organisations. [Paragraph 5.144]

7.155 The Commission recommends that the operation of the code should be overseen by the Debt Enforcement Office, which could be responsible for handling complaints of debtors or creditors in respect of the conduct of enforcement officers when carrying out the functions of execution against goods. The Code of Practice should establish detailed procedures for handling complaints, ensuring the transparency and impartiality of the process. [Paragraph 5.145]

7.156 The Commission recommends that the procedure known as “execution against goods” should be renamed “seizure and sale of goods”. The Commission recommends that “orders of fieri facias”, and “execution orders against goods” should be abolished, and replaced with a single order to be made by the Debt Enforcement Office known as a “goods seizure order”. [Paragraph 5.149]

7.157 The Commission recommends that the report to be prepared by a local enforcement officer and presented to the creditor, debtor and Debt Enforcement Office should be expressed in plain language, and should avoid the use of Latin terms such as “nulla bonna”. [Paragraph 5.150]

7.158 The Commission recommends that an application for enforcement made to the Debt Enforcement Office should bind the property in the goods of the judgment debtor as from the time when the application is delivered to the Debt Enforcement Office. The Commission recommends, however, that this binding effect should not prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he or she acquired his or her title notice that such an application or any other application by virtue of which the goods of the execution debtor might be seized had been delivered to the Debt Enforcement Office. The Commission recommends that such binding effect should not apply to any goods of the debtor that are protected as being exempt from seizure. [Paragraph 5.154]

7.159 The Commission recommends that primary legislation should establish a general rule that any assets of the debtor reasonably necessary to ensure that the debtor and his or her dependents may maintain a reasonable standard of living should be exempt from seizure. [Paragraph 5.163]

7.160 The Commission considers that certain basic exemptions should be established in legislation. The Commission recommends that this could be achieved by specifying certain categories of exemptions in primary legislation, while providing more detailed provisions or guidance, including limits on the monetary value of the exempted goods, in secondary legislation. The Commission suggests that the categories of exemptions specified in secondary legislation could include the following:

- Such household goods as are necessary for maintaining a reasonable standard of living for the debtor and his or her family;
- Such material items as are necessary to the debtor for use personally by him in his employment, business, profession or trade. [Paragraph 5.164]

7.161 The Commission recommends that secondary legislation should provide further detail as to the content of these categories, and should place monetary limits on the value of the goods that are exempted. The Commission recommends that such monetary limits should be index-linked or capable of being adjusted readily in order to ensure that their real values remain consistent over time. [Paragraph 5.165]

7.162 The Commission recommends that the law relating to charging orders against stocks or shares and stop orders should be consolidated into a single piece of legislation, as part of the introduction of the proposed new system for the enforcement of judgments. [Paragraph 5.170]

7.163 The Commission recommends that legislation should provide that a walking possession arrangement should come into existence where an enforcement officer identifies certain goods as having been seized, and reaches an agreement in writing with the debtor that the goods have been seized but

that the debtor is permitted to retain custody of them, subject to the condition that the debtor agrees not to remove or dispose of them, nor to permit anyone else to do so, before the judgment debt in question is paid. Where these conditions have been met, legislation should provide that the enforcement officer will not be deemed to have abandoned the goods. [Paragraph 5.176]

7.164 The Commission recommends that the current rules on the seizure of goods owned by third parties should be codified. The Commission recommends that the primary rule should be that only the goods of the debtor should be capable of being seized. The Commission however recommends that jointly-owned property should be capable of being seized subject to the protection of the interests of joint owners. [Paragraph 5.190]

7.165 The Commission recommends that an enforcement officer should be entitled to presume that goods found in the debtor's possession and/or on the debtor's premises are capable of being seized, unless the enforcement officer knows or ought to know that the goods are not solely owned by the debtor. The Commission recommends that the enforcement officer should make reasonable enquiries as to ownership of any person present at the place in which the goods are situated. Provided that these conditions are met, the Commission recommends that the enforcement officer should not incur liability for seizing third party goods. [Paragraph 5.191]

7.166 The Commission recommends that third parties holding interests in seized goods should be compensated for their interests by an enforcement officer in priority to the payment of the debt to the creditor and the payment of the costs of seizure and sale. [Paragraph 5.192]

7.167 The Commission recommends that third parties should be entitled to prevent the sale of jointly owned goods or goods in exceptional circumstances by applying to the Debt Enforcement Office and demonstrating that it would be unduly harsh on their interests to allow the sale to continue. [Paragraph 5.193]

7.168 The Commission recommends that where a debtor has a right to sell goods upon making a payment to a third party, an enforcement officer should be entitled to sell those goods provided that the judgment creditor pays this sum to the third party. The Commission also recommends that enforcement officers should be empowered to pay any balance owed under hire or leasing agreements in order to obtain a clear title to the goods held under such an agreement in advance of sale. [Paragraph 5.194]

7.169 The Commission recommends that a procedure should be put in place to give a legal basis to the existing practice of enforcement officers informally delivering goods to third parties claiming an interest in the goods on the production of receipts or similar proof of ownership. The Commission also recommends that a more formal, but non-judicial interpleader procedure should be established to adjudicate upon disputes as to ownership which cannot be resolved in this informal manner. The Commission recommends that parties should remain entitled to have recourse to court proceedings however. [Paragraph 5.197]

7.170 The Commission recommends that a third party who makes a vexatious claim with the intention of frustrating enforcement proceedings should be liable for any costs incurred by any party as a result of the vexatious claim. The Commission also recommends that a third party claiming an interest in seized goods should be required to swear an affidavit to this effect, with the usual sanctions for making a false statement in an affidavit being applicable. [Paragraph 5.198]

7.171 The Commission recommends that enforcement agents should retain a right of forcible entry to debtors' premises. The Commission recommends however that such a right should only be exercisable under a warrant of the court, with such warrant issued by the court only where it is satisfied that forcible entry is reasonably necessary for the enforcement of the judgment debt in question. [Paragraph 5.210]

7.172 The Commission recommends that legislation should provide for measures to facilitate access to multi-unit developments by enforcement officers. [Paragraph 5.212]

## **(6) The Role of Imprisonment in the Enforcement of Judgments**

7.173 The Commission recommends that, subject to the implementation of the Commission's other recommendations for the improvement of the efficacy of the enforcement system, all procedures for the imprisonment of debtors for failure to repay a judgment debt should be abolished. The Commission

recommends that the Debtors (Ireland) Act 1872 and the Enforcement of Court Orders Acts 1926 to 2009 should be repealed in the context of a reformed system of court-based enforcement. The Commission also recommends that this should not alter or affects the law of contempt of court. The Commission also recommends that a person should continue to be criminally liable where he or she wilfully refuses to pay a personal debt arising out of a court order to that effect, but that such a person should be liable on summary conviction to a community service order under the Criminal Justice (Community Service) Act 1983. [Paragraph 5.234]

## **F Regulation of Debt Collection Undertakings**

7.174 The Commission recommends that a system for the licensing and regulation of the debt collection industry should be introduced in Ireland. [Paragraph 6.76]

### **(1) Definitions**

7.175 The Commission recommends that the following definition of “debt collection undertaking” should be adopted:

“Debt collection undertaking” means any person who engages in debt collection activities. [Paragraph 6.83]

7.176 The Commission recommends that the following definition of “debt collection activities” should be adopted:

“Debt collection activities” includes the following:

- Collecting, offering, undertaking or attempting to collect, directly or indirectly, debts owed or asserted to be owed or due by a debtor to a creditor;
- Soliciting accounts for collection;
- Communicating or undertaking, offering or attempting to communicate, debt collection demands to debtors by post, telephone or electronic means;
- Collecting a debt owed to that person, using a name or other artifice that indicates that another party is attempting to collect the debt; or
- Collecting, attempting, undertaking or offering to collect a debt owed by a debtor to the collecting person where the debt was purchased by that person at a time when it was already in default. [Paragraph 6.84]

### **(2) Licensing**

7.177 The Commission recommends that legislation should be introduced requiring all persons to obtain a debt collection licence in order to carry on business as a debt collection undertaking and/or to engage in debt collection activities. The Commission recommends that legislation should provide that any person who, without holding a debt collection licence, carries on business as a debt collection agency or holds himself/herself/itself out as a debt collection undertaking commits an offence. The Commission recommends that legislation should provide expressly that any monies collected by or paid over to an unlicensed debt collection undertaking are liable to be refunded to the person who has paid over such monies. [Paragraph 6.86]

7.178 The Commission also recommends that licences should become due for renewal at regular intervals, so that the fitness of an undertaking to engage in debt collection activities is regularly reassessed. Thus a licence granted to a debt collection undertaking should be valid for a period of 24 months. [Paragraph 6.87]

7.179 The Commission recommends that debt collection licences should become due for renewal at regular intervals, and should remain valid only for a period of 24 months. [Paragraph 6.88]



### **(3) Licensing Authority**

7.180 The Commission recommends that a body should be assigned the role of the regulatory authority responsible for supervising the proposed regulatory regime for the debt collection industry. [Paragraph 6.94]

7.181 The Commission recommends that as part of the regulatory powers given to the body ultimately chosen, legislation should provide for a procedure for the body to refer suspected serious criminal conduct on the part of debt collection undertakings to the Garda Síochána. [Paragraph 6.95]

### **(4) Conditions for Obtaining a Licence**

7.182 The Commission recommends that an applicant for a debt collection licence must demonstrate that it is, in the opinion of the regulatory authority, a fit and proper person to carry on the business of a debt collection undertaking. [Paragraph 6.103]

7.183 The Commission recommends that the regulatory authority should be permitted take into account any circumstances which appear relevant in assessing a licence application, and should in particular have regard to factors such as whether the applicant has:

- Contravened any provisions of this Act [the Act establishing the debt collection regulatory regime] or of Regulations made under it;
- Committed any offence under the Non-Fatal Offences against the Person Act 1997 or the Consumer Credit Act 1995 or any other offence involving fraud, dishonesty or violence;
- Contravened any provisions of consumer protection law, either in Ireland or in another Member State of the European Economic Area;
- Practised discrimination on grounds of sex, colour, race or ethnic or national origins in, or in connection with, the carrying on of any business, or
- Engaged in business practices appearing to the regulatory authority to be deceitful or oppressive, or otherwise unfair or improper (whether unlawful or not) [Paragraph 6.104]

7.184 The Commission recommends that an applicant should also be required to demonstrate reasonably a capacity to comply with the substantive obligations imposed on debt collection undertakings by legislation and codes of practice; and that it has sufficient financial resources to conduct business as a debt collection undertaking. [Paragraph 6.105]

7.185 The Commission recommends that an applicant should also be required to provide a Revenue tax clearance certificate. [Paragraph 6.106]

7.186 The Commission recommends that an applicant should be required to demonstrate that it has registered as a data controller under the Data Protection Acts 1988 and 2003; or to commit to registering on being granted a licence. [Paragraph 6.107]

### **(5) Exemptions from Licensing Requirements**

7.187 The Commission recommends that the following persons should be excluded from the definition of “debt collection undertaking”, and hence from the requirement to obtain a debt collection licence:

- i) A person who is the creditor under the agreement giving rise to the debt which that person seeks to collect; or any employee or officer of such creditor.
- ii) A person who collects debts for another person, both of whom are related by common ownership and/or affiliated by corporate control, if the person collecting debts does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts.
- iii) A person who is licensed by the Financial Regulator and who collects debts arising as a result of the activities which it is licensed to perform by the Regulator.

- iv) A person who is licensed by a regulatory authority [approved by the debt collection regulatory authority as a “competent regulatory authority”] under statutory powers and who collects debts arising as a result of the activities which it is licensed to perform by that regulatory authority.
- v) An officer or employee of the State to the extent that collecting or attempting to collect any debt is in the performance of his or her official duties. [Paragraph 6.120]

7.188 Notwithstanding category i) above, the Commission recommends that a person who collects a debt on its own behalf should be categorised as a debt collection undertaking and should not be exempt from the requirement to obtain a licence if:

- the debt being collected was in default when the person acquired it, or
- if the debt was acquired for the principal purpose of collecting the debt for commercial gain. [Paragraph 6.121]

7.189 The Commission recommends that the following additional persons should not be considered to fall within the definition of “debt collection undertaking”, and so should be exempt from the requirement to obtain a debt collection licence:

- i) A person that collects a debt that has been obtained by that person as a secured party in a commercial credit transaction involving the original creditor.
- ii) A person that purchases a debt or debts through acquiring or merging with a business in a transaction that includes the transfer of accounts receivable.
- iii) A business that acquires a debt or debts through the seizure of accounts receivable under a security agreement, or

7.190 A person to whom the contract that gave rise to the debt was assigned for the purpose of financing the transaction. [Paragraph 6.122]

#### **(6) Substantive Obligations of Licence Holders**

7.191 The Commission recommends that legislation should require the debt collection regulatory authority to publish, following consultation with industry representatives, a statutory code specifying in detail the standards and obligations to be observed by debt collection undertakings, and prohibiting certain unfair practices. [Paragraph 6.132]

7.192 The Commission recommends that the content of the proposed statutory code should be a decision for the regulatory authority, but that it should at least include provisions relating to the following areas:

- Communication between the debt collection undertaking and the debtor, and the employers, relatives and friends of the debtor (subject to the provisions of sections 45, 46 and 49 of the Consumer Credit Act 1995).
- Conduct of undertaking employees in visiting debtors’ premises.
- Confidentiality standards.
- Rules regarding tracing and efforts to ascertain a debtor’s location.
- Complaints handling procedures.
- General prohibitions on false, misleading or deceptive practices.
- Furnishing of receipts and reports to clients.
- Handling of client money and the maintenance of trust accounts.
- Accounting and reporting practices. [Paragraph 6.133]

7.193 The Commission recommends that legislation should empower the regulatory authority to regulate the fees charged to debtors by debt collection undertakings. The Commission also recommends it be an offence for a licence holder to carry on licensed activity under a name not specified in the licence. [Paragraph 6.134]

7.194 The Commission recommends that legislation should create a criminal offence of knowingly engaging or using the services of a debt collection undertaking that is not licensed, or knowingly selling/assigning a debt to such an unlicensed undertaking where the creditor has reason to believe that the unlicensed undertaking is purchasing the debt for the purposes of collecting that debt. [Paragraph 6.135]

**(7) Enforcement**

7.195 The Commission recommends that as part of the regulatory powers given to the debt collection regulatory authority, legislation should provide for a procedure for the authority to refer suspected serious criminal conduct on the part of debt collection undertakings to the Gardaí Síochána. [Paragraph 6.139]

7.196 The Commission recommends that as part of the regulatory powers given to the regulatory authority, legislation should empower the authority to prosecute summarily offences contained in sections 45, 46 and 49 of the Consumer Credit Act 1995, as well as any new regulatory offences contained in the new legislation. [Paragraph 6.140]

7.197 The Commission recommends that any money advanced to a person carrying on debt collection activities without a debt collection licence should be liable to be refunded to the payer. [Paragraph 6.142]

7.198 The Commission recommends that any contracts or contractual terms that contravene legislative or regulatory requirements relating to debt collection activities should be unenforceable, unless the regulatory authority has made an order permitting enforcement. [Paragraph 6.143]

7.199 The Commission recommends that the regulatory authority's existing investigatory powers and administrative sanctions mechanisms under Part IIIC of the Central Bank Act 1942 should be applicable in the event of suspected breaches of regulatory and/or legislative requirements by debt collection undertakings. The Commission also recommends that summary proceedings in relation to an offence may be brought and prosecuted by the Financial Regulator. [Paragraph 6.144]

7.200 The Commission recommends that debt collection undertakings, once regulated by the debt collection regulatory authority, should fall under the remit of the Financial Services Ombudsman. The Commission recommends that legislation should provide for a procedure for the Financial Services Ombudsman to refer cases of suspected serious criminality to the Gardaí Síochána. [Paragraph 6.146]



**APPENDIX A: COMPARATIVE OVERVIEW OF DEBT SETTLEMENT/REPAYMENT PLAN PROCEDURE**



Country	Procedure	Supervisory Body	Access conditions and Income/Asset/Indebtedness Thresholds	Negotiator	Administrator/Trustee	Regulation of Trustees	Terms Imposed v Terms Agreed	Duration	Discharge?	Failure rate
England and Wales	Individual Voluntary Arrangement (Part VIII of the Insolvency Act 1986)	Court	No thresholds. The Straightforward Consumer Individual Voluntary Arrangement Protocol expressly provides that the level of debt is not a consideration in assessing whether a case is a straightforward consumer IVA (and so suitable for the application of the procedures contained in the Protocol).	Debtor/Insolvency Practitioner	Insolvency Practitioner (private sector).	Insolvency Service and Recognised Professional Bodies (OFT) has recommended reforms.	All terms subject to creditor agreement: 75% by value of voting creditors. Rankings of preferential debts established by legislation. Voluntary protocol establishes best practices.	Subject to agreement of parties: average = 3-5 years.	Subject to agreement of parties: usually creditors agree to discharge of remaining debt after 3-5 years.	Approx 30-35%
Australia	Part IX (Consumer) Debt Agreement (Part IX of the Bankruptcy Act 1966).	Insolvency and Trustee Service Australia (ITSA)	Indebtedness: up to AU\$588,379.20 (€61,197) Debtor's assets: up to AU\$588,379.20 (€61,197) Debtor's after tax income: up to AU\$56,284.40 (€45,897)	Debtor/administrator (trustee)	Registered Administrator, or Administrator of five or fewer debt agreements (private-sector). Administrator may be friend/associate of debtor if satisfies ITSA's eligibility test.	System of registration of administrators supervised by Inspector-General in Bankruptcy (ITSA Regulation).	Creditor agreement required: 50% by value. Certain terms imposed by law: - Pari passu - Secured creditors limited to unsecured portion of claim - Creditors can't receive more than 100% of debt owed.	Subject to agreement by the parties.	Once debt agreement completed, debtor is released from all claims (s.185MA).	Approx 33%
	Part X Personal Insolvency Agreement	Insolvency and Trustee Service Australia	No thresholds	Debtor/Trustee	Registered Trustee/Insolvency Practitioner (Australia/Suitably qualified solicitor)	System of registration of trustees, supervised by Inspector-General in Bankruptcy (ITSA Regulation).	Subject to agreement of the parties: 75% in value and over 50% in number of voting creditors.	Subject to agreement by the parties.	Once debt agreement completed, debtor is released from all claims.	

Canada	Division I Consumer Proposal	Official Receiver and Office of Superintendent in Bankruptcy (OSB)	Indebtedness: up to 250,000CAD (€ 186,667.5)	Debtor and trustee administrator	Administrator; Bankruptcy Trustee	Trustee (private practitioners)	Debtor and trustee	No threshold	Official Receiver, Office of Superintendent in Bankruptcy and the Court.	Court can annul proposal if default in performance of any provision by the debtor/fraud/debtor cannot continue without injustice or undue delay. Court can also annul proposal where debtor commits an offence under the BIA.	Subject to agreement by the parties. If no objection to proposal received within 45 days of filing, proposal deemed to have been accepted by creditors. If no objection within 15 days of acceptance, proposal deemed to have been approved by court. If 25% of creditors refuse proposal within 45 days of filing, creditors' meeting must be held; simple majority of creditors then required to approve proposal.  Certain terms imposed by law: - Proposal must provide for payment of preferred claims, all fees/expenses of administrator or counsellor. - Must set out manner of distributing dividends. - Proposal deemed annulled where debtor in default in repayment for more than three months. - Proposal deemed annulled where an amendment is withdrawn or refused by the creditors or the court.	Subject to agreement by the parties: typically 3-5 years.	Subject to approval by the parties: a consumer proposal accepted does not release the consumer debtor from any particular debt or liability unless the consumer proposal explicitly provides for the compromise of that debt or liability and the creditor in relation to that debt or liability voted for the acceptance of the consumer proposal.	Approx 30%
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Section 63(1) BIA.  
Section 58 BIA.



New Zealand	Proposals Part 5, Subpart 4 of the Insolvency Act 2006.	<p>Court:</p> <p>-Proposal filed in court office in debtor's area (S328)</p> <p>-Court must approve proposal after creditors have accepted it (S333).</p> <p>-Court may vary or cancel proposal, or adjudicate the debtor bankrupt (S339).</p> <p>-Once proposal approved by courts, creditors cannot take enforcement/recovery proceedings without court's permission (S351).</p>	No threshold	Debtor and trustee	Trustee	SIO Supervisors	<p>SIO Supervisors approved by Official Assignee.</p> <p>The SIO itself must appoint a "suitable and willing person". OA may require supervisor to provide a bond to secure his or her performance of his or her obligations under the Act.</p> <p>OA may displace with appointment of a supervisor if OA thinks it appropriate (S345).</p> <p>OA may terminate appointment of supervisor on grounds of failure to supervise adequately (S346).</p> <p>Secondary legislation may fix or prescribe the amount of rates of remuneration chargeable by supervisors (S346).</p>	<p>Subject to agreement of the parties (and court approval).</p> <p>Majority in number and 75% in value of creditors who vote and are personally represented at the meeting required for proposal to be accepted (S331).</p> <p>The proposal may include all or any of the following:</p> <p>(a) an offer to assign all or any of the insolvent's property to a trustee for the benefit of the creditors;</p> <p>(b) an offer to pay the insolvent's debts by instalments;</p> <p>(c) an offer to compromise the insolvent's debts at less than 100 cents in the dollar;</p> <p>(d) an offer to pay the insolvent's debts at some time in the future;</p> <p>(e) any other offer for an arrangement for the satisfaction of the insolvent's debts.</p> <p>The proposal may include any other conditions for the benefit of the creditors and may be accompanied by a charge or guarantee (S329).</p> <p>Proposal must provide for priority payment of preferential debts, trustee's fees and costs of organising creditors meeting (S333(f)).</p> <p>Certain priorities established in legislation: S358.</p>	<p>5 specified in legislation: period of instalments may be spread over a period of:</p> <p>-Up to 3 years</p> <p>-Up to 5 years if justified by special circumstances</p>	<p>SIO may provide for payment to fall or to the extent that the OA considers practicable in the circumstances of the case (S340(b)).</p>	
	<p>Summary Instalment Orders (SIOs) (Part 5, Subpart 5 of the Insolvency Act 2006)</p>	<p>Official Assignee:</p> <p>- Official Assignee makes the SIO (S343)</p> <p>- OA may also make orders regarding the debtor's future earnings or income or regarding the disposal of goods of debtor (S344)</p> <p>- Once SIO made against a debtor, debt recovery/enforcement proceedings can only be brought with the permission of the OA.</p>	Indebtedness: up to \$120,000 (€22,090) (S343)	Not negotiated – OA imposes an order.							

France	Voluntary Procedure	Individual Over-indebtedness Commissions (Commissions de surendettement des particuliers)	No monetary thresholds.	Over-indebtedness Commission draws up a plan and propose it to debtor's creditors.		Where Over-indebtedness Commission's proposed plan has been rejected, Commission can make recommendations to court for either "ordinary" or "extraordinary" relief measures, depending on the Commission's view of the debtor's circumstances. Ordinary and extraordinary measures are specified in legislation.	Average voluntary repayment plan: 6-10 years.	No debt discharge.	
	Procedure: "Ordinary" and "Extraordinary Relief"	Individual Commissions and Court.	No monetary thresholds.	Commission makes recommendations to court for either "ordinary" or "extraordinary" debt relief measures. The court usually accepts these recommendations and makes an order to that effect.				Some discharge possible for debtors qualifying for the "extraordinary" measures. Over-indebtedness Commission has discretion as to proportion of debts to be discharged.	In 80% of cases, no repayment is made to creditors under the repayment plan.
Germany	"Good behaviour period" ("Wohlverhaltensperiode")	Court	No monetary thresholds.	No negotiation – plan terms specified in legislation and imposed by court.	Court-appointed Trustee.	Terms specified in law. All income not specified as being exempt must be distributed to creditors. Statutory exemptions are the same as those applying to debt enforcement procedures.	5 years No fallback for MNA debtors.	Yes – at end of 6 years all remaining debts discharged (with some exceptions)	In 80% of cases, no repayment is made to creditors under the repayment plan.
Sweden	Consumer debt settlement	State Enforcement Agency (Kronofogdemyndigheten) or KFM	No monetary thresholds. Access may be denied where debts incurred improperly, such as through criminal, unfair or speculative means.	No negotiation (since 2007) – KFM imposes a payment plan.	KFM administers the system – no trustee involved. (Note that KFM is also the State debt enforcement agency, and so its functions include collecting debts.	Legislation allows flexibility in drafting of plan, but practice has been largely standardised. KFM draws up mandatory payment plan in accordance with budgetary guidelines. Discretion given to local KFM offices: e.g. many add extra "buffer" to debtor's exempt income to allow for unexpected expenses; housing and transport costs often treated separately from exempt income by local offices.	Almost all plans last for 5 years.	Yes – at end of repayment plan, remaining obligations discharged (some exceptions). Immediate discharge for MNA debtors – zero payment plans.	In 2002-2003, over 50% of plans provided dividend of 10% or less. Only 25% of plans provided dividend of more than 20%.
Netherlands	Consumer Bankruptcy	Court		No negotiation – court sets terms of the plan.	Court-appointed trustee	Court given complete discretion in theory to design "reasonable and fair" payment plan. Proportion of debtor's income to be contributed to creditors is established in law. Three-year repayment period set out in law, and judges follow this in vast majority of cases.	Three years is established in legislation as the standard period, and in practice judges follow this rule. Plans of 5 years can be imposed in exceptional circumstances.	Yes – remaining obligations discharged at end of 3 year plan. Fast-track discharge after one year for MNA debtors.	

**APPENDIX B: DRAFT PERSONAL INSOLVENCY BILL 2010**



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**DRAFT PERSONAL INSOLVENCY BILL 2010**

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ARRANGEMENT OF SECTIONS

PART 1

PRELIMINARY AND GENERAL

Section

1. Short title and commencement
2. Interpretation

PART 2

NON-JUDICIAL DEBT SETTLEMENT ARRANGEMENTS

CHAPTER 1

*Debt Settlement Arrangements: General*

3. Purpose of Part 2, Chapter 1
4. Debtor and Debt Settlement Arrangement: General Conditions
5. General Duty of Personal Insolvency Trustee to Advise Debtor prior to initiating Debt Settlement Arrangement
6. General Functions of Personal Insolvency Trustee Prior to making of Debt Settlement Arrangement
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Consumer Credit Act 1995	1995, No.24
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Non-Fatal Offences against the Person Act 1997	1997, No.26
<i>Proceeds of Crime Acts 1996 and 2005</i>	

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**DRAFT PERSONAL INSOLVENCY BILL 2010**

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**BILL**

*Entitled*

AN ACT TO REFORM THE LAW ON PERSONAL INSOLVENCY; TO PROVIDE FOR A NON-JUDICIAL DEBT SETTLEMENT ARRANGEMENT PROCESS CONCERNING PERSONAL DEBT; TO PROVIDE FOR A DEBT RELIEF ORDER FOR PERSONAL DEBT WHERE A DEBT SETTLEMENT ARRANGEMENT OR BANKRUPTCY IS NOT APPROPRIATE; TO REFORM THE LAW ON THE ENFORCEMENT OF PERSONAL DEBT, INCLUDING INDIVIDUAL ENFORCEMENT MECHANISMS; TO PROVIDE FOR THE ESTABLISHMENT OF A DEBT ENFORCEMENT OFFICE, WHICH INCLUDES A DEBT SETTLEMENT OFFICE; TO PROVIDE FOR THE LICENSING AND REGULATION OF PERSONAL INSOLVENCY TRUSTEES AND DEBT COLLECTION UNDERTAKINGS; AND TO PROVIDE FOR RELATED MATTERS

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

PART 1

PRELIMINARY

**Short title and commencement**

1.—(1) This Act may be cited as the Personal Insolvency Act 2010.

(2) This Act comes into operation on such day or days as the Minister may appoint by order or orders either generally or with reference to any particular purpose or provision, and different days may be so appointed for different purposes or provisions.

***Explanatory note***

This is a standard section setting out the short title and commencement arrangements.

**Interpretation**

2.— (1) In this Act —

“the Court” means, unless the context otherwise requires, the Circuit Court;

“debtor” means a natural person who is unable to pay his or her personal debt;

“Minister” means the Minister for Justice and Law Reform;

“personal debt” means a debt or debts incurred by a natural person through his or her personal consumption or in the course of his or her business, trade or profession that —

(a) is or are for a liquidated sum or sums payable either immediately or at some certain future time, and

(b) is or are not secured debt or debts or excluded debt or debts;

“prescribed” means prescribed in Regulations made by the Minister under this Act.

***Explanatory note***

This section sets out a number of definitions for the purposes of the Bill.

The definitions of “personal debt” and “debtor” implement the recommendations in paragraph 1.346 that access to the non-judicial debt settlement process in the Bill should be open to any individual (any natural person) who is unable to pay his or her personal debt. This can arise from debts incurred through his or her personal consumption or in the course of his or her business, trade or profession.

PART 2

NON-JUDICIAL DEBT SETTLEMENT ARRANGEMENTS

CHAPTER 1

*Debt Settlement Arrangements: General*

**Purpose of Part 2, Chapter 1**

3.— This Chapter sets out—

(a) the general conditions that apply where a debtor enters into a Debt Settlement Arrangement, and

(b) the duties and functions of a Personal Insolvency Trustee, of the Debt Settlement Office and of the Circuit Court in connection with Debt Settlement Arrangements.

***Explanatory note***

This section describes the general purposes of *Part 2, Chapter 1* of the Bill. Purpose clauses have been used from time to time in Ireland, for example, in the *Education Act 1998*.

**Debtor and Debt Settlement Arrangement: General Conditions**

4.— (1) Subject to the provisions of this Act, a debtor may enter into a Debt Settlement Arrangement with his or her creditors in respect of his or her personal debt.

(2) Subject to *subsection (3)*, a debtor may enter into a Debt Settlement Arrangement once only in a 10 year period, unless during that time period exceptional factors or other external factors outside of his or her control justify a subsequent Debt Settlement Arrangement.

(3) It shall be presumed that any debtor, including one who has entered into a Debt Settlement Arrangement within the preceding 10 year period, is eligible to propose a Debt Settlement Arrangement to his or her creditors on any number of occasions, subject to —

(a) the approval of the creditors' meeting in accordance with *section 14*,

(b) that a creditor may challenge the debtor's eligibility where he or she has previously proposed a Debt Settlement Arrangement within the 10 years, and

(c) that it is for the debtor to establish the existence of exceptional factors or other external factors outside of his or her control that have caused his or indebtedness and which justify a second Debt Settlement Arrangement within the 10 year time period.

(4) In any application for a Debt Settlement Arrangement, the debtor or his or her Personal Insolvency Trustee shall make a statutory declaration as to the debtor's previous participation, if any, in a Debt Settlement Arrangement.

#### ***Explanatory note***

*Subsection (1)* implements the general recommendation in paragraph 1.346 that a debtor (defined in *section 2* of the Bill) may enter into a non-judicial debt settlement process, called a Debt Settlement Arrangement, with his or her creditors.

*Subsection (2)* implements the recommendation in paragraph 1.353 that a debtor may enter into a Debt Settlement Arrangement once only in a 10 year period, unless during that time period exceptional factors or other external factors outside of his or her control justify a subsequent Debt Settlement Arrangement.

*Subsection (3)* implements the recommendation in paragraph 1.354 concerning the conditions that would apply as to the exceptional factors or other external factors outside of the debtor's control to justify a second Debt Settlement Arrangement during the normal 10 year time period. These are: (a) the approval of the creditors' meeting in accordance with *section 14*, (b) that a creditor may challenge the debtor's eligibility where he or she has previously proposed a Debt Settlement Arrangement within the 10 years, and (c) that it is for the debtor to establish the existence of the exceptional factors or other external factors outside his or her control.

*Subsection (4)* implements the recommendation in paragraph 1.355 that, in any application for a Debt Settlement Arrangement, the debtor or his or her Personal Insolvency Trustee shall make a statutory declaration as to the debtor's previous participation, if any, in a Debt Settlement Arrangement.

#### **General Duty of Personal Insolvency Trustee to Advise Debtor prior to initiating Debt Settlement Arrangement**

**5.—** A Personal Insolvency Trustee shall, prior to a debtor initiating a Debt Settlement Arrangement process, advise the debtor as to —

- (a) any alternative option or options available to the debtor, including a Debt Relief Order or bankruptcy, and the general effect of any such option or options, and
- (b) the general effect of initiating and of entering into a Debt Settlement Arrangement process.

*Explanatory note*

This section implements the recommendation in paragraph 1.205 that a Personal Insolvency Trustee must, prior to a debtor initiating a Debt Settlement Arrangement process, advise the debtor as to (a) any alternative options available to the debtor, including a Debt Relief Order or bankruptcy, and the general effect of such options, and (b) the general effect of initiating, and entering into, a Debt Settlement Arrangement process.

**General Functions of Personal Insolvency Trustee Prior to making of Debt Settlement Arrangement**

**6.—** The general functions of a Personal Insolvency Trustee prior to the making of a Debt Settlement Arrangement are to—

- (a) confirm in writing that he or she has consented to act in the role of Personal Insolvency Trustee for the purposes of the Debt Settlement Arrangement, and has entered into an agreement with the debtor to make the payments to creditors (“individual debt settlement agreements”) comprising the Debt Settlement Arrangement,
- (b) hold a meeting with the debtor and provide information to the debtor in accordance with *section 5* about his or her options for addressing his or her situation of financial difficulty, and certify that such information has been provided,
- (c) receive a full disclosure of the debtor’s financial affairs, and, if such a step has not already been taken, assist the debtor in completing a Standard Financial Statement,
- (d) make a statutory declaration to the effect that the Trustee has reasonable grounds to believe that the information contained in the debtor’s statement of affairs is complete and accurate,
- (e) prepare a proposal to be considered and voted upon at a creditors’ meeting to be held in accordance with *section 14*,
- (f) consider the likely viability of the proposal, its fairness to all parties involved, whether it is an acceptable alternative to bankruptcy or a Debt Relief Order, and whether it is otherwise fit to be considered by creditors,
- (g) submit a report to the Debt Settlement Office stating whether the proposed Debt Settlement Arrangement has a reasonable prospect of being accepted by creditors and completed sustainably by the debtor; and whether a creditors’ meeting should be summoned to consider the proposal, and
- (h) summon a creditors’ meeting, to be held in accordance with *section 14*.

*Explanatory note*

This section implements the recommendations in paragraph 1.64 concerning the general functions of a Personal Insolvency Trustee prior to the making of a Debt Settlement Arrangement. These are to: (a) confirm in writing that he or she has consented to act in the role of Personal Insolvency Trustee for the purposes of the Debt Settlement Arrangement, and has entered into an agreement with the debtor to make the payments to creditors (“individual debt settlement agreements”) comprising the Debt Settlement Arrangement; (b) hold a meeting with the debtor and provide information to the debtor in accordance with section 5 about his or her options for addressing his or her situation of financial difficulty, and certify that such information has been provided; (c) receive a full disclosure of the debtor’s financial affairs, and, if such a step has not already been taken, assist the debtor in completing a Standard Financial Statement; (d) make a statutory declaration to the effect that the Trustee has reasonable grounds to believe that the information contained in the debtor’s statement of affairs is complete and accurate; (e) prepare a proposal to be considered and voted upon at a creditors’ meeting to be held in accordance with *section 14*; (f) consider the likely viability of the proposal, its fairness to all parties involved, whether it is an acceptable alternative to bankruptcy or a Debt Relief Order, and whether it is otherwise fit to be considered by creditors; (g) submit a report to the Debt Settlement Office stating whether the proposed Debt Settlement Arrangement has a reasonable prospect of being accepted by creditors and completed sustainably by the debtor; and whether a creditors’ meeting should be summoned to consider the proposal; and (h) summon a creditors’ meeting, to be held in accordance with *section 14*.

### **General Functions of Personal Insolvency Trustee after making of Debt Settlement Arrangement**

7.— The general functions of a Personal Insolvency Trustee after the making of a Debt Settlement Arrangement are to—

- (a) ensure that the Debt Settlement Arrangement proceeds in accordance with its accepted terms,
- (b) maintain regular contact with the debtor, obtaining reports and conducting reviews as may be required,
- (c) monitor any problems that may arise and, where a default appears likely to take place, discuss the issue with the debtor,
- (d) provide information to the debtor concerning the option to vary the Debt Settlement Arrangement in accordance with *section 17* where the debtor’s circumstances have changed,
- (e) if a variation in the terms of the a Debt Settlement Arrangement is required, take appropriate action to achieve a variation in accordance with *section 17*,
- (f) comply with any requirements in this Act or Regulations made under the Act concerning his or her remuneration, including maintaining a separate record of money received, payments made and the balance of money held in relation to any Debt Settlement Arrangement,
- (g) notify creditors of any increase in his or her remuneration occurring during the course of the administration of the Debt Settlement Arrangement,
- (h) deal with the debtor’s property in the manner specified in the Debt Settlement Arrangement,
- (i) respond in a timely manner to reasonable requests from creditors about the progress of individual debt settlement agreements,

- (j) respond in a timely manner to reasonable requests from a debtor for information,
- (k) ensure that creditors and the Debt Settlement Office are informed where the debtor defaults in prescribed circumstances,
- (l) handle and properly account for money including paying all money received from debtors under individual debt settlement agreements to the credit of a single interest-bearing bank account and keeping such accounts, books and records as are necessary to give a full and correct account of the administration of the individual debt settlement agreements, and
- (m) answer any inquiries about the individual debt settlement agreements and cooperate with any inquiry or investigation made by the Debt Settlement Office or court.

***Explanatory note***

This section implements the recommendation in paragraphs 1.65 and 1.232 concerning the general functions of a Personal Insolvency Trustee after the making of a Debt Settlement Arrangement. These are to: (a) ensure that the Debt Settlement Arrangement proceeds in accordance with its accepted terms; (b) maintain regular contact with the debtor, obtaining reports and conducting reviews as may be required; (c) monitor any problems that may arise and, where a default appears likely to take place, discuss the issue with the debtor; (d) provide information to the debtor concerning the option to vary the Debt Settlement Arrangement in accordance with *section 17* of the Bill where the debtor's circumstances have changed; (e) if a variation in the terms of the a Debt Settlement Arrangement is required, take appropriate action to achieve a variation in accordance with *section 17*; (f) comply with any requirements in this Act or Regulations made under the Act concerning his or her remuneration, including maintaining a separate record of money received, payments made and the balance of money held in relation to any Debt Settlement Arrangement; (g) notify creditors of any increase in his or her remuneration occurring during the course of the administration of the Debt Settlement Arrangement; (h) deal with the debtor's property in the manner specified in the Debt Settlement Arrangement; (i) respond in a timely manner to reasonable requests from creditors about the progress of individual debt settlement agreements; (j) respond in a timely manner to reasonable requests from a debtor for information; (k) ensure that creditors and the Debt Settlement Office are informed where the debtor defaults in prescribed circumstances; (l) handle and properly account for money including paying all money received from debtors under individual debt settlement agreements to the credit of a single interest-bearing bank account and keeping such accounts, books and records as are necessary to give a full and correct account of the administration of the individual debt settlement agreements; and (m) answer any inquiries about the individual debt settlement agreements and cooperate with any inquiry or investigation made by the Debt Settlement Office or court.

**General Duties of Debtor in Debt Settlement Arrangement process**

**8.—** A debtor who participates in the Debt Settlement Arrangement process shall, from the time of applying for entry to it through to the completion of the process, comply with the following duties—

- (a) to cooperate fully in the process, and in particular to comply with any reasonable request from the Personal Insolvency Trustee to provide assistance, documents and information necessary for the application of the process to the debtor's case;
- (b) to inform the Personal Insolvency Trustee as soon as reasonably practicable of any material change in the debtor's circumstances, particularly an increase in the level of the debtor's assets or income, which would affect the debtor's ability to make repayments under the Debt Settlement Arrangement;
- (c) not to obtain credit above a prescribed amount without disclosing the fact that the debtor is party to a Debt Settlement Arrangement; and



- (d) not to engage directly or indirectly in any business under a name other than that in which the Debt Settlement Arrangement has been registered (in the Personal Insolvency Register) without disclosing the name in which the arrangement was registered to all persons with whom the debtor enters into a business transaction.

***Explanatory note***

This section implements the recommendation in paragraph 1.305 concerning the general duties of a debtor who participates in the Debt Settlement Arrangement process. These are: (a) to cooperate fully in the process, and in particular to comply with any reasonable request from the Personal Insolvency Trustee to provide assistance, documents and information necessary for the application of the process to the debtor's case; (b) to inform the Personal Insolvency Trustee as soon as reasonably practicable of any material change in the debtor's circumstances, particularly an increase in the level of the debtor's assets or income, which would affect the debtor's ability to make repayments under the Debt Settlement Arrangement; (c) not to obtain credit above a prescribed amount without disclosing the fact that the debtor is party to a Debt Settlement Arrangement; and (d) not to engage directly or indirectly in any business under a name other than that in which the Debt Settlement Arrangement has been registered (in the Personal Insolvency Register) without disclosing the name in which the arrangement was registered to all persons with whom the debtor enters into a business transaction.

**Documents to be prepared for Debt Settlement Arrangement**

**9.**— The following documents shall be prepared by the Personal Insolvency Trustee in advance of the application for entry to the Debt Settlement Arrangement procedure —

- (a) a statement by the Personal Insolvency Trustee indicating his or her consent to act as Personal Insolvency Trustee;
- (b) a completed statement of the debtor's financial affairs, showing the debtor's position of insolvency, in the form of the Standard Financial Statement;
- (c) a statement that, by reference to cash flow and balance sheet, in the opinion of the Personal Insolvency Trustee, as verified by the completed Standard Financial Statement—
  - (i) the value of the debtor's assets is less than the amount of the debtor's liabilities, and that it is unforeseeable that at any stage within a 5 year period the value of the assets will be equal to, or larger than, the value of the liabilities, or
  - (ii) the debtor is unable to pay his or her debts as they fall due, and it is unforeseeable that over the course of a 5 year period the debtor will be able to pay his or her debts in full;
- (d) the terms of the proposal to be sent to creditors for consideration;
- (e) a report of the Personal Insolvency Trustee stating whether, in the opinion of the Personal Insolvency Trustee—
  - (i) the proposal of the debtor has a reasonable prospect of being accepted by creditors,
  - (ii) the proposal of the debtor is viable and that the debtor is reasonably likely to be able to comply with its terms,

- (iii) a meeting of the debtor's creditors will be held on a specific date to consider the proposal, and
- (iv) the proposal is reasonably fair to all parties involved, and is an acceptable alternative to bankruptcy or a Debt Relief Order;
- (f) a statement to the effect that the debtor has been appropriately advised by the Personal Insolvency Trustee in accordance with *section 5* of his or her options for managing his or her debt difficulty;
- (g) a statement to the effect that the Personal Insolvency Trustee has reasonable grounds to believe that the information contained in the debtor's statement of affairs is complete and accurate; and
- (h) a statement to the effect that the Personal Insolvency Trustee has reasonable grounds to believe that the debtor is eligible to enter the Debt Settlement Arrangement procedure.

***Explanatory note***

This section implements the recommendations in paragraphs 1.212 and 1.334 concerning the documents that must be prepared by the Personal Insolvency Trustee in advance of the application for entry to the Debt Settlement Arrangement procedure. These are: (a) a statement by the Personal Insolvency Trustee indicating his or her consent to act as Personal Insolvency Trustee; (b) a completed statement of the debtor's financial affairs, showing the debtor's position of insolvency, in the form of the Standard Financial Statement; (c) a statement that, by reference to cash flow and balance sheet, in the opinion of the Personal Insolvency Trustee, as verified by the completed Standard Financial Statement: (i) the value of the debtor's assets is less than the amount of the debtor's liabilities, and that it is unforeseeable that at any stage within a 5 year period the value of the assets will be equal to, or larger than, the value of the liabilities, or (ii) the debtor is unable to pay his or her debts as they fall due, and it is unforeseeable that over the course of a 5 year period the debtor will be able to pay his or her debts in full; (d) the terms of the proposal to be sent to creditors for consideration; (e) a report of the Personal Insolvency Trustee stating whether, in the opinion of the Personal Insolvency Trustee: (i) the proposal of the debtor has a reasonable prospect of being accepted by creditors, (ii) the proposal of the debtor is viable and that the debtor is reasonably likely to be able to comply with its terms, (iii) a meeting of the debtor's creditors will be held on a specific date to consider the proposal, and (iv) the proposal is reasonably fair to all parties involved, and is an acceptable alternative to bankruptcy or a Debt Relief Order; (f) a statement to the effect that the debtor has been appropriately advised by the Personal Insolvency Trustee in accordance with section 5 of his or her options for managing his or her debt difficulty; (g) a statement to the effect that the Personal Insolvency Trustee has reasonable grounds to believe that the information contained in the debtor's statement of affairs is complete and accurate; and (h) a statement to the effect that the Personal Insolvency Trustee has reasonable grounds to believe that the debtor is eligible to enter the Debt Settlement Arrangement procedure.

**Mandatory requirements concerning Debt Settlement Arrangement**

**10.—** (1) Subject to the mandatory requirements in *subsection (2)*, the terms of a Debt Settlement Arrangement are to be agreed between the debtor and his or her creditors.

(2) The mandatory requirements referred to in *subsection (1)* are—

- (a) the maximum duration of a Debt Settlement Arrangement shall be 5 years, so that a proposed Debt Settlement Arrangement shall provide for the performance of its obligations within a period of 5 years;
- (b) subject to *paragraphs (c) and (d)*, on completion of the obligations specified in a Debt Settlement Arrangement the debtor shall be discharged from the remainder of the debts covered by the arrangement;
- (c) a Debt Settlement Arrangement shall not release the debtor from any of the following debts or liabilities unless the proposed Debt Settlement Arrangement explicitly provides for the compromise of that debt or liability and the relevant creditor for any of the following debts or liabilities has voted to accept the a Debt Settlement Arrangement —
  - (i) any liability arising out of a court order made in family law proceedings,
  - (ii) any liability arising out of damages awarded in respect of personal injuries or wrongful death arising from the tort of the debtor, or
  - (iii) any debt or liability arising from a loan (or forbearance of a loan) obtained through fraud, misappropriation, embezzlement or fraudulent breach of trust;
- (d) a Debt Settlement Arrangement shall not release the debtor from any debt or liability arising by virtue of a court order made under the *Proceeds of Crime Acts 1996 and 2005* or by virtue of a fine ordered to be paid by a court in respect of a criminal offence;
- (e) a Debt Settlement Arrangement shall not contain any terms requiring the debtor to sell any assets of the debtor that are necessary for the debtor's employment, business or vocation;
- (f) without prejudice to *paragraph (e)*, a Debt Settlement Arrangement shall not contain any terms which would require such repayments as would leave the debtor with insufficient income to maintain a reasonable standard of living for the debtor and his or her dependants (if any).

(3) The Minister may make Regulations prescribing the details of any of the matters set out in *paragraphs (e) and (f) of subsection (2)*.

(4) The Debt Settlement Office may publish a Code of Practice providing guidance on any of the matters set out in *paragraphs (e) and (f) of subsection (2)*.

***Explanatory note***

*Subsection (1)* implements the recommendation in paragraph 1.253 that, subject to certain minimum mandatory statutory requirements (which are set out in *subsection (2)*), the terms of a Debt Settlement Arrangement are to be agreed between the debtor and his or her creditors.

*Subsection (2)* implements the recommendations in paragraphs 1.259, 1.263, 1.278, 1.279, 1.285, 1.286, 1.287 and 2.295 on the minimum mandatory statutory requirements concerning the terms of a Debt Settlement Arrangement. These include that: (a) the maximum duration of a Debt Settlement Arrangement is 5 years, so that a proposed Debt Settlement Arrangement shall provide for the performance of its obligations within a period of 5 years; (b) subject to paragraphs (c) and (d), on completion of the obligations specified in a Debt Settlement Arrangement the debtor shall be

discharged from the remainder of the debts covered by the arrangement; (c) a Debt Settlement Arrangement shall not release the debtor from any of the following debts or liabilities unless the proposed Debt Settlement Arrangement explicitly provides for the compromise of that debt or liability and the relevant creditor for any of the following debts or liabilities has voted to accept the a Debt Settlement Arrangement: (i) any liability arising out of a court order made in family law proceedings, (ii) any liability arising out of damages awarded in respect of personal injuries or wrongful death arising from the tort of the debtor, or (iii) any debt or liability arising from a loan (or forbearance of a loan) obtained through fraud, misappropriation, embezzlement or fraudulent breach of trust; (d) a Debt Settlement Arrangement shall not release the debtor from any debt or liability arising by virtue of a court order made under the *Proceeds of Crime Acts 1996 and 2005* or by virtue of a fine ordered to be paid by a court in respect of a criminal offence; (e) a Debt Settlement Arrangement shall not contain any terms requiring the debtor to sell any assets of the debtor that are necessary for the debtor's employment, business or vocation; and (f) without prejudice to paragraph (e), a Debt Settlement Arrangement shall not contain any terms which would require such repayments as would leave the debtor with insufficient income to maintain a reasonable standard of living for the debtor and his or her dependants (if any).

*Subsections (3) and (4)* implement the recommendations in paragraph 1.286 on the making of Regulations and a Code of Practice as to the minimum mandatory statutory requirements concerning the terms of a Debt Settlement Arrangement.

### **Preferential debts in Debt Settlement Arrangement**

**11.**— Unless the relevant preferential creditors agree otherwise, a Debt Settlement Arrangement shall provide for the payment of any debts specified in the *Bankruptcy Act 1988* as preferential debts in priority to those of the debtor's debts that are not preferential debts.

#### ***Explanatory note***

This section implements the recommendation in paragraph 1.311 that, unless the relevant preferential creditors agree otherwise, a Debt Settlement Arrangement must provide for the payment of any debts specified in the *Bankruptcy Act 1988* as preferential debts in priority to those of the debtor's debts that are not preferential debts. The Commission has recommended in paragraph 3.94 of this Report that the number of preferential debts currently provided for in the *Bankruptcy Act 1988* should be significantly reduced, including in respect of debts owed to the Revenue Commissioners: see also Head 10 of *Outline Scheme of Amendments to Judicial Bankruptcy Legislation* in Appendix B, below.

### **Secured creditors and Debt Settlement Arrangement**

**12.**— In the Debt Settlement Arrangement process, a secured creditor remains free to choose between the following three options —

- (a) realising its security and claiming for the balance due, if any, after deducting the net amount realised in the Debt Settlement Arrangement process,
- (b) surrendering its security to the debtor and claiming for the full amount of the debt owed as if it was unsecured, or

- (c) valuing the security when proving its debt, and claiming alongside unsecured creditors for the balance due after deducting the amount of the valuation.

***Explanatory note***

This section implements the recommendation in paragraph 1.316 that, in the Debt Settlement Arrangement process, a secured creditor remains free to choose between the following three options: (a) realising its security and claiming for the balance due, if any, after deducting the net amount realised in the Debt Settlement Arrangement process; (b) surrendering its security to the debtor and claiming for the full amount of the debt owed as if it was unsecured; or (c) valuing the security when proving its debt, and claiming alongside unsecured creditors for the balance due after deducting the amount of the valuation.

**Protective Order and its effect**

**13.—** (1) A debtor who seeks to enter into a Debt Settlement Arrangement may apply to the Debt Settlement Office for an order to prevent the enforcement of any personal debt while attempts are made to reach a Debt Settlement Arrangement, and such an order is referred to in this Act as a “protective order.”

(2) A debtor shall inform his or her creditors of the making of a protective order.

(3) The officers of the Debt Enforcement Office shall refrain from taking any steps to enforce a judgment against a debtor who is the subject of a protective order.

(4) The debtor shall, when applying for a protective order, provide the Debt Settlement Office with draft terms of the Debt Settlement Arrangement.

(5) Any creditor on whom notice of the making of a protective order has been served shall, if commencing proceedings against the debtor for the recovery of a debt, notify the court of the making of such an order, and the court shall, without prejudice to any other order it may deem appropriate, make an order staying the proceedings for such period it deems appropriate pending the outcome of attempts to reach a Debt Settlement Arrangement.

***Explanatory note***

*Subsection (1)* implements the recommendation in paragraph 1.207 that a debtor who seeks to enter into a Debt Settlement Arrangement may apply to the Debt Settlement Office for a “protective order,” that is, an order to prevent the enforcement of any personal debt while attempts are made to reach a Debt Settlement Arrangement.

*Subsection (2)* implements the recommendation in paragraph 1.208 that a debtor must inform his or her creditors of the making of a protective order.

*Subsection (3)* implements the recommendation in paragraph 1.209 that the officers of the Debt Enforcement Office must refrain from taking any steps to enforce a judgment against a debtor who is the subject of a protective order.

*Subsection (4)* implements the recommendation in paragraph 1.210 that the debtor must, when applying for a protective order, provide the Debt Settlement Office with draft terms of the Debt Settlement Arrangement.

*Subsection (5)* implements the recommendation in paragraph 1.208 that any creditor on whom notice of the making of a protective order has been served must, if commencing proceedings against the debtor for the recovery of a debt, notify the court of the making of such an order, and the court shall, without prejudice to any other order it may deem appropriate, make an order staying the proceedings for such period it deems appropriate pending the outcome of attempts to reach a Debt Settlement Arrangement.

### **Creditors' meeting required to approve Debt Settlement Arrangement**

**14.—** (1) Where a proposed Debt Settlement Arrangement is approved at a creditors' meeting by a majority of 60% in value of actual votes cast at the meeting, the proposed Debt Settlement Arrangement shall become a Debt Settlement Arrangement under this Act and shall, subject to the provisions of this Act (in particular *section 15*) then be binding on every creditor who was entitled to vote at the creditors' meeting.

(2) Where a Debt Settlement Arrangement is approved in accordance with *subsection (1)*, the Personal Insolvency Trustee shall forthwith send a copy of the Debt Settlement Arrangement to the Debt Settlement Office.

(3) Where the proposed Debt Settlement Arrangement is not approved in accordance with *subsection (1)*, the Debt Settlement Arrangement procedure shall be deemed to have come to an end, and any protective order issued by the Debt Settlement Office shall cease to have effect.

(4) The Minister shall make Regulations concerning the requirements as to the holding of a creditors' meeting, and without prejudice to the generality of such Regulations, they shall provide that such a meeting may be held otherwise than in the form of a physical meeting, and shall provide for the voting process (including permitting the communication of creditors' votes to the Intermediary by telephone or electronically, such as by means of email or the internet).

#### ***Explanatory note***

*Subsection (1)* implements the recommendation in paragraph 1.222 that where a proposed Debt Settlement Arrangement is approved at a creditors' meeting by a majority of 60% in value of actual votes cast at the meeting, the proposed Debt Settlement Arrangement shall become a Debt Settlement Arrangement and shall, subject to the provisions of this Bill (in particular *section 15*), then be binding on every creditor who was entitled to vote at the creditors' meeting.

*Subsection (2)* implements the recommendation in paragraph 1.222 that where a Debt Settlement Arrangement is approved at a creditors' meeting in accordance with *subsection (1)*, the Personal Insolvency Trustee must forthwith send a copy of the Debt Settlement Arrangement to the Debt Settlement Office.

*Subsection (3)* implements the recommendation in paragraph 1.224 that where the proposed Debt Settlement Arrangement is not approved by 60% of the creditors present at the creditor's meeting, the Debt Settlement Arrangement procedure is deemed to have come to an end, and any protective order issued by the Debt Settlement Office will cease to have effect.

*Subsection (4)* implements the recommendations in paragraphs 1.214 and 1.215 as to Regulations to be made by the Minister for Justice and Law Reform concerning the detailed procedural requirements for the holding of a creditors' meeting.

## **Debt Settlement Arrangement comes into effect after registration**

**15.**— (1) Where a Debt Settlement Arrangement is approved in accordance with *section 14*, the Debt Settlement Office shall forthwith send a copy of the Debt Settlement Arrangement to the Circuit Court in whose Circuit the debtor resides.

(2) Unless a creditor enters an objection in the Circuit Court to the Debt Settlement Arrangement within 30 days from the communication of the result of the creditors' meeting to the Debt Settlement Office, the Debt Settlement Arrangement shall be deemed to have effect 30 days after such communication.

(3) Where a creditor enters an objection in the Circuit Court to the Debt Settlement Arrangement within 30 days from the communication of the result of the creditors' meeting to the Debt Settlement Office, the Circuit Court shall hear such objection in accordance with the scope of the Court's powers set out in *section 19*.

(4) (a) Where the Circuit Court upholds the objection to the Debt Settlement Arrangement, the Debt Settlement Arrangement procedure shall be deemed to have come to an end, and any protective order issued by the Debt Settlement Office shall cease to have effect.

(b) Where the Circuit Court rejects the objection to the Debt Settlement Arrangement, the Debt Settlement Arrangement procedure shall be deemed to have effect from the making of the Court's order.

### ***Explanatory note***

*Subsection (1)* implements the recommendation in paragraph 1.225 that where a Debt Settlement Arrangement is approved in accordance with *section 14*, the Debt Settlement Office must send a copy of the Debt Settlement Arrangement to the Circuit Court in whose Circuit the debtor resides.

*Subsection (2)* implements the recommendation in paragraph 1.225 that unless a creditor enters an objection in the Circuit Court to the Debt Settlement Arrangement within 30 days from the communication of the result of the creditors' meeting to the Debt Settlement Office, the Debt Settlement Arrangement shall be deemed to have effect 30 days after such communication.

*Subsection (3)* implements the recommendation in paragraph 1.225 that where a creditor enters an objection in the Circuit Court to the Debt Settlement Arrangement within 30 days from the communication of the result of the creditors' meeting to the Debt Settlement Office, the Circuit Court shall hear such objection in accordance with Rules of Court made for that purpose.

*Subsection (4)* implements the recommendation in paragraph 1.226 that: (a) where the Circuit Court upholds the objection to the Debt Settlement Arrangement, the Debt Settlement Arrangement procedure shall be deemed to have come to an end, and any protective order issued by the Debt Settlement Office shall cease to have effect; but that (b) where the Circuit Court rejects the objection to the Debt Settlement Arrangement, the Debt Settlement Arrangement procedure shall be deemed to have effect from the making of the Court's order.

## **Effect of registration of Debt Settlement Arrangement**

**16.**— (1) Where a Debt Settlement Arrangement is deemed to have effect under *section 15 (2)* or *section 15(4)(b)*, it shall be registered by the Debt Settlement Office in the Personal Insolvency Register, which shall be maintained by the Debt Settlement Office.

(2) The effect of registering a Debt Settlement Arrangement in the Personal Insolvency Register shall be that —

(a) no creditor may present a bankruptcy petition against the debtor, and

(b) no creditor may commence legal proceedings for the recovery of a debt covered by the arrangement, and

(c) no action may be taken by an enforcement officer to enforce a judgment debt owed by the debtor.

*Explanatory note*

*Subsection (1)* implements the recommendation in paragraph 1.226 that where a Debt Settlement Arrangement is deemed to have effect under *section 15 (2)* or *section 15(4)(b)*, it must be registered by the Debt Settlement Office in the Personal Insolvency Register (as with Debt Relief Orders: see *section 35(6)*), which shall be maintained by the Debt Settlement Office.

*Subsection (2)* implements the recommendation in paragraph 1.228 that the effect of registering a Debt Settlement Arrangement in the Personal Insolvency Register is that: (a) no creditor may present a bankruptcy petition against the debtor, and (b) no creditor may commence legal proceedings for the recovery of a debt covered by the arrangement, and (c) no action may be taken by an enforcement officer to enforce a judgment debt owed by the debtor.

**Variation of Debt Settlement Arrangement**

**17.**— (1) A Debt Settlement Arrangement may be varied at a creditors' meeting by a majority of 60% in value of actual votes cast at the meeting and such variation shall, subject to the provisions of this Act, then be binding on every creditor who was entitled to vote at the creditors' meeting.

(2) Where a Debt Settlement Arrangement is varied in accordance with *subsection (1)*, the Personal Insolvency Trustee shall forthwith send a copy of the variation of the Debt Settlement Arrangement to the Debt Settlement Office.

(3) When the Debt Settlement Office receives the variation of a Debt Settlement Arrangement in accordance with *subsection (2)*, it shall forthwith register the variation in the Personal Insolvency Register.

(4) *Section 15(2) to (4)* shall apply, with appropriate adaptations, to a variation made under this section.

*Explanatory note*

*Subsection (1)* implements the recommendation in **paragraph 1.231** that a Debt Settlement Arrangement may be varied at a creditors' meeting by a majority of 60% in value of actual votes cast at the meeting and such variation shall, subject to the provisions of this Bill, then be binding on every creditor who was entitled to vote at the creditors' meeting.



*Subsection (2)* implements the recommendation in **paragraph 1.231** that where a Debt Settlement Arrangement is varied in accordance with *subsection (1)*, the Personal Insolvency Trustee must forthwith send a copy of the variation of the Debt Settlement Arrangement to the Debt Settlement Office.

*Subsection (3)* implements the recommendation in **paragraph 1.231** that when the Debt Settlement Office receives the variation of a Debt Settlement Arrangement in accordance with *subsection (2)*, it must forthwith register the variation in the Personal Insolvency Register.

*Subsection (4)* implements the recommendation in **paragraph 1.231** that a variation comes into effect in the same manner as the original Debt Settlement Arrangement, and that a creditor may challenge the variation in the same manner.

### **Termination of Debt Settlement Arrangement**

**18.**— (1) A Debt Settlement Arrangement may be terminated at a creditors' meeting by a majority of 60% in value of actual votes cast at the meeting and such termination shall, subject to the provisions of this Act, then be binding on every creditor who was entitled to vote at the creditors' meeting.

(2) Where a Debt Settlement Arrangement is terminated in accordance with *subsection (1)*, the Personal Insolvency Trustee shall forthwith notify the Debt Settlement Office.

(3) When the Debt Settlement Office receives notice of the termination of a Debt Settlement Arrangement in accordance with *subsection (2)*, it shall forthwith register the termination in the Personal Insolvency Register.

(4) *Section 15(2) to (4)* shall apply, with appropriate adaptations, to a termination made under this section.

#### ***Explanatory note***

This section implements the recommendation in paragraph 1.234 that a Debt Settlement Arrangement may be terminated at a creditors' meeting by analogy with the procedure for variation of a Debt Settlement Agreement, and that a creditor may challenge the termination in the same manner.

### **Application for adjudication in bankruptcy on ending, termination or failure of Debt Settlement Arrangement**

**19.**— (1) Where a Debt Settlement Arrangement has been deemed to come to an end or is terminated in accordance with *section 14*, *section 15*, *section 17* or *section 18*, or is deemed to have failed under *section 22*, a creditor or the Personal Insolvency Trustee may apply to court for an adjudication in bankruptcy against the debtor involved.

(2) For the avoidance of doubt, a creditor or the Personal Insolvency Trustee may apply to court for an adjudication in bankruptcy against the debtor involved in the same proceedings as an application for termination of the Debt Settlement Arrangement.

#### ***Explanatory note***

*Subsection (1)* implements the recommendation in paragraph 1.239 that where a Debt Settlement Arrangement has been ended, terminated or deemed to have failed under this Bill (see *sections 14, 15, 17, 18* and *22*), a creditor or the Personal Insolvency Trustee may apply to court for an adjudication in bankruptcy against the debtor involved.

*Subsection (2)* implements the recommendation in paragraph 1.239 that a creditor or the Personal Insolvency Trustee may apply to court for an adjudication in bankruptcy against the debtor involved in the same proceedings as an application for termination of the Debt Settlement Arrangement.

### **Scope of functions of Court concerning Debt Settlement Arrangements**

**20.**— In this Part, the scope of the functions of the Court concerning Debt Settlement Arrangements are limited to the following matters —

- (a) approval of a Debt Settlement Arrangement that has been accepted at a creditors’ meeting in accordance with *section 14* and registered by the Debt Settlement Office in accordance with *section 16*, such approval to be given by the Court without a hearing unless an objection to approval is raised by a creditor in accordance with *sections 15, 17 or 18*;
- (b) in a hearing held concerning an objection by a creditor in accordance with *sections 15, 17 or 18*, the hearing shall be limited to the grounds specified in *section 21*; and
- (c) in a hearing concerning a challenge to any actions, directions or decisions of either the Personal Insolvency Trustee or the Debt Settlement Office, the hearing shall be limited to the grounds specified in *section 22*.

#### ***Explanatory note***

This section implements the recommendation in paragraph 1.196 as to the limited scope of the Circuit’s Court’s role concerning Debt Settlement Arrangements. The Circuit Court is a court of “local and limited jurisdiction” within the meaning of Article 34 of the Constitution of Ireland. The limitations in this section of the Bill do not restrict any other aspect of the Circuit Court’s jurisdiction, such as the enforcement of its orders generally.

### **Grounds of challenge by creditor to Debt Settlement Arrangement**

**21.**— The grounds on which a Debt Settlement Arrangement may be challenged by a creditor under *sections 15, 17 or 18* are, without prejudice to *section 22*, limited to the following matters —

- (a) the procedural requirements specified in this Act were not followed,
- (b) a material inaccuracy or omission exists in the debtor’s statement of affairs (based on the Standard Financial Statement) which causes a material detriment to the creditor,
- (c) the debtor did not satisfy the eligibility requirements to enter the Debt Settlement Arrangement process when he or she initiated the process,
- (d) the arrangement unfairly prejudices the interests of a creditor, or

(e) the debtor has committed an offence under this Act.

***Explanatory note***

This section implements the recommendation in paragraph 1.197 as to the limited grounds on which a Debt Settlement Arrangement may be challenged by a creditor under 15, 17 or 18 of the Bill.

**Application to Court to have Debt Settlement Arrangement terminated**

**22.**— (1) Without prejudice to *section 21*, a creditor or a Personal Insolvency Trustee may, at any time during the operation of a Debt Settlement Arrangement, apply to the Court to have a Debt Settlement Arrangement terminated, and such application shall be limited to the following grounds —

- (a) the procedural requirements specified in this Act were not followed,
- (b) a material inaccuracy or omission exists in the debtor’s statement of affairs (based on the Standard Financial Statement) which causes a material detriment to the creditor,
- (c) the debtor did not satisfy the eligibility requirements to enter the Debt Settlement Arrangement process when he or she initiated the process,
- (d) the debtor did not comply with the duties and obligations imposed under the Debt Settlement Arrangement process,
- (e) the continuation of the arrangement would lead to injustice or undue delay,
- (f) the debtor has committed an offence under this Act, or
- (g) a 3 month arrears default has occurred.

(2) For the purposes of *subsection (1)(g)*, a 3 month arrears default means a default that occurs at a specific time (the “test time”) in relation to a Debt Settlement Arrangement if, and only if,—

- (a) at the beginning of the 3 month period ending immediately before the test time, one or more payments in respect of debtor’s provable debts become due and payable by the debtor under an individual debt settlement agreement, and
- (b) throughout that 3 month period, the debtor was in arrears in respect of any or all of those payments.

***Explanatory note***

This section implements the recommendations in paragraphs 1.198 and 1.199 as to the limited grounds on which a creditor or a Personal Insolvency Trustee may, at any time during the operation of a Debt Settlement Arrangement, apply to the Court to have a Debt Settlement Arrangement terminated. These grounds are that: (a) the procedural requirements specified in this Act were not followed; (b) a material inaccuracy or omission exists in the debtor’s statement of affairs (based on the Standard Financial Statement) which causes a material detriment to the creditor; (c) the debtor did not satisfy the eligibility requirements to enter the Debt Settlement Arrangement process when he or she initiated the process; (d) the debtor did not comply with the duties and

obligations imposed under the Debt Settlement Arrangement process; (e) the continuation of the arrangement would lead to injustice and/or undue delay; (f) the debtor has committed an offence under this Act, or (g) a 3 month arrears default has occurred (that is, throughout a specified 3 month period, the debtor was in arrears in respect of any or all of the payments due under an individual debt settlement agreement in the Debt Settlement Arrangement).

### **Debt Settlement Arrangement deemed to have failed after 6 month arrears default**

**23.—** (1) A Debt Settlement Arrangement shall be deemed to have failed where, after a 6 month arrears default has occurred, a creditor or the Personal Insolvency Trustee, notifies the Debt Settlement Office of such default.

(2) Where the Debt Settlement Office receives notification of default referred to in *subsection (1)*, it shall record the failure of the Debt Settlement Arrangement in the Personal Insolvency Register.

(3) For the purposes of this section, a 6 month arrears default means a default that occurs at a specific time (the “test time”) in relation to a Debt Settlement Arrangement if, and only if, either—

- (a) before the test time, one or more payments in respect of provable debts became due and payable by the debtor under an individual debt settlement agreement, and
- (b) at no time during the 6 month period ending immediately before the test time were any obligations in respect of those payments discharged.

#### ***Explanatory note***

This section implements the recommendations in paragraphs 1.200 and 1.201 that a Debt Settlement Arrangement shall be deemed to have failed where, after a 6 month arrears default has occurred, a creditor or the Personal Insolvency Trustee, notifies the Debt Settlement Office of such default. Where the Debt Settlement Office receives such a notification of default, it must record the failure of the Debt Settlement Arrangement in the Personal Insolvency Register. A 6 month arrears default means that, throughout a specified 6 month period, the debtor was in arrears in respect of any of the payments due under an individual debt settlement agreement in the Debt Settlement Arrangement.

## CHAPTER 2

### *Debt Settlement Arrangements: Licensing and Regulatory Functions of Debt Settlement Office*

#### **Purpose of Part 2, Chapter 2**

**24.—** This Chapter sets out—

- (a) the status and general licensing functions of the Debt Settlement Office,
- (b) mandatory requirements to obtain a licence as a Personal Insolvency Trustee,
- (c) the making of Codes of Practice and guidelines by the Debt Settlement Office, and

(d) offences for failure to comply with this Part.

***Explanatory note***

This section describes the general purposes of *Part 2, Chapter 2* of the Bill.

**Status and general licensing functions of Debt Settlement Office**

**25.—** (1) The Debt Settlement Office shall be an independent unit within the Debt Enforcement Office established under *section 43*, and shall have all the necessary powers to carry out the functions conferred on it by this Act.

(2) Without prejudice to the generality of *subsection (1)* and to the other provisions of this Act, a person who performs the functions of a Personal Insolvency Trustee shall be in possession of a current Personal Insolvency Trustee licence issued by the Debt Settlement Office.

(3) In carrying out its licensing functions under *subsection (2)*, the Debt Settlement Office shall have the power to —

- (a) issue licences to suitably qualified persons to carry out the functions of Personal Insolvency Trustee,<sup>1</sup>
- (b) receive and review annual reports from licensed Personal Insolvency Trustees,
- (c) enter and inspect any places where a Personal Insolvency Trustee conducts his or her business as licensed by the Debt Settlement Office,<sup>2</sup>
- (d) investigate any complaints or suspected violation of this Act, Regulations made under the Act or codes of practice issued under it, and
- (e) develop and publish Codes of Practice in accordance with this Act to provide guidance on the requirements of the functions of Personal Insolvency Trustee,

(4) The Debt Settlement Office shall be funded [**in whole or in part**]<sup>3</sup> through the prescribed licensing fees payable to it.

***Explanatory note***

*Subsection (1)* implements the recommendation in paragraph 1.177 that the Debt Settlement Office is to be an independent unit within the Debt Enforcement Office established under *section 43* of this Bill.

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<sup>1</sup> The Commission considers that the details of such licensing powers could be modelled on those available to, for example, the Central Bank of Ireland.

<sup>2</sup> The Commission considers that the details of such powers of entry and inspection could be modelled on those available to, for example, the Central Bank of Ireland or the Office of the Director of Corporate Enforcement.

<sup>3</sup> The Commission appreciates that the precise funding of the Debt Settlement Office is a policy issue which will be determined in the general context of implementing the thrust of this Report.

*Subsection (2)* implements the recommendation in paragraph 1.144 that the Debt Settlement Office is to be the licensing authority for Personal Insolvency Trustees, and that a person who performs the functions of a Personal Insolvency Trustee must be in possession of a current Personal Insolvency Trustee licence issued by the Debt Settlement Office.

*Subsection (3)* implements the recommendation in paragraph 1.165 concerning the general regulatory functions of the Debt Settlement Office, namely: (a) issue licences to suitably qualified persons to carry out the functions of Personal Insolvency Trustee, (b) receive and review annual reports from licensed Personal Insolvency Trustees, (c) enter and inspect any places where a Personal Insolvency Trustee conducts his or her business as licensed by the Debt Settlement Office, (d) investigate any complaints or suspected violation of this Act, Regulations made under the Act or codes of practice issued under it, and (e) develop and publish Codes of Practice in accordance with this Act to provide guidance on the requirements of the functions of Personal Insolvency Trustee.

*Subsection (4)* implements the recommendation in paragraph 1.178 that the Debt Settlement Office is to be funded (in whole or in part) through the prescribed licensing fees payable to it. In this respect, the Commission appreciates that the precise funding of the Debt Settlement Office is a policy issue which will be determined in the general context of implementing the thrust of this Report. This recommendation also mirrors the proposed arrangements for the Debt Enforcement Office: see *section 45* of the Bill.

### **Powers of investigation and sanction of Debt Settlement Office**

**26.—** (1) The Debt Settlement Office, in carrying out its role to investigate any complaints or suspected violation of this Act, Regulations made under the Act or codes of practice issued under it, shall have the power to compel a Personal Insolvency Trustee to provide it with books of account and other records.

(2) The Debt Settlement Office, where it finds that a Personal Insolvency Trustee has acted in breach of any provision of this Act, of any Regulations made under the Act or of any codes of practice issued under it, shall have the power to do any one, or a combination of, the following—

- (a) impose restrictions or conditions on the licence of a Personal Insolvency Trustee;
- (b) in cases of serious breaches, revoke the licence of a Personal Insolvency Trustee;
- (c) without prejudice to paragraphs (a) and (b), refer a breach to a professional body, if any, of a Personal Insolvency Trustee where the breach raises issues as to the Personal Insolvency Trustee's continued fitness to be a member of such body;
- (d) impose a financial sanction by way of penalty on a Personal Insolvency Trustee,
- (e) order a Personal Insolvency Trustee to pay monetary compensation to any individual who has suffered financial loss arising from any such breach.

#### ***Explanatory note***

This section implements the recommendation in paragraph 1.167 concerning the sanctions which the Debt Settlement Office may impose: (a) impose restrictions or conditions on the licence of a Personal Insolvency Trustee; (b) in cases of serious breaches, revoke the licence of a Personal

Insolvency Trustee; (c) without prejudice to paragraphs (a) and (b), refer a breach to a professional body, if any, of a Personal Insolvency Trustee where the breach raises issues as to the Personal Insolvency Trustee's continued fitness to be a member of such body; (d) impose a financial sanction by way of penalty on a Personal Insolvency Trustee, (e) order a Personal Insolvency Trustee to pay monetary compensation to any individual who has suffered financial loss arising from any such breach.

### **Annual Report of Debt Settlement Office**

**27.—** (1) The Debt Settlement Office shall, as soon as practicable after the end of each calendar year, publish an annual report, which shall include a financial statement and a statistical analysis of the complaints received and cases investigated during the year to which it applies.

#### *Explanatory note*

This section implements the recommendation in paragraph 1.168 that the Debt Settlement Office shall, as soon as practicable after the end of each calendar year, publish an annual report, which shall include a financial statement and a statistical analysis of the complaints received and cases investigated during the year to which it applies.

### **Mandatory requirements to obtain licence as Personal Insolvency Trustee**

**28.—** (1) A person applying for a licence as a Personal Insolvency Trustee shall comply with prescribed conditions concerning —

- (a) the applicant's general fitness and good character;
- (b) whether the applicant has been convicted of any offence, in particular involving fraud, dishonesty or violence;
- (c) the applicant's record of compliance with insolvency legislation;
- (d) whether the applicant has engaged in any practice considered to be deceitful, oppressive or otherwise unfair or improper, which casts doubt upon his or her probity or competence for discharging duties of Personal Insolvency Trustee;
- (e) the prior conduct of the applicant in carrying out any insolvency practice, including the applicant's independence, skill, integrity and compliance with generally accepted professional standards;
- (f) adequate systems of control;
- (g) disclosure of conflicts of interests;
- (h) previous cancellation of registration or other disciplinary sanctions;
- (i) the applicant's education and training;
- (j) the skills and relevant knowledge of the applicant regarding the relevant legislation, debt management techniques, and his or her ability to carry out the role and to comply with all

of the duties and obligations required of the role;

- (k) the level of the applicant's insurance against liabilities that the applicant may incur in this role or to provide security for the proper performance of his or her functions;
- (l) the solvency of the applicant and any previous bankruptcies or insolvencies within a prescribed period;
- (m) if the applicant is a member of any professional body, the applicant's standing within that body, and any current disciplinary action by the body involving the applicant.

(2) The Minister shall make Regulations prescribing the details of any of the matters set out in *subsection (2)*.

(3) The Debt Settlement Office shall publish a Code of Practice providing guidance on any of the matters set out in *subsection (2)*.

(4) For the avoidance of doubt—

- (a) a Personal Insolvency Trustee need not be a money adviser or money advice undertaking, and
- (b) the same Personal Insolvency Trustee may act for a debtor for any or all of the following, namely, a Debt Settlement Arrangement process, a Debt Relief Order or for any purpose connected with and permitted by the Bankruptcy Act 1988, as amended by this Act.

#### ***Explanatory note***

*Subsection (1)* implements the recommendation in paragraph 1.144 as to the mandatory requirements to obtain a licence as a Personal Insolvency Trustee.

*Subsections (2)* and *(3)* implement the recommendations in paragraph 1.145 on the making of Regulations and a Code of Practice as to the mandatory requirements to obtain a licence as a Personal Insolvency Trustee.

*Subsection (4)* implements the recommendations in paragraphs 1.41, 1.58 and 1.140 (a) that a Personal Insolvency Trustee need not be a money adviser or money advice undertaking (this assumes that such entities will, in the near future, become regulated entities); and (b) that the same Personal Insolvency Trustee may act for a debtor for any or all of the following, namely, a Debt Settlement Arrangement process, a Debt Relief Order or for any purpose connected with and permitted by the *Bankruptcy Act 1988*.

#### **Code of Practice on Standards for Personal Insolvency Trustees**

**29.—** (1) The Debt Settlement Office shall, as soon as practicable after it has been established, prepare and publish a Code of Practice on Standards for Personal Insolvency Trustees, which shall provide guidance on the standards expected of a Personal Insolvency Trustee in carrying out his or her duties and functions.

(2) Without prejudice to the generality of *subsection (1)*, the Code of Practice on Standards for Personal Insolvency Trustees shall include guidance on the following matters The Commission recommends that codes of conduct could cover subjects such as the following —



- (a) continuing professional development activities;
- (b) maintenance in force of a bond or security for losses caused by the fraud or dishonesty of the Personal Insolvency Trustee;
- (c) general best practice standards in relation to the preparation and supervision of Debt Settlement Arrangements (including the provision of advice to debtors);
- (d) duties to assess the debtor's income and the repayments that the debtor can reasonably make or is obliged to make towards his or her creditors, and to monitor the payment of contributions by the debtor to his/her creditors;
- (e) making of annual returns relating to all cases worked on during a year;
- (f) records to be maintained by a Personal Insolvency Trustee;
- (g) a duty to act honestly and impartially;
- (h) a duty to notify creditors, the Debt Settlement Office or the court (as appropriate) if it becomes apparent that a conflict of interests exists, and to take steps to avoid the conflict of interest;
- (i) a duty to respect any data protection legislation and privacy rights when dealing with information relating to an insolvency;
- (j) details of the obligatory preliminary inquiries and actions that must be taken by the Personal Insolvency Trustee in any process or proceedings under this Act;
- (k) details of the approach to be taken by the Personal Insolvency Trustee in investigating matters affecting any process or proceedings under this Act;
- (l) details of the approach to be taken by the Personal Insolvency Trustee in identifying, protecting, realising, or determining the ownership of, assets, or in obtaining advice about an interest or value, and disposing of property;
- (m) standards regarding remuneration and costs;
- (n) standards and duties regarding the holding of meetings of creditors;
- (o) standards and duties regarding the keeping of Personal Insolvency Trustee accounts;
- (p) duties to provide information to creditors;
- (q) duties to report to creditors;
- (r) duties regarding the distribution of dividends;
- (s) advertising practices of a Personal Insolvency Trustee; and
- (t) duties relating to the reporting of offences or the sanctioning of debtors or directors.

(3) The Debt Settlement Office shall consult with such parties as it considers appropriate necessary in preparing the Code of Practice on Standards for Personal Insolvency Trustees, which shall include relevant representatives and professional bodies.

### *Explanatory note*

This section implements the recommendation in paragraph 1.158 that the Debt Settlement Office must prepare and publish a Code of Practice on Standards for Personal Insolvency Trustees to provide guidance on the standards expected of a Personal Insolvency Trustee in carrying out his or her duties and functions. This Code will cover: (a) continuing professional development activities; (b) maintenance in force of a bond or security for losses caused by the fraud or dishonesty of the Personal Insolvency Trustee; (c) general best practice standards in relation to the preparation and supervision of Debt Settlement Arrangements (including the provision of advice to debtors); (d) duties to assess the debtor's income and the repayments that the debtor can reasonably make or is obliged to make towards his or her creditors, and to monitor the payment of contributions by the debtor to his/her creditors; (e) making of annual returns relating to all cases worked on during a year; (f) records to be maintained by a Personal Insolvency Trustee; (g) a duty to act honestly and impartially; (h) a duty to notify creditors, the Debt Settlement Office or the court (as appropriate) if it becomes apparent that a conflict of interests exists, and to take steps to avoid the conflict of interest; (i) a duty to respect any data protection legislation and privacy rights when dealing with information relating to an insolvency; (j) details of the obligatory preliminary inquiries and actions that must be taken by the Personal Insolvency Trustee in any process or proceedings under this Bill; (k) details of the approach to be taken by the Personal Insolvency Trustee in investigating matters affecting any process or proceedings under this Bill; (l) details of the approach to be taken by the Personal Insolvency Trustee in identifying, protecting, realising, or determining the ownership of, assts, or in obtaining advice about an interest or value, and disposing of property; (m) standards regarding remuneration and costs; (n) standards and duties regarding the holding of meetings of creditors; (o) standards and duties regarding the keeping of Personal Insolvency Trustee accounts; (p) duties to provide information to creditors; (q) duties to report to creditors; (r) duties regarding the distribution of dividends; (s) advertising practices of a Personal Insolvency Trustee; and (t) duties relating to the reporting of offences or the sanctioning of debtors or directors.

### **Guidelines on Reasonable Expenditure and Essential Income for Debtors**

**30.—** (1) The Debt Settlement Office shall, as soon as practicable after it has been established, prepare and publish Guidelines on Reasonable Expenditure and Essential Income for Debtors.

(2) Without prejudice to the generality of *subsection (1)*, in preparing the Guidelines the Debt Settlement Office shall take into account —

- (a) the structural framework of the Standard Financial Statement published by the Money Advice and Budgeting Service;
- (b) the definition of poverty in the *National Anti-Poverty Strategy* and *National Action Plan for Social Inclusion 2007-2016* or similar replacement publications
- (c) subject to *paragraph (d)*, the amount of the Basic Supplementary Welfare Allowance; and
- (d) the need to incentivise the debtor to seek and maintain employment and to cooperate in the completion of his or her obligations under the Debt Settlement Arrangement as far as possible, in particular by—
  - (i) ensuring that the reasonable essential income permitted to be maintained by a debtor is higher than that which the debtor would receive if he or she was unemployed and reliant on social welfare payments for income;

- (ii) ensuring that the debtor is allowed to retain a significant portion of any income increase;
- (iii) providing for proportionate reductions in the amount of payments to be made by the debtor as a reward for completing certain stages of the Debt Settlement Arrangement payment plan;
- (iv) ensuring that the level of income allowed to the debtor under a Debt Settlement Arrangement is greater than that exempted under an instalment order, attachment of earnings mechanism or other method for the enforcement of judgment debts.

***Explanatory note***

This section implements the recommendation in paragraph 1.296 that the Debt Settlement Office must prepare and publish Guidelines on Reasonable Expenditure and Essential Income for Debtors.

**Offences [and penalties]**

**31.—** (1) A debtor who participates in a Debt Settlement Arrangement process in a manner that involves fraudulent or dishonest conduct commits an offence.

(2) Without prejudice to the generality of *subsection (1)*, a debtor commits an offence under this section where he or she —

- (a) fraudulently makes a false or incomplete representation for the purposes of obtaining the acceptance by a creditors' meeting of a proposed Debt Settlement Arrangement;
  - (b) knowingly conceals, or refuses to produce, or produces falsified document or documents or information when required to do so by the Personal Insolvency Trustee, the Debt Settlement Office or the court;
  - (c) conceals or disposes of property with the intention of defrauding creditors;
  - (d) fraudulently deals with property obtained on credit;
  - (e) obtains credit above a certain limit without disclosing that the debtor is a party to a Debt Settlement Arrangement; or
  - (f) carries on business in a name other than the debtor's own without disclosing the name under which the Debt Settlement Arrangement has been registered in the Personal Insolvency Register.
- (3) (a) Where a Personal Insolvency Trustee has reasonable grounds to believe that the debtor may have committed a criminal offence under this Act, the Personal Insolvency Trustee shall notify the Debt Settlement Office of this.
- (b) The Personal Insolvency Trustee shall cooperate with any criminal investigation under this Act.

(4) A person who acts as a Personal Insolvency Trustee without a current licence issued under this Act commits an offence.

(5) Summary proceedings in relation to an offence under this Act, other than Part 5, may be brought and prosecuted by the Debt Settlement Office.

(6) [Penalites for offences].

***Explanatory note***

*Subsections (1) and (2)* implement the recommendations in paragraph 1.362 that a debtor who participates in a Debt Settlement Arrangement process in a manner that involves fraudulent or dishonest conduct commits an offence.

*Subsection (3)* implements the recommendations in paragraph 1.363 that: (a) where a Personal Insolvency Trustee has reasonable grounds to believe that the debtor may have committed a criminal offence under this Bill, the Personal Insolvency Trustee must notify the Debt Settlement Office of this; and (b) the Personal Insolvency Trustee must cooperate with any criminal investigation under this Bill.

*Subsection (4)* implements the recommendation in paragraph 1.138 that a person who acts as a Personal Insolvency Trustee without a current licence issued under this Bill commits an offence.

*Subsection (5)* implements the recommendation in paragraph 1.144 that summary proceedings in relation to an offence under this Bill (other than Part 5, on debt collection undertakings), may be brought and prosecuted by the Debt Settlement Office.

As to *subsection (6)*, the Commission considers that the details of the penalties for offences under the Bill could be modelled on those available to, for example, the Central Bank of Ireland or the Office of the Director of Corporate Enforcement. The Commission has not made specific recommendations on this because it is primarily a policy issue which will be determined in the general context of implementing the thrust of this Report.

## PART 3

### DEBT RELIEF ORDERS

#### **Purpose of Part 3**

32.— This Part sets out—

- (a) the nature and purpose of a Debt Relief Order,
- (b) the process for obtaining a Debt Relief Order, and
- (c) duties of debtors and offences under this Part.

***Explanatory note***

This section describes the general purposes of *Part 3* of the Bill.

#### **Debt Relief Order**

**33.—** (1) Subject to the provisions of this Act, an insolvent debtor (being a natural person) whose disposable income, non-essential assets and total debts fall below the prescribed level (in this Part referred to as an insolvent debtor) may obtain a Debt Relief Order in respect of his or her personal debt.

(2) (a) The Minister shall, as soon as practicable after the coming into force of this Act, make Regulations for the purposes of *subsection (1)* which set out the prescribed levels of disposable income, non-essential assets and total debts.

(b) The Minister shall, from time to time, amend the prescribed levels, having regard in particular to the Consumer Price Index.

***Explanatory note***

The Debt Relief Order is a low-cost “No Income, No Assets” procedure which would grant debt discharge after a short waiting period to insolvent individuals whose income and assets are so limited that neither a Debt Settlement Arrangement or bankruptcy would be appropriate: see paragraph 2.46 of the Report.

*Subsection (1)* implements the recommendation in paragraph 2.50 that insolvent debtors whose disposable income, non-essential assets and total debts fall below thresholds specified by law may apply for a Debt Relief Order.

*Subsection (2)* implements the recommendation in paragraph 2.50 that these levels are to be set in secondary legislation and that the levels should be index-linked.

**Debts and liabilities excluded from Debt Relief Order**

**34.—** (1) A Debt Relief Order shall not release an insolvent debtor from any secured debt, and any such debt is therefore not capable of being discharged under this Part.

(2) A Debt Relief Order shall not release an insolvent debtor from any of the following debts or liabilities, and any such debts or liabilities are therefore not capable of being discharged under this Part—

(a) any liability arising out of a court order made in family law proceedings,

(b) any liability arising out of damages awarded in respect of personal injuries or wrongful death arising from the tort of the insolvent debtor,

(c) any debt or liability arising from a loan (or forbearance of a loan) obtained through fraud, misappropriation, embezzlement or fraudulent breach of trust, or

(d) any debt or liability arising by virtue of a court order made under the *Proceeds of Crime Acts 1996 and 2005* or by virtue of a fine ordered to be paid by a court in respect of a criminal offence.

***Explanatory note***

*Subsection (1)* implements the recommendation in paragraph 2.54 that secured debts should be excluded from the Debt Relief Order process, and should not be capable of being discharged.

*Subsection (2)* implements the recommendation in paragraph 2.55 that the following debts or liabilities are also excluded from the Debt Relief Order process, and are also not capable of being discharged: (a) any liability arising out of a court order made in family law proceedings; (b) any liability arising out of damages awarded in respect of personal injuries or wrongful death arising from the tort of the debtor; (c) any debt or liability arising from a loan (or forbearance of a loan) obtained through fraud, misappropriation, embezzlement or fraudulent breach of trust; or (d) any debt or liability arising by virtue of a court order made under the *Proceeds of Crime Acts 1996 and 2005* or by virtue of a fine ordered to be paid by a court in respect of a criminal offence.

### **Application for Debt Relief Order**

**35.—** (1) An insolvent debtor may initiate an application for a Debt Relief Order to the Money Advice and Budgeting Service only.

(2) The Money Advice and Budgeting Service shall, in consultation with the debtor, prepare and complete a prescribed application form for a Debt Relief Order, based on the Standard Financial Statement, and shall confirm that, having regard to the information supplied by the debtor, the debtor appears to comply with the conditions in *section 33* and *section 36*.

(3) The Money Advice and Budgeting Service shall communicate the application form for a Debt Relief Order to the Debt Settlement Office, which shall determine, in accordance with this Part, whether to make a Debt Relief Order.

(4) The Debt Settlement Office shall make a Debt Relief Order where the application complies with the requirements specified in *section 33* and *section 36*.

(5) The insolvent debtor shall pay a prescribed fee to the Money Advice and Budgeting Service, which shall be set at such a level as not to operate as an obstacle to access to the Debt Relief Order process and which shall be revised from time to time by reference to the Consumer Price Index.

(6) Applications for, and communications concerning, a Debt Relief Order shall, so far as practicable, be made using on-line information and communications technology.

(7) Where a Debt Relief Order is made, it shall be registered by the Debt Settlement Office in the Personal Insolvency Register.

### ***Explanatory note***

*Subsection (1)* implements the recommendation in paragraph 2.59 that an insolvent debtor must initiate an application for a Debt Relief Order through the Money Advice and Budgeting Service (MABS) only.

*Subsection (2)* implements the recommendation in paragraph 2.59 that the Money Advice and Budgeting Service, in consultation with the debtor, is to prepare and complete a prescribed application form for a Debt Relief Order, based on the Standard Financial Statement, and must confirm that, having regard to the information supplied by the debtor, the debtor appears to comply with the conditions in *section 33* and *section 36*.

*Subsections (3) and (4)* implement the recommendations in paragraph 2.76 that the Money Advice and Budgeting Service (MABS) will communicate the application form for a Debt Relief Order to the Debt Settlement Office, and that the Debt Settlement Office must make a Debt Relief Order where the application complies with the requirements specified in *section 33* and *section 36*.

*Subsection (5)* implements the recommendation in paragraph 2.61 that the insolvent debtor must pay a fee to the Money Advice and Budgeting Service, which is to prescribed in Regulations and set at such a level as not to operate as an obstacle to access to the Debt Relief Order process. The fee is to be revised from time to time to take account of the Consumer Price Index. The Commission suggests in the Report that this fee could be set at the same level as the fee for a claimant to the Personal Injuries Assessment Board, which is currently (December 2010) €50.

*Subsection (6)* implements the recommendation in paragraph 2.65 that applications for, and communications concerning, a Debt Relief Order shall, so far as practicable, be made using on-line information and communications technology.

*Subsection (7)* implements the recommendation in paragraph 2.115 that where a Debt Relief Order is made, it must be registered by the Debt Settlement Office in the Personal Insolvency Register (as with Debt Settlement Arrangements: see *section 16(1)*).

### **Conditions for Making Debt Relief Order**

**36.—** (1) A Debt Relief Order may be granted by the Debt Settlement Office only in respect of an applicant who is insolvent as defined in *section 33* and where the applicant —

(a) has resided in the State for one year prior to the application or whose centre of main interests is in the State, and

(b) either —

(i) has not previously been granted a Debt Relief Order, or

(ii) if he or she has previously been granted a Debt Relief Order, his or her insolvency as defined in this section has been caused by external factors outside of the debtor's control (it being presumed that any such factors were not outside his or her control where less than 6 years have elapsed since a Debt Relief Order was granted to the debtor).

(2) The Debt Settlement Office may refuse to make a Debt Relief Order where it is of opinion, based on reasonable grounds, that any of the following conditions exist —

(a) the debtor is an undischarged bankrupt;

(b) a bankruptcy petition is pending against the debtor, and the financial outcome for the petitioning creditor would be materially better if the debtor is adjudicated bankrupt than if the debtor is admitted to the Debt Relief Order process;

(c) the debtor has made any false representation in making the application or on supplying any information or documents in support of it;

(d) the debtor has entered into a transaction with any person at an undervalue during the period between the start of the period of 3 months (ending with the application date) and the determination date;

(e) the debtor has concealed assets with the intention of defrauding creditors;

(f) the debtor has engaged in conduct that would, if the debtor were adjudicated bankrupt, constitute an offence; or

(g) the debtor has incurred a debt or debts knowing that the he or she does not have the means to repay them.

(3) Where the Debt Settlement Office refuses an application, it shall give reasons for the refusal.

(4) (a) The Debt Settlement Office may request further information from the debtor where the Office has reasonable grounds to believe that such information is necessary in order to reach a conclusion in relation to the existence of the conditions specified in this section.

(b) The Debt Settlement Office may refuse to make a Debt Relief Order where the debtor fails to provide such information when requested.

(5) The Debt Settlement Office shall presume that all of the relevant conditions in this section are satisfied if that appears to be the position from the debtor's application and where the Office has no reasonable grounds to believe that the information supplied is inaccurate or incomplete.

#### ***Explanatory note***

*Subsection (1)* implements the recommendations in paragraphs 2.69 and 2.76 that a Debt Relief Order may be granted only in respect of an applicant who is insolvent within the meaning of *section 33* and: (a) has resided in the State for one year prior to the application or whose centre of main interests is in the State; and (b) either (i) has not previously been granted a Debt Relief Order, or (ii) if he or she has previously been granted a Debt Relief Order, his or her insolvency as defined in this section has been caused by external factors outside of the debtor's control (it being presumed that any such factors were not outside his or her control where less than 6 years have elapsed since a Debt Relief Order was granted to the debtor).

*Subsection (2)* implements the recommendation in paragraph 2.77 that the Debt Settlement Office may refuse to make a Debt Relief Order where it is of opinion, based on reasonable grounds, that any of the following conditions exist: (a) the debtor is an undischarged bankrupt; (b) a bankruptcy petition is pending against the debtor, and the financial outcome for the petitioning creditor would be materially better if the debtor is adjudicated bankrupt than if the debtor is admitted to the Debt Relief Order process; (c) the debtor has made any false representation in making the application or on supplying any information or documents in support of it; (d) the debtor has entered into a transaction with any person at an undervalue during the period between the start of the period of 3 months (ending with the application date) and the determination date; (e) the debtor has concealed assets with the intention of defrauding creditors; (f) the debtor has engaged in conduct that would, if the debtor were adjudicated bankrupt, constitute an offence; or (g) the debtor has incurred a debt or debts knowing that the he or she does not have the means to repay them.

*Subsection (3)* implements the recommendation in paragraph 2.78 that where the Debt Settlement Office refuses an application, it must give reasons for the refusal.

*Subsection (4)* implements the recommendations in paragraph 2.79 that: (a) the Debt Settlement Office may request further information from the debtor where the Office has reasonable grounds to believe that such information is necessary in order to reach a conclusion in relation to the existence of the conditions specified in this section; and (b) that the Debt Settlement Office may refuse to make a Debt Relief Order where the debtor fails to provide such information when requested.



*Subsection (5)* implements the recommendations in paragraph 2.80 that the Debt Settlement Office must presume that all of the relevant conditions in this section are satisfied if that appears to be the position from the debtor's application and where the Office has no reasonable grounds to believe that the information supplied is inaccurate or incomplete.

### **Effect of Debt Relief Order**

**37.—** (1) The effect of granting a Debt Relief Order shall be that for a period of 12 months after the granting of the Debt Relief Order, any creditor is prevented from commencing any legal proceedings for the recovery of a debt included in the Debt Relief Order.

(2) Where proceedings for the recovery of a debt included in the Debt Relief Order have already been commenced, the court may make an order staying the proceedings or an order permitting them to continue subject to such terms as the court thinks fit.

(3) For the avoidance of doubt, a creditor and his or her agent are prohibited from taking any action to collect, or undertake or attempt to collect, directly or indirectly, debts owed by a debtor which have been included in a Debt Relief Order.

(4) This section does not affect the power of a secured creditor to realise or otherwise deal with his or her security.

(5) On the expiry of the 12 month period after the granting of the Debt Relief Order, the debts included in the Debt Relief Order shall stand discharged.

### ***Explanatory note***

*Subsection (1)* implements the recommendation in paragraph 2.85 that the effect of granting a Debt Relief Order is to impose a 12 month moratorium on the enforcement or recovery of any debts included in the Order. This means that for a period of 12 months after the granting of the Debt Relief Order, any creditor is prevented from commencing any legal proceedings for the recovery of a debt included in the Debt Relief Order.

*Subsection (2)* implements the recommendation in paragraph 2.85 that where proceedings for the recovery of a debt included in the Debt Relief Order have already been commenced, the court may make an order staying the proceedings or an order permitting them to continue subject to such terms as the court thinks fit.

*Subsection (3)* implements the recommendation in paragraph 2.86 that, to avoid any doubt, a creditor and his or her agent are prohibited from taking any action to collect, or undertake or attempt to collect, directly or indirectly, debts owed by a debtor which have been included in a Debt Relief Order.

*Subsection (4)* implements the recommendation in paragraph 2.87 that the 12 month moratorium on the enforcement or recovery of any debts included in a Debt Relief Order does not affect the power of a secured creditor to realise or otherwise deal with his or her security.

*Subsection (5)* implements the recommendation in paragraph 2.88 that at the end of the 12 month period after the granting of the Debt Relief Order, the debts included in the Debt Relief Order are deemed to be discharged.

### **General Duties of Debtor in Debt Relief Order process**

**38.**— A debtor who participates in the Debt Relief Order process shall, from the time of applying for entry to it through to the completion of the process, comply with the following duties—

- (a) to co-operate fully in the process, and in particular to comply with any reasonable request of the Debt Settlement Office to provide assistance, documents and information necessary for the application of the process to the debtor's case;
- (b) to inform the Debt Settlement Office as soon as reasonably practicable of any material change in his or her circumstances, particularly an increase in the level of the debtor's assets or income, which would affect (or would have affected) the adjudication on the debtor's application, or which influences the debtor's ability to repay an amount towards the debts included in the Debt Relief Order;
- (c) not to obtain credit above a certain amount without disclosing the fact that a Debt Relief Order or a Debt Relief Restrictions Order is in place in respect of the debtor; and
- (d) not to engage directly or indirectly in any business under a name other than that in which the Debt Relief Order was made without disclosing the debtor's name as used in the Order to all persons with whom the debtor enters into a business transaction.

#### ***Explanatory note***

This section implements the recommendation in paragraph 2.93 concerning the duties of a debtor who participates in the Debt Relief Order process.

### **Creditor objection to Debt Relief Order**

**39.**—(1) A creditor may, at any time during the 12 month duration of the Debt Relief Order process, object to the debtor's continuing participation in the Debt Relief Order process by way of applying to the Debt Settlement Office for an investigation by the Debt Settlement Office under this section.

(2) The Debt Settlement Office shall, in response to such objection, carry out an investigation of the debtor's affairs and, if it finds that the conditions for making a Debt Relief Order specified in *section 36* did not exist at the time the Order was made, may amend or, in its discretion, revoke the Order.

(3) A creditor may appeal to the court against a decision of the Debt Settlement Office made under this section on the following grounds —

- (a) the procedural requirements specified in this Act were not followed,
- (b) a material inaccuracy or omission exists in the debtor's application form which causes a material detriment to the creditor,
- (c) the debtor did not satisfy the eligibility requirements to enter the Debt Relief Order process when he or she initiated the process,
- (d) the arrangement unfairly prejudices the interests of a creditor, or

(e) the debtor has committed an offence under this Act.

***Explanatory note***

*Subsections (1) and (2)* implement the recommendations in paragraphs 2.63 and 2.100 concerning the conditions under which the Debt Settlement Office may carry out an investigation on foot of a creditor objection to the debtor's continuing participation in the Debt Relief Order process.

*Subsection (3)* implements the recommendation in paragraph 2.109 that a creditor may apply to court to challenge a decision of the Debt Settlement Office in relation to a Debt Relief Order or an application for such an order in a manner comparable to those applicable to Debt Settlement Arrangements (see *section 21*, above).

**Amendment or termination of Debt Relief Order**

**40.—** (1) The Debt Settlement Office may amend or, in its discretion, terminate a Debt Relief Order where —

(a) the Debt Settlement Office, having carried out an investigation under *section 39*, becomes aware that the conditions for making a Debt Relief Order specified in *section 36* did not exist at the time the Order was made, or

(b) the Debt Settlement Office becomes aware that the debtor no longer complies with the duties imposed on a debtor under this Part.

***Explanatory note***

This section implements the recommendation in paragraph 2.99 concerning the conditions under which the Debt Settlement Office may amend or, in its discretion, terminate a Debt Relief Order, namely where: (a) the Debt Settlement Office, having carried out an investigation under *section 39*, becomes aware that the conditions for making a Debt Relief Order specified in *section 36* did not exist at the time the Order was made; or (b) the debtor no longer complies with the duties imposed on a debtor under this Part.

**Effect of termination of Debt Relief Order**

**41.—** (1) Where a Debt Relief Order is terminated, the debtor shall be liable for all debts covered by the Debt Relief Order, including any arrears, charges and interest that have accrued during the continuance of the Debt Relief Order.

(2) Where a Debt Relief Order is terminated because a debtor's income has increased since the making of the Order, the Debt Settlement Office shall provide that the termination is not to take effect until the debtor has been given reasonable time to come to an arrangement, including a Debt Settlement Arrangement, with his or her creditors.

***Explanatory note***

*Subsection (1)* implements the recommendation in paragraph 2.101 that where a Debt Relief Order is terminated, the debtor becomes liable for all debts covered by the Debt Relief Order, including any arrears, charges and interest that have accrued.

*Subsection (2)* implements the recommendation in paragraph 2.104 that where a Debt Relief Order is terminated because a debtor's income has increased since the making of the Order, the Debt Settlement Office must provide that the termination is not to take effect until the debtor has been given reasonable time to come to an arrangement, including a Debt Settlement Arrangement, with his or her creditors.

### **Offences [and penalties]**

**42.—** (1) A debtor who participates in a Debt Relief Order process in a manner that involves fraudulent or dishonest conduct commits an offence.

(2) Without prejudice to the generality of *subsection (1)*, a debtor commits an offence under this section where he or she —

- (a) knowingly conceals, or refuses to produce, documents, or produces falsified document or documents or information when required to do so by the Money Advice and Budgeting Service, the Debt Settlement Office or the court;
- (b) disposes of property with the intention of defrauding creditors;
- (c) fraudulently deals with property obtained on credit;
- (d) obtains credit above a certain limit without disclosing that a Debt Relief Order has been made in respect of him or her;
- (e) carries on business in a name other than the debtor's own without disclosing the name under which the Debt Relief Order has been registered in the Personal Insolvency Register.

(3) [Penalties for offences].

### ***Explanatory note***

*Subsections (1) and (2)* implement the recommendations in paragraph 2.112 that a debtor who participates in a Debt Relief Order process in a manner that involves fraudulent or dishonest conduct commits an offence.

As to *subsection (3)*, the Commission considers that the details of the penalties for offences under the Bill could be modelled on those available to, for example, the Central Bank of Ireland or the Office of the Director of Corporate Enforcement. The Commission has not made specific recommendations on this because it is primarily a policy issue which will be determined in the general context of implementing the thrust of this Report.

## PART 4

### DEBT ENFORCEMENT PROCEDURES

## CHAPTER 1

### *Institutions and Structures*

#### **Purpose of Part 4, Chapter 1**

**43.**— This Chapter sets out—

- (a) the nature and functions of the Debt Enforcement Office,
- (b) the role and functions of Enforcement Officers, and
- (c) the requirement to have a court order in order to initiate enforcement mechanisms under Part 4, Chapter 2.

#### ***Explanatory note***

This section describes the general purposes of *Part 4, Chapter 1* of the Bill.

#### **Debt Enforcement Office**

**44.**— (1) Without prejudice to *section 47*, the Debt Enforcement Office shall be responsible for the oversight and management in the State of the debt enforcement procedures provided for in this Part.

(2) (a) The Debt Enforcement Office shall put in place procedures to receive and, so far as practicable, to resolve complaints arising in respect of the debt enforcement procedures provided for in this Part.

(b) The Debt Enforcement Office shall, where practicable, resolve any complaints through informal mediation.

(3) The Debt Settlement Office established under *section 25(1)* shall be an independent unit within the Debt Enforcement Office.

#### ***Explanatory note***

*Subsection (1)* implements the recommendation in paragraph 4.28 that the Debt Enforcement Office is to be responsible for the oversight and management in the State of the debt enforcement procedures provided for in this Part. The general functions of the Debt Enforcement Office are set out in *section 47* of the Bill.

*Subsection (2)* implements the recommendation in paragraph 4.28 that the Debt Enforcement Office must put in place procedures to receive and, so far as practicable, to resolve complaints arising in respect of the debt enforcement procedures provided for in this Part; and that it must, where practicable, resolve any complaints through informal mediation.

*Subsection (3)* reiterates the recommendation in paragraph 1.177 that the Debt Settlement Office is to be an independent unit within the Debt Enforcement Office: see also *section 25(1)* of this Bill.

## **Enforcement Officers and supervision by Debt Enforcement Office**

**45.**— (1) Without prejudice to *section 47*, the Debt Enforcement Office shall be responsible for supervising and managing Enforcement Officers who shall carry into effect the enforcement mechanisms provided for in *Part 2* of this Chapter.

(2) Enforcement Officers shall be suitably qualified persons (and may be a natural person or an undertaking), and shall be appointed through a publicly advertised tendering procedure.

(3) Enforcement Officers shall be remunerated either by reference to the money value (poundage) generated by the enforcement mechanisms or on a commission basis.

(4) The Debt Enforcement Office shall appoint at least one Enforcement Officer in each of a number of designated geographical areas in the State.

(5) Subject to *subsection (2)*, the position of Enforcement Officer shall be capable of being carried out by a person who, at the time of coming in to force of this Act, carries out the role of Sheriff or Revenue Sheriff, but nothing in this Act shall require that such a person shall be appointed as an Enforcement Officer.

### ***Explanatory note***

This section implements the recommendation in paragraph 4.29 concerning Enforcement Officers and their supervision by the Debt Enforcement Office. It provides that: (a) the Debt Enforcement Office is to be responsible for supervising and managing Enforcement Officers who are to carry into effect the enforcement mechanisms provided for in *Part 2* of this Chapter; (b) Enforcement Officers must be suitably qualified persons (and may be a natural person or an undertaking), and must be appointed through a publicly advertised tendering procedure; (c) Enforcement Officers are to be remunerated either by reference to the money value (poundage) generated by the enforcement mechanisms or on a commission basis; (d) the Debt Enforcement Office must appoint at least one Enforcement Officer in each of a number of designated geographical areas in the State; and (e) the position of Enforcement Officer can be carried out by existing Sheriffs and Revenue Sheriffs, but that other persons may be appointed to these positions under the publicly advertised tendering procedure provided for in *subsection (2)*.

## **Enforcement fees and Debt Enforcement Office**

**46.**— The Debt Settlement Office shall be funded [**in whole or in part**]<sup>4</sup> through the prescribed fees payable to it by a judgment creditor when applying for the enforcement mechanisms provided for in *Part 2* of this Chapter.

### ***Explanatory note***

This section implements the recommendation in paragraph 4.30 that the Debt Enforcement Office is to be funded, at least in part, through the fees payable to it by a judgment creditor when applying

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<sup>4</sup> The Commission appreciates that the precise funding of the Debt Enforcement Office is a policy issue which will be determined in the general context of implementing the thrust of this Report.

for the enforcement mechanisms provided for in *Part 2* of this Chapter. In this respect, the Commission appreciates that the precise funding of the Debt Settlement Office is a policy issue which will be determined in the general context of implementing the thrust of this Report. This also mirrors the proposed arrangements for the Debt Settlement Office: see *section 25(4)* of the Bill.

### **General functions of Debt Enforcement Office**

**47.—** (1) Without prejudice to *sections 44 and 45*, the functions of the Debt Enforcement Office shall be to —

- (a) oversee the tendering process for the appointment of Enforcement Officers;
- (b) prepare and publish the requirements that must be met by applicants for the position of Enforcement Officer (in respect of which the Debt Enforcement Office shall have regard to the conditions applicable to Personal Insolvency Trustees and to debt collection undertakings);
- (c) supervise and co-ordinate the activities of Enforcement Officers in accordance with their terms of appointment, including —
  - (i) monitoring their performance, and
  - (ii) complaints handling (in particular by reference to the terms of appointment of Enforcement Officers);
- (d) prepare and publish a Code of Practice for Enforcement Officers;
- (e) obtain information on the debtor's means, including through Enforcement Information Disclosure Requests;
- (f) determine whether enforcement is possible in a given case, in particular by choosing the most appropriate enforcement mechanism;
- (g) establish and maintain an internal appeals mechanism for dealing with challenges to its decisions; and
- (h) maintain a register of judgments and enforcement proceedings.

(2) The register of judgments and enforcement proceedings referred to in *subsection (1)(h)* shall include information as to—

- (a) all court judgments in respect of which an enforcement application has been brought;
- (b) all enforcement proceedings in respect of which a stay of enforcement or certificate of unenforceability has been issued on the grounds of the inability of the debtor to pay the amount owed; and
- (c) all enforcement orders made by the Debt Enforcement Office, subject to the removal of information relating to such orders as soon as practicable following the satisfaction of the order.

(3) The register of judgments and enforcement proceedings shall be publicly accessible, subject to a prescribed fee payable to access the register, and shall be integrated into the Personal Insolvency Register maintained under *section 15(1)*.

***Explanatory note***

*Subsection (1)* implements the recommendations in paragraph 4.31 concerning the general functions of the Debt Enforcement Office. These are to: (a) oversee the tendering process for the appointment of Enforcement Officers; (b) prepare and publish the requirements that must be met by applicants for the position of Enforcement Officer (in respect of which the Debt Enforcement Office shall have regard to the conditions applicable to Personal Insolvency Trustees and to debt collection undertakings); (c) supervise and co-ordinate the activities of Enforcement Officers in accordance with their terms of appointment, including (i) monitoring their performance, and (ii) complaints handling (in particular by reference to the terms of appointment of Enforcement Officers); (d) prepare and publish a Code of Practice for Enforcement Officers; (e) obtain information on the debtor's means, including through Enforcement Information Disclosure Requests; (f) determine whether enforcement is possible in a given case, in particular by choosing the most appropriate enforcement mechanism; (g) establish and maintain an internal appeals mechanism for dealing with challenges to its decisions; and (h) maintain a register of judgments and enforcement proceedings.

*Subsections (2) and (3)* implement the recommendations in paragraphs 4.79, 4.80 and 4.81 concerning the register of judgments and enforcement proceedings referred to in *subsection (1)(h)*. The register is to include information as to: (a) all court judgments in respect of which an enforcement application has been brought; (b) all enforcement proceedings in respect of which a stay of enforcement or certificate of unenforceability has been issued on the grounds of the inability of the debtor to pay the amount owed; and (c) all enforcement orders made by the Debt Enforcement Office, subject to the removal of information relating to such orders as soon as practicable following the satisfaction of the order. The register of judgments and enforcement proceedings must be publicly accessible, subject to a prescribed fee payable to access the register, and must be integrated into the Personal Insolvency Register maintained by the Debt Settlement Office under *section 15(1)* of the Bill.

**Obtaining comprehensive information on debtor's means by Debt Enforcement Office**

**48.—** (1) Where a creditor applies to the Debt Enforcement Office to seek an enforcement mechanism provided for in *Part 2* of this Chapter, the Debt Enforcement Office shall obtain comprehensive information concerning the means and financial circumstances of the debtor in question in accordance with the procedures in *subsection (2)*, in order to determine the most appropriate enforcement mechanism, if any, to be used the specific application.

(2) The procedures for obtaining comprehensive information concerning the means and financial circumstances of the debtor in question under *subsection (1)* are—

- (a) The Debt Enforcement Office shall communicate with the debtor, indicating that an enforcement application has been made, and shall require the debtor to complete a Standard Financial Statement within a specified period.
- (b) (i) If the debtor does not comply with this requirement, the relevant local Enforcement Officer shall make contact with the debtor (which may, where appropriate, include visiting the home of the debtor) for the purposes of interviewing the debtor as to his or her means, and completing the Standard Financial Statement.



- (ii) The Enforcement Officer may dispense with such interview where there are reasonable grounds to believe that the process will be unsuccessful or otherwise unjustified (because of the absence of debtor cooperation or unjustifiable cost);
- (c) (i) If the procedure under *paragraph (b)* is unsuccessful or if the Enforcement Officer dispenses with the interview, the Enforcement Officer shall request the debtor to attend the office of the Enforcement Officer, where the debtor shall make a statutory declaration as to his or her means.
  - (ii) This attendance shall be held in private, and the judgment creditor shall be entitled to attend in order to question the debtor;
- (d) Following the process that occurs under *paragraph (b)* or *paragraph (c)*, the Enforcement Officer shall, as soon as practicable, prepare a report and submit the report to the Debt Enforcement Office, and the report shall contain —
  - (i) a recommendation by the Enforcement Officer regarding the most appropriate method of enforcement, if any, in the particular case,
  - (ii) whether the enforcement officer is of the opinion that further information is required, and whether the enforcement officer has reasonable grounds to be of the opinion that further relevant information concerning the debtor may be obtained through accessing tax or social welfare databases, credit history or bank records.
- (e) creditors and debtors may challenge any factual statements made in the Enforcement Officer's report, and make representations to the Debt Enforcement Office as to the most appropriate method of enforcement.

(3) The Debt Enforcement Office shall, as soon as practicable after the coming into force of this Act, develop and publish a Code of Practice setting out the procedures to be followed by Enforcement Officers under subsection (2), in particular in connection with the interview and examination of debtors, and the contents of the Enforcement Officer's report.

***Explanatory note***

*Subsections (1) and (2)* implement the recommendations in paragraph 4.47 concerning how the Debt Enforcement Office obtains comprehensive information concerning the means and financial circumstances of a debtor in order to determine the most appropriate enforcement mechanism, if any, to be used the specific case where a creditor applies for debt enforcement. The sequence of the procedures are: (a) the Debt Enforcement Office must communicate with the debtor, indicating that an enforcement application has been made, and require the debtor to complete a Standard Financial Statement within a specified period; (b) (i) if the debtor does not comply with this requirement, the relevant local Enforcement Officer shall make contact with the debtor (which may, where appropriate, include visiting the home of the debtor) for the purposes of interviewing the debtor as to his or her means, and completing the Standard Financial Statement; (ii) The Enforcement Officer may dispense with such interview where there are reasonable grounds to believe that the process will be unsuccessful or otherwise unjustified (because of the absence of debtor cooperation or unjustifiable cost); (c) (i) If the procedure under paragraph (b) is unsuccessful or if the Enforcement Officer dispenses with the interview, the Enforcement Officer shall request the debtor to attend the office of the Enforcement Officer, where the debtor shall make a statutory declaration as to his or her means; (ii) This attendance shall be held in private, and the judgment creditor shall be entitled to attend in order to question the debtor; (d) Following the process that occurs under paragraph (b) or paragraph (c), the Enforcement Officer shall, as soon as practicable, prepare a report and submit the report to the Debt Enforcement Office, and the report shall contain: (i) a recommendation by the Enforcement

Officer regarding the most appropriate method of enforcement, if any, in the particular case, (ii) whether the enforcement officer is of the opinion that further information is required, and whether the enforcement officer has reasonable grounds to be of the opinion that further relevant information concerning the debtor may be obtained through accessing tax or social welfare databases, credit history or bank records; (e) creditors and debtors may challenge any factual statements made in the Enforcement Officer's report, and make representations to the Debt Enforcement Office as to the most appropriate method of enforcement.

*Subsection (3)* implements the recommendation in paragraph 4.47 that the Debt Enforcement Office must develop and publish a Code of Practice setting out the procedures to be followed by Enforcement Officers under *subsection (2)*, in particular in connection with the interview and examination of debtors, and the contents of the Enforcement Officer's report.

### **Enforcement Information Disclosure Request**

**49.—** (1) Subject to the requirements of the *Data Protection Acts 1988 and 2003*, and to the need to protect, as far as practicable, the debtors' right to privacy, the Debt Enforcement Office may make an Enforcement Information Disclosure Request in the circumstances specified in this section.

(2) The Debt Enforcement Office may make an Enforcement Information Disclosure Request, directed at a Department of State, the Revenue Commissioners or other body (being a bank, credit union or credit reporting company) requesting the disclosure of the specified information concerning the debtor referred to in *subsection (5)*.

(3) The Debt Enforcement Office may make an Enforcement Information Disclosure Request where —

(a) the Debt Enforcement Office is satisfied that it is reasonably necessary and proportionate for the effective enforcement of a judgment and where other less restrictive mechanisms to determine accurately the debtor's means have failed or are inappropriate, and

(b) the Enforcement Officers has stated in his or her report under *section 48* that, in his or her opinion, such a Request is necessary.

(4) A creditor may make a submission to the Debt Enforcement Officer requesting that an Enforcement Information Disclosure Request be made.

(5) The information requested in an Enforcement Information Disclosure Request shall be limited to the following—

(a) the full name of the debtor;

(b) the address of the debtor;

(c) the date of birth of the debtor;

(d) the PPS number of the debtor;

(e) whether or not the debtor is employed;

(f) the name and address of the debtor's employer (if the debtor is employed);

(g) the amount of income being received by the debtor from his or her employment;

(h) the amount of income being received by the debtor from his or her business, trade or profession (if the debtor is self-employed); and

(i) the amount of income being received by the debtor in social welfare benefits.

(6) The recipient of an Enforcement Information Disclosure Request shall comply with the request, except where it is not possible to do so, or where it would be unreasonable to require the recipient to do so, and in either event the recipient shall state the reason for refusing to comply with the Request.

(7) (a) The information received in response to an Enforcement Information Disclosure Request shall, subject to *paragraph (b)*, not be disclosed to any other person (including a creditor) by the Debt Enforcement Office, and shall be restricted to determining what method of enforcement, if any, is appropriate in the specific instance to which the Request relates.

(b) The information may be disclosed to an Enforcement Officer, but only to the extent that it is necessary for the implementation of the enforcement order made by the Debt Enforcement Office (including disclosure of the debtor's employer to facilitate an attachment of earnings, or the disclosure of the debtor's bank account in order to facilitate an attachment of the debtor's bank account).

(8) The Minister shall, as soon as practicable after the coming into force of this Act, make Regulations prescribing how the information referred to in this section shall be communicated, and such Regulations shall have regard in particular to the requirements of the *Data Protection Acts 1988 and 2003*.

(9) It is an offence for any person to engage in the unauthorised use or disclosure of information obtained under an Enforcement Information Disclosure Request.

[(10) Penalties for offences.]

#### ***Explanatory note***

This section implements the recommendations in paragraphs 4.60, 4.61, 4.62, 4.63 and 4.64 that the Debt Enforcement Office should be permitted under certain conditions to make an Enforcement Information Disclosure Request and an Enforcement Information Disclosure Order. These are important aspects of ensuring that the most effective, and least restrictive, enforcement mechanism is used. Any such Request is subject to the requirements of the *Data Protection Acts 1988 and 2003*, and to the need to protect, as far as practicable, the debtors' right to privacy. The Debt Enforcement Office may make an Enforcement Information Disclosure Request, directed at a Department of State, the Revenue Commissioners or other body (being a bank, credit union or credit reporting company) requesting the disclosure of specified information concerning the debtor. The Debt Enforcement Office may only make an Enforcement Information Disclosure Request where: (a) the Debt Enforcement Office is satisfied that it is reasonably necessary and proportionate for the effective enforcement of a judgment and where other less restrictive mechanisms to determine accurately the debtor's means have failed or are inappropriate, and (b) the Enforcement Officers has stated in his or her report under *section 48* that, in his or her opinion, such a Request is necessary. The information requested in an Enforcement Information Disclosure Request is limited to the following: (a) the full name of the debtor; (b) the address of the debtor; (c) the date of birth of the debtor; (d) the PPS number of the debtor; (e) whether or not the debtor is employed; (f) the name and address of the debtor's employer (if the debtor is employed); (g) the amount of income being received by the debtor from his or her employment; (h) the amount of income being received by the debtor from his or her business, trade or profession (if the debtor is self-employed); and (i) the amount of income being

received by the debtor in social welfare benefits. It is an offence for any person to engage in the unauthorised use or disclosure of information obtained under an Enforcement Information Disclosure Request.

As to *subsection (10)*, the Commission considers that the details of the penalties for offences under the Bill could be modelled on those available to, for example, the Central Bank of Ireland or the Office of the Director of Corporate Enforcement. The Commission has not made specific recommendations on this because it is primarily a policy issue which will be determined in the general context of implementing the thrust of this Report.

## **Determination and Implementation of Enforcement Mechanisms**

**50.—** (1) The Debt Enforcement Office shall determine whether enforcement is possible in a given case and shall determine the most appropriate enforcement mechanism in *Chapter 2* of this Part is to be used, having regard to the information collected under *section 48* and, where appropriate, *section 49*, and to the principle of proportionality in *Chapter 2* of this Part.

(2) A creditor and a debtor may appeal the determination of the Debt Enforcement Office as to enforcement to the internal appeals mechanisms of the Debt Enforcement Office.

(3) A determination of the Debt Enforcement Office that a specific enforcement mechanism in *Chapter 2* of this Part is to be used shall be implemented by the Enforcement Officer in the relevant designated geographical area in the State in which the debtor resides.

### ***Explanatory note***

This section implements the recommendations in paragraphs 4.72 and 4.73 that the Debt Enforcement Office shall determine whether enforcement is possible in a given case and shall determine the most appropriate enforcement mechanism in *Chapter 2* of this Part is to be used, having regard to the information collected under *section 48* and, where appropriate, *section 49*, and to the principle of proportionality in *Chapter 2* of this Part. It also provides that a creditor and a debtor may appeal the determination of the Debt Enforcement Office as to enforcement to the internal appeals mechanisms of the Debt Enforcement Office. It also provides that a determination of the Debt Enforcement Office that a specific enforcement mechanism in *Chapter 2* of this Part is to be used shall be implemented by the Enforcement Officer in the relevant designated geographical area in the State in which the debtor resides.

## **Court order required for enforcement mechanisms, use of single process and progress reports by Enforcement Officer**

**51.—** (1) For the avoidance of doubt, a court order to the effect that a debt is due and owing to a specified creditor is a necessary precondition for an application by that creditor to the Debt Enforcement Office for an enforcement mechanism under this Part.

(2) The use of an enforcement mechanism or mechanisms through the Debt Enforcement Office under this Part against a specific debtor shall involve, as far as practicable, a single process, in particular where more than one creditor applies for an enforcement mechanism against a specific debtor.

(3) The Enforcement Officer with responsibility for the implementation of a specific enforcement mechanism shall, from time to time (in accordance with guidelines to be issued by the

Debt Enforcement Office as to the appropriate time periods), prepare and submit a report setting out the progress of the enforcement process to both the Debt Enforcement Office and the judgment creditor.

*Explanatory note*

*Subsection (1)* implements the recommendations in paragraph 4.97 that, to avoid any doubt on the matter, a court order to the effect that a debt is due and owing to a specified creditor is a necessary precondition for an application by that creditor to the Debt Enforcement Office for an enforcement mechanism under this Part.

*Subsection (2)* implements the recommendations in paragraph 4.104 that the use of an enforcement mechanism or mechanisms through the Debt Enforcement Office under this Part against a specific debtor must involve, as far as practicable, a single process, in particular where more than one creditor applies for an enforcement mechanism against a specific debtor.

*Subsection (3)* implements the recommendations in paragraph 4.108 that the Enforcement Officer with responsibility for the implementation of a specific enforcement mechanism must, from time to time (in accordance with guidelines to be issued by the Debt Enforcement Office as to the appropriate time periods), prepare and submit a report setting out the progress of the enforcement process to both the Debt Enforcement Office and the judgment creditor.

## CHAPTER 2

### *Enforcement Mechanisms*

#### **Purpose of Part 4, Chapter 2<sup>5</sup>**

**52.**— This Chapter sets out—

- (a) the principles of proportionality and maintenance of a minimum standard of living in the application of enforcement mechanisms,
- (b) the supervisory functions of the Debt Enforcement Office,
- (c) the individual enforcement mechanisms: instalment orders, attachment of debts orders, attachment of earnings orders, goods seizure orders for seizure and sale of goods, and orders to receive and retain money due to debtor from future sale, and
- (d) abolition of imprisonment for non-payment of debt.

*Explanatory note*

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<sup>5</sup> The Commission notes that the reforms provided for in Part 4, Chapter 2 of the Bill complement the general consolidation and reform of the provisions on enforcement of judgments set out in Part 2, Chapter 10 (sections 112 to 122), and Schedule 8, of the draft *Courts (Consolidation and Reform) Bill* in Appendix A of the Commission's *Report on Consolidation and Reform of the Courts Acts* (LRC 97-2010).

This section describes the general purposes of *Part 4, Chapter 2* of the Bill.

#### **Proportionality of enforcement mechanism and minimum standard of living**

**53.—** (1) The Debt Enforcement Office shall, when determining the enforcement mechanism in a specific case, have regard to the principle of proportionality and the need to ensure that the enforcement mechanism chosen by it is the least restrictive in respect of the specific debtor.

(2) The Debt Enforcement Office shall ensure that the effect of any enforcement mechanism is that the debtor's income does not fall below the level of income exempted from attachment under an attachment of earnings order.

#### ***Explanatory note***

*Subsection (1)* implements the recommendation in paragraph 5.16 that the Debt Enforcement Office must, when determining the enforcement mechanism in a specific case, have regard to the principle of proportionality and the need to ensure that the enforcement mechanism chosen by it is the least restrictive in respect of the specific debtor.

*Subsection (2)* implements the recommendation in paragraph 5.53 that the Debt Enforcement Office must ensure that the effect of any enforcement mechanism is that the debtor's income does not fall below the level of income exempted from attachment under an attachment of earnings order.

#### **Admission by debtor of claim at pre-action stage**

**54.—** Where any debtor receives a pre-action notice of pending legal proceedings for the recovery of a debt, the debtor may admit the claim and make an offer to pay the amount owed by instalments, with may be made into a consensual court order on the agreement of the creditor.

#### ***Explanatory note***

This section implements the recommendation in paragraph 5.20 that where any debtor receives a pre-action notice of pending legal proceedings for the recovery of a debt, the debtor may admit the claim and make an offer to pay the amount owed by instalments, with may be made into a consensual court order on the agreement of the creditor.

#### **Consolidated instalment order**

**55.—** Where a debtor's financial circumstances are such as to permit multiple judgment debts that have been obtained against him or her to be repaid by instalment orders within a reasonable period of up to 5 years, the Debt Enforcement Office may make a consolidated instalment order which may provide for the sharing of the instalment payments made by the debtor amongst his or her relevant judgment creditors on a shared basis.

#### ***Explanatory note***

This section implements the recommendation in paragraph 5.26 that where a debtor's financial circumstances are such as to permit multiple judgment debts that have been obtained against him or her to be repaid by instalment orders within a reasonable period of up to 5 years, the Debt Enforcement Office may make a consolidated instalment order which may provide for the sharing of the instalment payments made by the debtor amongst his or her relevant judgment creditors on a shared basis.

#### **Attachment of debts order**

**56.—** (1) The Debt Enforcement Office may make an attachment of debts order without first requiring that an Enforcement Officer attempt enforcement by execution against the debtor's goods.

(2) An attachment of debts order shall not operate to deprive a debtor of the means necessary to maintain a minimum standard of living for the debtor, and of his or her dependents, if any.

(3) The minimum standard of living referred to in *subsection (2)* shall be the same as the level of income exempted from attachment under an attachment of earnings order, and shall be achieved in the case of an attachment of debts order by maintaining a balance in the debtor's bank account at that minimum level.

(4) In this section an attachment of debts order means an order directed at the debtor's bank account for payment of a personal debt due to a creditor.

(5) The term "attachment of debts order" shall replace the term "garnishee order."

#### ***Explanatory note***

*Subsection (1)* implements the recommendation in paragraph 5.47 that the Debt Enforcement Office may make an attachment of debts order without first requiring that an Enforcement Officer attempt enforcement by execution against the debtor's goods. *Subsection (4)* defines an attachment of debts order as an order directed at the debtor's bank account for payment of a personal debt due to a creditor.

*Subsection (2)* implements the recommendation in paragraph 5.53 that an attachment of debts order must not operate to deprive a debtor of the means necessary to maintain a minimum standard of living for the debtor, and of his or her dependents, if any.

*Subsection (3)* implements the recommendation in paragraph 5.53 that the minimum standard of living referred to in *subsection (2)* is to be the same as the level of income exempted from attachment under an attachment of earnings order, and is to be achieved in the case of an attachment of debts order by maintaining a balance in the debtor's bank account at that minimum level.

*Subsection (5)* implements the recommendation in paragraph 5.40 that the term "attachment of debts order" shall replace the term "garnishee order."

#### **Joint bank accounts and attachment of debts order**

**57.—** (1) A debt owed to a creditor in the form of a bank account held jointly by the debtor with another person (a joint bank account) shall be capable of being attached to an attachment of debts order in order to satisfy the debt.

(2) The amount of a balance held in a joint bank account capable of being attached shall be limited to 50% (or a proportionately lower amount where the account is held jointly by more than two people).

(3) (a) It shall be presumed that a joint bank account held by two persons is held in equal shares, subject the non-debtor account holder providing evidence that the funds in the account are proportioned differently.

(b) The Debt Enforcement Office shall notify the non-debtor account holder of its decision to make an attachment of debts order in respect of the account, and the non-debtor account holder shall then be given the opportunity, within a specified time, to provide evidence to the Debt Enforcement Office that the account is held otherwise than in equal shares.

(4) The Debt Enforcement Office shall as soon as is practicable, including by reference to any information obtained under *subsection (3)*, determine the shares in which the account is held before a final attachment of debts order is made by it.

#### ***Explanatory note***

*Subsection (1)* implements the recommendation in paragraph 5.57 that a debt owed to a creditor in the form of a bank account held jointly by the debtor with another person shall be capable of being attached to an attachment of debts order in order to satisfy the debt.

*Subsection (2)* implements the recommendation in paragraph 5.58 that the amount of a balance held in a joint bank account capable of being attached shall be limited to 50% (or a proportionately lower amount where the account is held jointly by more than two people).

*Subsection (3)* implements the recommendation in paragraph 5.59 that: (a) it will be presumed that a joint bank account held by two persons is held in equal shares, subject the non-debtor account holder providing evidence that the funds in the account are proportioned differently; and (b) that the Debt Enforcement Office must notify the non-debtor account holder of its decision to make an attachment of debts order in respect of the account, and the non-debtor account holder shall then be given the opportunity, within a specified time, to provide evidence to the Debt Enforcement Office that the account is held otherwise than in equal shares.

*Subsection (4)* implements the recommendation in paragraph 5.60 that the Debt Enforcement Office must as soon as is practicable, including by reference to any information obtained under *subsection (3)*, determine the shares in which the account is held before a final attachment of debts order is made by it.

#### **Attachment of earnings order**

**58.—** (1) The Debt Enforcement Office may make an attachment of earnings order in respect of any debt owed by any debtor who is in receipt of any income.

(2) An attachment of earnings order shall not operate to deprive a debtor of the means necessary to maintain a minimum standard of living for the debtor, and of his or her dependents, if any.



(3) The minimum standard of living referred to in *subsection (2)* shall be the same as the level of income exempted under a Debt Settlement Arrangement in accordance with *section 10*.

(4) (a) An employer may deduct from the debtor's salary a prescribed sum that reflects the actual cost incurred by the employer in complying with the attachment of earnings order.

(b) Where the employer deducts the sum referred to in paragraph (a), the employer shall notify the employee in writing of the making of any such deduction.

(5) (a) Where practicable, an employer may transmit all sums deducted to satisfy an attachment of earnings order into a designated account under the control of the Debt Enforcement Office.

(b) The Debt Enforcement Office shall, as soon as practicable after receipt of a deduction, transmit the sum or sums to the relevant creditor.

(6) Any employer who, by reason of the circumstances that an attachment of earnings order has been made in relation to the employee or that the employer is required to make payments under such an order in relation to the employee, dismisses the employee, or alters the employee's position to his or her prejudice, or otherwise penalises the employee shall be guilty of an offence.

#### ***Explanatory note***

*Subsection (1)* implements the recommendation in paragraph 5.91 that the Debt Enforcement Office may make an attachment of earnings order in respect of any debt owed by any debtor who is in receipt of any income.

*Subsection (2)* implements the recommendation in paragraph 5.94 that an attachment of earnings order must not operate to deprive a debtor of the means necessary to maintain a minimum standard of living for the debtor, and of his or her dependents, if any.

*Subsection (3)* implements the recommendation in paragraph 5.97 that the minimum standard of living referred to in *subsection (2)* is to be the same as the level of income exempted under a Debt Settlement Arrangement in accordance with *section 10* of the Bill.

*Subsection (4)* implements the recommendation in paragraph 5.108 that: (a) an employer may deduct from the debtor's salary a prescribed sum (to be set out in Regulations) that reflects the actual cost incurred by the employer in complying with the attachment of earnings order; and (b) that where the employer deducts the sum referred to in *paragraph (a)*, the employer must notify the employee in writing of the making of any such deduction.

*Subsection (5)* implements the recommendation in paragraph 5.109 that: (a) where practicable, an employer may transmit all sums deducted to satisfy an attachment of earnings order into a designated account under the control of the Debt Enforcement Office; and (b) the Debt Enforcement Office must, as soon as practicable after receipt of a deduction, transmit the sum or sums to the relevant creditor.

*Subsection (6)* implements the recommendation in paragraph 5.105 that any employer who, by reason of the circumstances that an attachment of earnings order has been made in relation to the employee or that the employer is required to make payments under such an order in relation to the employee, dismisses the employee, or alters the employee's position to his or her prejudice, or otherwise penalises the employee shall be guilty of an offence.

### Variation and review of attachment of earnings order

**59.—** (1) A debtor or a creditor may apply to the Debt Enforcement Office for a variation of an attachment of earnings order where the debtor's circumstances change materially.

(2) A debtor may apply to the Debt Enforcement Office for the suspension of an attachment of earnings order where his or her circumstances have changed rendering him or her temporarily unable to comply with the order.

(3) The Debt Enforcement Office shall publish guidance for debtors and creditors in readily understandable and plain language containing information on their entitlement to apply for a variation or suspension of an attachment of earnings order, including the types of circumstances in which a variation or suspension is possible.

(4) The Debt Enforcement Office may review an attachment of earnings order of its own motion where an application is made to it to enforce another judgment debt against a debtor who is subject to an attachment of earnings order.

(5) Where a review of the debtor's changed circumstances (either on an application of the debtor or creditor, or on the Office's own motion) concludes that the debtor no longer possesses the means to satisfy a judgment debt through an attachment of earnings order, the Debt Enforcement Office may discharge the attachment of earnings order and provide the debtor with information of the relevant insolvency procedures that may be open to him or her.

(6) (a) A debtor who is subject to an attachment of earnings order shall inform the Debt Enforcement Office of any change in his or her employment status, including any change of employer.

(b) Where a debtor who is subject to an attachment of earnings order changes employer and the employer becomes aware that the employee is subject to such an order, the debtor's new employer shall notify the Debt Enforcement Office that the attachment of earnings order is to apply to the new employer.

(7) Where attachment of earnings deductions have ceased, and the debtor has failed to comply with a request by the Debt Enforcement Office for the voluntary disclosure of details concerning his or her employment status, the Debt Enforcement Office may (subject to the requirements of the *Data Protection Acts 1988 and 2003*) apply for access to any relevant information concerning the debtor held by the Revenue Commissioners and the Department of Social Protection.

### *Explanatory note*

*Subsections (1) to (3)* implement the recommendations in **paragraph 5.115** that: (a) a debtor or a creditor may apply to the Debt Enforcement Office for a variation of an attachment of earnings order where the debtor's circumstances change materially; (2) that a debtor may apply to the Debt Enforcement Office for the suspension of an attachment of earnings order where his or her circumstances have changed rendering him or her temporarily unable to comply with the order; and (3) that the Debt Enforcement Office shall publish guidance for debtors and creditors in readily understandable and plain language containing information on their entitlement to apply for a variation or suspension of an attachment of earnings order, including the types of circumstances in which a variation or suspension is possible.

*Subsection (4)* implements the recommendation in paragraph 5.116 that the Debt Enforcement Office may review an attachment of earnings order of its own motion where an application is made to it to enforce another judgment debt against a debtor who is subject to an attachment of earnings order.

*Subsection (5)* implements the recommendation in paragraph 5.111 that where a review of the debtor's changed circumstances (either on an application of the debtor or creditor, or on the Office's own motion) concludes that the debtor no longer possesses the means to satisfy a judgment debt through an attachment of earnings order, the Debt Enforcement Office may discharge the attachment of earnings order and provide the debtor with information of the relevant insolvency procedures that may be open to him or her.

*Subsection (6)* implements the recommendations in paragraph 5.117 that: (a) a debtor who is subject to an attachment of earnings order shall inform the Debt Enforcement Office of any change in his or her employment status, including any change of employer; and (b) where a debtor who is subject to an attachment of earnings order changes employer and the employer becomes aware that the employee is subject to such an order, the debtor's new employer shall notify the Debt Enforcement Office that the attachment of earnings order is to apply to the new employer.

*Subsection (7)* implements the recommendations in paragraph 5.118 that where attachment of earnings deductions have ceased, and the debtor has failed to comply with a request by the Debt Enforcement Office for the voluntary disclosure of details concerning his or her employment status, the Debt Enforcement Office may (subject to the requirements of the Data Protection Acts 1988 and 2003) apply for access to any relevant information concerning the debtor held by the Revenue Commissioners and the Department of Social Protection.

#### **Consolidated attachment of earnings order**

**60.**— Where a debtor's financial circumstances are such as to permit multiple judgment debts that have been obtained against him or her to be repaid by attachment of earnings orders within a reasonable period of up to 5 years, the Debt Enforcement Office may make a consolidated attachment of earnings order which may provide for the distribution of a single amount deducted from the debtor's income amongst his or her relevant judgment creditors on a shared basis.

#### ***Explanatory note***

This section implements the recommendation in paragraph 5.126 that where a debtor's financial circumstances are such as to permit multiple judgment debts that have been obtained against him or her to be repaid by attachment of earnings orders within a reasonable period of up to 5 years, the Debt Enforcement Office may make a consolidated attachment of earnings order which may provide for the distribution of a single amount deducted from the debtor's income amongst his or her relevant judgment creditors on a shared basis.

#### **Attachment of earnings order and family maintenance**

**61.**— Without prejudice to the other provisions of this Act and for the avoidance of doubt, where an attachment of earnings order has been made for family maintenance in respect of a debtor, the Debt Settlement Office shall not make any further attachment of earnings order unless the deductions arising from such further order allow the debtor a reasonable standard of living sufficient for the debtor and his or her dependants, if any.

### *Explanatory note*

This section implements the recommendation in paragraph 5.130 that where an attachment of earnings order has been made for family maintenance in respect of a debtor, the Debt Settlement Office shall not make any further attachment of earnings order unless the deductions arising from such further order allow the debtor a reasonable standard of living sufficient for the debtor and his or her dependants, if any.

### **Goods seizure order for seizure and sale of goods**

**62.—** (1) The Debt Enforcement Office may make a Goods Seizure Order which provides for the seizure and sale of specified goods of a debtor by an Enforcement Officer.

(2) (a) Subject to *paragraphs (b) and (c)*, the effect of an application made to the Debt Enforcement Office for a Goods Seizure Order is to bind the property in the goods of the judgment debtor as from the time when the application is made by a creditor to the Debt Enforcement Office.

(b) The binding effect does not prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he or she acquired his or her title notice that such an application or any other application by virtue of which the goods of the execution debtor might be seized had been made to the Debt Enforcement Office.

(c) The binding effect shall not apply to any goods of the debtor that are exempt from seizure.

(3) The following are exempt from seizure under a Goods Seizure Order —

(a) any assets of the debtor reasonably necessary to ensure that the debtor, and his or her dependants (if any), may maintain a reasonable standard of living; and

(b) any assets of the debtor that are necessary for the debtor's employment, business or vocation.

(4) The Minister may make Regulations prescribing the details of any of the matters set out in *subsection (3)*.

(5) (a) An Enforcement Officer may identify certain goods of the debtor for seizure, and reach an agreement in writing with the debtor (a "walking possession agreement") that the goods have been seized but that the debtor is permitted to retain custody of them, subject to the condition that the debtor agrees not to remove or dispose of them, nor to permit anyone else to do so, before the judgment debt in question is paid.

(b) Where the requirements in *paragraph (a)* have been met, the effect of the walking possession agreement is that the Enforcement Officer shall be deemed not to have abandoned the goods.

(6) (a) An Enforcement Officer shall prepare a report setting out the result of carrying out the Goods Seizure Order and submit it to the creditor, the debtor and the Debt Enforcement Office.

(b) (i) The report shall be expressed in clearly understandable plain language.

(ii) Without prejudice to the generality of *subparagraph (i)*, if the Enforcement Officer finds no goods to seize, the report shall state this in plain language and shall avoid the use of any term such as “*nulla bonna*”.

(7) For the avoidance of doubt, the Goods Seizure Order replaces the procedure known as “execution against goods” and the order known as “*feri facias*.”

#### ***Explanatory note***

*Subsections (1) and (7)* implement the recommendations in paragraph 5.149 that the Debt Enforcement Office may make a Goods Seizure Order which provides for the seizure and sale of goods of a debtor by an Enforcement Officer; and that the Goods Seizure Order replaces the procedure known as “execution against goods” and the order known as “*feri facias*.” The *feri facias* order (sometimes abbreviated to “*fi fa*”) originated in medieval times when court orders were issued in Latin. The officer carrying out the order, traditionally a sheriff, was ordered “*quod fieri facias de bonis et catallis, etc.*” The literal translation of these Latin words is “that you cause to be made of the goods and chattels, etc”. This meant, in effect, that the sheriff “make good” or obtain enough money to repay the debt owed to comply with the amount specified in the creditor’s court order (judgment order). This was, and is, often done by seizing and selling some goods of the debtor.

*Subsection (2)* implements the recommendations in paragraphs 5.154 that subject to two exceptions, the effect of an application made to the Debt Enforcement Office for a Goods Seizure Order is to bind the property in the goods of the judgment debtor as from the time when the application is made by a creditor to the Debt Enforcement Office. The two exceptions are: (a) the binding effect does not prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he or she acquired his or her title notice that such an application or any other application by virtue of which the goods of the execution debtor might be seized had been made to the Debt Enforcement Office; and (b) the binding effect does not apply to any goods of the debtor that are exempt from seizure.

*Subsections (3) and (4)* implement the recommendations in paragraphs 5.163 and 5.164 that the following are exempt from seizure under a Goods Seizure Order: (a) any assets of the debtor reasonably necessary to ensure that the debtor, and his or her dependants (if any), may maintain a reasonable standard of living; and (b) any assets of the debtor that are necessary for the debtor’s employment, business or vocation. The details of any of the matters set out in *subsection (3)* are to be set out in Regulations.

*Subsection (5)* implements the recommendation in paragraph 5.176 that an Enforcement Officer may identify certain goods of the debtor for seizure, and reach an agreement in writing with the debtor (a “walking possession agreement”) that the goods have been seized but that the debtor is permitted to retain custody of them, subject to the condition that the debtor agrees not to remove or dispose of them, nor to permit anyone else to do so, before the judgment debt in question is paid. Where these requirements have been met, the effect of the walking possession agreement is that the Enforcement Officer shall be deemed not to have abandoned the goods.

*Subsection (6)* implements the recommendation in paragraph 5.150 that an Enforcement Officer must prepare a report setting out the result of carrying out the Goods Seizure Order and submit it to the creditor, the debtor and the Debt Enforcement Office. The report must be expressed in clearly understandable plain language. In particular, if the Enforcement Officer finds no goods to seize, the report must state this in plain language and must avoid the use of Latin terms such as “*nulla bonna*” (which means “no goods” were found).

### Goods seizure order: jointly owned and third party goods

**63.**— (1) Subject to the provisions of this section, a Goods Seizure Order shall apply to the debtor's goods only.

(2) Jointly-owned goods may be being seized under a Goods Seizure Order subject to the protection of the interests of joint owners.

(3) (a) An Enforcement Officer may act on the presumption that goods found in the debtor's possession or on the debtor's premises are capable of being seized, unless the Enforcement Officer knows or ought to know that the goods are not solely owned by the debtor.

(b) The Enforcement Officer shall make reasonable enquiries as to ownership of any person present at the place in which the goods are situated.

(c) Where the Enforcement Officer makes reasonable enquiries, the Enforcement Officer shall incur no liability for seizing jointly owned goods or goods owned by a third party.

(4) A third party holding an interest in seized goods shall be paid by the Enforcement Officer the amount of his or her interest in priority to the payment of the debt to the creditor and the payment of the costs of seizure and sale.

(5) A third party holding an interest in seized goods may prevent the sale of such goods in exceptional circumstances where he or she establishes to the Debt Enforcement Office that it would be unduly harsh to his or her interests to allow the sale to continue.

(6) (a) Where a debtor has a right to sell goods upon making a payment to a third party, an Enforcement Officer may sell those goods provided that the judgment creditor pays this sum to the third party.

(b) An Enforcement Officer may pay any balance due under a hire or leasing agreement in order to obtain a clear title to the goods held under such an agreement in advance of sale.

(7) (a) Subject to *paragraph (b)*, an Enforcement Officer may deliver goods to a third party who claims an interest in the goods, on production of a receipt or similar proof of ownership.

(b) The Debt Enforcement Office shall put in place an internal procedure to resolve any dispute that arises as to ownership of goods which have been delivered under *paragraph (a)*.

(c) The internal procedure under *paragraph (b)* does not alter or affect the entitlement of any person to institute proceedings in court as to ownership of the goods.

(8) (a) Subject to *subsection (7)*, a third party who claims an interest in seized goods shall make a statutory declaration to that effect.

(b) A third party who makes a vexatious or frivolous claim with the purpose of frustrating a Goods Seizure Order shall be liable for any costs incurred by any party as a result of such claim.

### ***Explanatory note***

*Subsection (1)* implements the recommendation in paragraph 5.190 that, in general and subject to the other provisions of the section, a Goods Seizure Order shall apply to the debtor's goods only.

*Subsection (2)* implements the recommendation in paragraph 5.190 that jointly-owned goods may be being seized under a Goods Seizure Order subject to the protection of the interests of joint owners.

*Subsection (3)* implements the recommendation in paragraph 5.191 that an Enforcement Officer may act on the presumption that goods found in the debtor's possession or on the debtor's premises are capable of being seized, unless the Enforcement Officer knows or ought to know that the goods are not solely owned by the debtor. The Enforcement Officer must make reasonable enquiries as to ownership of any person present at the place in which the goods are situated; if so, the Enforcement Officer will incur no liability for seizing jointly owned goods or goods owned by a third party.

*Subsection (4)* implements the recommendation in paragraph 5.192 that a third party holding an interest in seized goods shall be paid by the Enforcement Officer the amount of his or her interest in priority to the payment of the debt to the creditor and the payment of the costs of seizure and sale.

*Subsection (5)* implements the recommendation in paragraph 5.193 that a third party holding an interest in seized goods may prevent the sale of such goods in exceptional circumstances where he or she establishes to the Debt Enforcement Office that it would be unduly harsh to his or her interests to allow the sale to continue.

*Subsection (6)* implements the recommendations in paragraph 5.194 that: (a) where a debtor has a right to sell goods upon making a payment to a third party, an Enforcement Officer may sell those goods provided that the judgment creditor pays this sum to the third party; and (b) an Enforcement Officers may pay any balance due under a hire or leasing agreement in order to obtain a clear title to the goods held under such an agreement in advance of sale.

*Subsection (7)* implements the recommendations in paragraph 5.197 that: (a) subject to paragraph (b), an Enforcement Officer may deliver goods to a third party who claims an interest in the goods, on production of a receipt or similar proof of ownership (this puts on a statutory footing a long-standing informal practice); (b) the Debt Enforcement Office must put in place an internal procedure to resolve any dispute that arises as to ownership of goods which have been delivered under paragraph (a); and (c) the internal procedure under paragraph (b) does not alter or affect the entitlement of any person to institute proceedings in court as to ownership of the goods.

*Subsection (8)* implements the recommendations in paragraph 5.198 that: (a) other than where the circumstances under *subsection (7)* arise, a third party who claims an interest in seized goods must make a statutory declaration to that effect; and (b) a third party who makes a vexatious or frivolous claim with the purpose of frustrating a Goods Seizure Order will be liable for any costs incurred by any party as a result of such a claim.

### **Goods seizure order: entry of premises**

**64.—** (1) Subject to this section, an Enforcement Officer may enter a debtor's premises.

(2) An Enforcement Officer may use reasonable force to enter a debtor's premises only where authorised to do so on foot of a warrant issued by the District Court, on the Court being satisfied on information on oath that forcible entry is reasonably necessary for the enforcement of the judgment debt in question.

(3) The Minister may make Regulations providing for measures to facilitate access to multi-unit developments by Enforcement Officers.

***Explanatory note***

*Subsections (1) and (2)* implement the recommendations in paragraph 5.210 that: (a) subject to this section, an Enforcement Officer may enter a debtor's premises; and (b) an Enforcement Officer may use reasonable force to enter a debtor's premises only where authorised to do so on foot of a warrant issued by the District Court, on the Court being satisfied on information on oath that forcible entry is reasonably necessary for the enforcement of the judgment debt in question. The Commission has published a *Consultation Paper on Search Warrants and Bench Warrants* (LRC CP 58-2009) which provisionally recommended the enactment of a generally applicable *Search Warrants Act*.

*Subsection (2)* implements the recommendation in paragraph 5.212 that the Minister may make Regulations providing for measures to facilitate access to multi-unit developments by Enforcement Officers. At the time of writing (December 2010), the *Multi-Unit Developments Bill 2009* is currently before the Oireachtas.

**Order to receive and retain money due to debtor from future sale: receiver by way of equitable execution**

**65.**— (1) The Debt Enforcement Office may make an order appointing a named person, called a receiver by way of equitable execution, to receive and retain any money due to a debtor from a specified sale of goods that is known to be occurring in the future.

(2) It shall not be necessary to attempt to use any other form of enforcement mechanism provided for in this Chapter before the appointment of a receiver by way of equitable execution.

***Explanatory note***

*Subsection (1)* implements the recommendation in paragraph 5.65 that the Debt Enforcement Office may use the long-established procedure of appointing a named person, called a receiver by way of equitable execution, to receive and retain any money due to a debtor from a specified sale of goods that is known to be occurring in the future.

*Subsection (2)* implements the recommendation in paragraph 5.67 that it is not necessary to attempt to use any other form of enforcement mechanism provided for in this Chapter before the appointment of a receiver by way of equitable execution. This confirms the position under existing law.

**Combined mechanisms and orders**

**66.**— (1) The Debt Enforcement Office may combine enforcement mechanisms and orders provided for under this Part in a case involving a single debtor.

(2) Where the Debt Enforcement Office has made an attachment of debts order, or an attachment of earnings order or a Goods Seizure Order, and has suspended any such order subject to compliance with an instalment order, any such order shall come into effect if a debtor fails to comply with an instalment order.



*Explanatory note*

This section implements the recommendation in paragraph 5.18 that the Debt Enforcement Office may combine enforcement mechanisms and orders in a case involving a single debtor. Where the Debt Enforcement Office has made an attachment of debts order, or an attachment of earnings order or a Goods Seizure Order, and has suspended any such order subject to compliance with an instalment order, any such order comes into effect if a debtor fails to comply with an instalment order.

**Guidelines on use of Goods Seizure Order**

**67.** — (1) The Debt Enforcement Office shall prepare and publish guidelines which describe the circumstances in which the use of a Goods Seizure Order would be appropriate and proportionate.

(2) The guidelines shall include guidance on the following —

- (a) whether the debtor possesses such assets available for seizure as to indicate that a Goods Seizure Order is likely to realise a significant amount of the judgment debt owed within a reasonable time;
- (b) whether other more appropriate or less restrictive methods of enforcement are likely to be successful in recovering a significant amount of the judgment debt owed within a reasonable time;
- (c) the need for additional consideration of the debtor's right to privacy and the inviolability of the dwelling in cases where a Goods Seizure Order takes place at the debtor's home; and
- (d) whether the proceeds raised from the sale and seizure of a debtor's assets would exceed the costs incurred in the process by a reasonable amount.

*Explanatory note*

This section implements the recommendation in paragraph 5.140 that the Debt Enforcement Office must prepare and publish guidelines which describe the circumstances in which the use of a Goods Seizure Order would be appropriate and proportionate. The guidelines must include guidance on the following: (a) whether the debtor possesses such assets available for seizure as to indicate that a Goods Seizure Order is likely to realise a significant amount of the judgment debt owed within a reasonable time; (b) whether other more appropriate or less restrictive methods of enforcement are likely to be successful in recovering a significant amount of the judgment debt owed within a reasonable time; (c) the need for additional consideration of the debtor's right to privacy and the inviolability of the dwelling in cases where a Goods Seizure Order takes place at the debtor's home; and (d) whether the proceeds raised from the sale and seizure of a debtor's assets would exceed the costs incurred in the process by a reasonable amount.

**Code of Practice on Goods Seizure Order**

**68.** — (1) The Debt Enforcement Office shall prepare and publish a Code of Practice concerning the manner in which Enforcement Officers shall carry out a Goods Seizure Order.

(2) The content of the Code of Practice shall take account of relevant non-statutory codes in the State and those developed in other states, and shall take account of the views of representatives of Enforcement Officers, and creditor and debtor representative bodies.

(3) (a) The Debt Enforcement Office shall monitor the operation of the Code of Practice, and shall receive and hear any complaints of debtors or creditors in respect of the conduct of Enforcement Officers when carrying out a Goods Seizure Order.

(b) The Code of Practice shall include the procedures for dealing with complaints, including the transparency and impartiality of the process.

#### ***Explanatory note***

*Subsections (1) and (2)* implement the recommendations in paragraph 5.144 that the Debt Enforcement Office must prepare and publish a Code of Practice concerning the manner in which Enforcement Officers shall carry out a Goods Seizure Order, that the content of the Code of Practice must take account of relevant non-statutory codes in the State and those developed in other states, and also take account of the views of representatives of Enforcement Officers, and creditor and debtor representative bodies.

*Subsection (3)* implements the recommendation in paragraph 5.145 that the Debt Enforcement Office must monitor the operation of the Code of Practice, and receive and hear any complaints of debtors or creditors in respect of the conduct of Enforcement Officers when carrying out a Goods Seizure Order. The Code of Practice must also include the procedures for dealing with complaints, including the transparency and impartiality of the process.

#### **Abolition of imprisonment for non-payment of debt**

**69.** — (1) Notwithstanding any enactment or rule of law, no person shall be liable to imprisonment for non-payment of a personal debt, including where this arises from wilful refusal to pay the debt.

(2) Subject to *subsection (3)*, nothing in this section alters or affects the law of contempt of court.

(3) (a) A person commits an offence where he or she wilfully refuses to pay a personal debt arising out of a court order to that effect.

(b) A person who commits an offence under *paragraph (a)* is liable on summary conviction to a community service order in accordance with the Criminal Justice (Community Service) Act 1983.

#### ***Explanatory note***

*Subsection (1)* implements the recommendation in paragraph 5.234 that imprisonment for non-payment of debt be abolished.

*Subsection (2)* implements the recommendation in paragraph 5.234 that, subject to *subsection (3)*, nothing in this section alters or affects the law of contempt of court. The Commission's *Report on Contempt of Court* (LRC 47-1994) recommended that the law on contempt of court be placed on a statutory footing.

*Subsection (3)* implements the recommendation in paragraph 5.234 that: (a) a person commits an offence where he or she wilfully refuses to pay a personal debt arising out of a court order to that effect; and (b) a person who commits an offence under *subsection (3)* is liable on summary conviction to a community service order under the *Criminal Justice (Community Service) Act 1983*.

## PART 5

### REGULATION OF DEBT COLLECTION ACTIVITIES AND UNDERTAKINGS

#### **Purpose of Part 5**

**70.**— This Part sets out—

- (a) the meaning of debt collection activities and debt collection undertakings,
- (b) the licensing of debt collection activities and undertakings, and
- (c) the roles and functions of the Financial Regulator and the Financial Services Ombudsman.

#### ***Explanatory note***

This section describes the general purposes of *Part 5* of the Bill.

#### **Debt collection activities and debt collection undertaking**

**71.**— In this Part—

“debt collection activities” includes the following—

- (a) collecting, offering, undertaking or attempting to collect, directly or indirectly, debts owed or asserted to be owed or due by a debtor to a creditor;
- (b) soliciting accounts for collection;
- (c) communicating or undertaking, offering or attempting to communicate, debt collection demands to debtors by post, telephone or electronic means;
- (d) collecting a debt owed to that person, using a name or other artifice that indicates that another party is attempting to collect the debt; or
- (e) collecting, attempting, undertaking or offering to collect a debt owed by a debtor to the collecting person where the debt was purchased by that person at a time when it was already in default;

“debt collection undertaking” means any person (legal or natural) who engages in debt collection activities, with the exception of the following persons (such persons not being required to obtain a debt collection licence under this Part) —

- (a) a person who is the creditor under the agreement giving rise to the debt which that person seeks to collect, or any employee or officer of such creditor, but that this exception does not apply where —
  - (i) the debt being collected was in default when the person acquired it, or
  - (ii) the debt was acquired for the principal purpose of collecting the debt for commercial gain;
- (b) a person who collects debts for another person, both of whom are related by common ownership or affiliated by corporate control, if the person collecting debts does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;
- (c) a person who is otherwise licensed by the Financial Regulator and who collects debts arising as a result of the activities which it is otherwise licensed to perform by the Financial Regulator;
- (d) a person who is licensed by another regulatory authority (approved by the Financial Regulator as a “competent regulatory authority”) under statutory powers and who collects debts arising as a result of the activities which it is licensed to perform by that regulatory authority;
- (e) an officer or employee of the State to the extent that collecting or attempting to collect any debt is in the performance of his or her official duties;
- (f) a person who collects a debt that has been obtained by that person as a secured party in a commercial credit transaction involving the original creditor;
- (g) a person who purchases a debt or debts through acquiring or merging with a business in a transaction that includes the transfer of accounts receivable;
- (h) a person who, as part of the person’s business activity, acquires a debt or debts through the seizure of accounts receivable under a security agreement; and
- (i) a person to whom the contract that gave rise to the debt was assigned for the purpose of financing the transaction.

***Explanatory note***

The definition of “debt collection activities” implements the recommendation in paragraph 6.84 that the term includes the following: (a) collecting, offering, undertaking or attempting to collect, directly or indirectly, debts owed or asserted to be owed or due by a debtor to a creditor; (b) soliciting accounts for collection; (c) communicating or undertaking, offering or attempting to communicate, debt collection demands to debtors by post, telephone or electronic means; (d) collecting a debt owed to that person, using a name or other artifice that indicates that another party is attempting to collect the debt; or (e) collecting, attempting, undertaking or offering to collect a debt owed by a debtor to the collecting person where the debt was purchased by that person at a time when it was already in default.

The definition of “debt collection undertaking” implements the recommendation in paragraph 6.83 that the term means any person (legal or natural) who engages in debt collection activities. It also

implements the recommendations in paragraphs 6.120, 6.121 and 6.122 as to the categories of persons engaged in debt collection who do not need to obtain a debt collection licence under this Bill: (a) a person who is the creditor under the agreement giving rise to the debt which that person seeks to collect, or any employee or officer of such creditor (but that this exception does not apply where the debt being collected was in default when the person acquired it, or the debt was acquired for the principal purpose of collecting the debt for commercial gain); (b) a person who collects debts for another person, both of whom are related by common ownership or affiliated by corporate control, if the person collecting debts does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts; (c) a person who is otherwise licensed by the Financial Regulator and who collects debts arising as a result of the activities which it is otherwise licensed to perform by the Financial Regulator; (d) a person who is licensed by another regulatory authority (approved by the Financial Regulator as a “competent regulatory authority”) under statutory powers and who collects debts arising as a result of the activities which it is licensed to perform by that regulatory authority; (e) an officer or employee of the State to the extent that collecting or attempting to collect any debt is in the performance of his or her official duties; (f) a person who collects a debt that has been obtained by that person as a secured party in a commercial credit transaction involving the original creditor; (g) a person who purchases a debt or debts through acquiring or merging with a business in a transaction that includes the transfer of accounts receivable; (h) a person who, as part of the person’s business activity, acquires a debt or debts through the seizure of accounts receivable under a security agreement; and (i) a person to whom the contract that gave rise to the debt was assigned for the purpose of financing the transaction.

### **Licence required for debt collection undertaking**

**72.—** A debt collection undertaking shall be in possession of a current debt collection licence.

#### *Explanatory note*

This section implements the recommendation in paragraph 6.86 that a debt collection undertaking must be in possession of a current debt collection licence.

### **Licensing role of Financial Regulator**

**73.—** (1) The Central Bank of Ireland (in this Part referred to as the “Financial Regulator”)<sup>6</sup> shall issue a licence to a suitably qualified person to carry out the functions of a debt collection undertaking.<sup>7</sup>

(2) A licence issued under this section shall remain valid for 2 years.

(3) An applicant for a debt collection licence shall —

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<sup>6</sup> The Commission is conscious that, since the enactment of the *Central Bank Reform Act 2010*, the Central Bank of Ireland is a single unitary body which is responsible for both central banking and financial regulation. The senior management of the Central Bank of Ireland comprises the Governor of the Central Bank of Ireland, the Director General and the Head of Financial Regulation. The Head of Financial Regulation has functional responsibility within the Central Bank of Ireland for financial regulation.

<sup>7</sup> The Commission considers that the details of such licensing powers could be modelled on those already available to the Central Bank of Ireland.

- (a) demonstrate to the satisfaction of the Financial Regulator that it is a fit and proper person to carry on the business of a debt collection undertaking;
- (b) demonstrate to the satisfaction of the Financial Regulator the capacity to comply with the substantive obligations imposed on a debt collection undertaking by this Act and sufficient financial resources to conduct a business as a debt collection undertaking;
- (c) demonstrate that it has registered as a data controller under the Data Protection Acts 1988 and 2003, or has applied to be so registered; and
- (d) provide a tax clearance certificate from the Revenue Commissioners.

(4) In determining whether to grant an applicant a debt collection licence, the Financial Regulator shall have regard to any circumstances which appear relevant, and shall in particular have regard to whether the applicant has—

- (a) contravened any provisions of this Act or of Regulations made under it;
- (b) committed any offence under the Consumer Credit Act 1995 or the Non-Fatal Offences against the Person Act 1997 or any other offence involving fraud, dishonesty or violence;
- (c) contravened any provisions of consumer protection law, either in Ireland or in another Member State of the European Economic Area;
- (d) engaged in discrimination within the meaning of the *Employment Equality Acts 1998 to 2008* or the *Equal Status Acts 2000 to 2008* in, or in connection with, the carrying on of any business; or
- (e) engaged in business practices appearing to the Financial Regulator to be deceitful or oppressive, or otherwise unfair or improper (whether unlawful or not).

(5) The Financial Regulator may refer to the Garda Síochána any matter which it may reasonably suspect could constitute an offence by an applicant or a licence holder under the Non-Fatal Offences against the Person Act 1997 or any other offence involving fraud, dishonesty or violence.

(6) The investigatory powers and administrative sanctions of the Financial Regulator under Part IIIC of the Central Bank Act 1942 (inserted by the Central Bank and Financial Services Authority of Ireland Act 2004, and as further amended) shall apply to the activities of a debt collection undertaking under this Part.

***Explanatory note***

*Subsection (1)* implements the recommendation in paragraph 6.94 that the Central Bank of Ireland (the Financial Regulator) should be the licensing authority for debt collection undertakings.

*Subsection (2)* implements the recommendation in paragraph 6.87 that a licence issued under this section remains valid for 2 years.

*Subsection (3)* implements the recommendations in paragraphs 6.103, 6.105, 6.106 and 6.107 that an applicant for a debt collection licence must: (a) demonstrate to the satisfaction of the Financial Regulator that it is a fit and proper person to carry on the business of a debt collection undertaking; (b) demonstrate to the satisfaction of the Financial Regulator the capacity to comply with the substantive obligations imposed on a debt collection undertaking by this Act and sufficient financial resources to conduct a business as a debt collection undertaking; (c) demonstrate that it has registered as a data controller under the *Data Protection Acts 1988 and*

2003, or has applied to be so registered; and (d) provide a tax clearance certificate from the Revenue Commissioners.

*Subsection (4)* implements the recommendations in paragraph 6.104 that, in determining whether to grant an applicant a debt collection licence, the Financial Regulator must have regard to any circumstances which appear relevant, and must in particular have regard to whether the applicant has: (a) contravened any provisions of this Bill or of Regulations made under it; (b) committed any offence under the Consumer Credit Act 1995 or the Non-Fatal Offences against the Person Act 1997 or any other offence involving fraud, dishonesty or violence; (c) contravened any provisions of consumer protection law, either in Ireland or in another Member State of the European Economic Area; (d) engaged in discrimination within the meaning of the Employment Equality Acts 1998 to 2008 or the Equal Status Acts 2000 to 2008 in, or in connection with, the carrying on of any business; or (e) engaged in business practices appearing to the Financial Regulator to be deceitful or oppressive, or otherwise unfair or improper (whether unlawful or not).

*Subsection (5)* implements the recommendation in paragraph 6.95 that the Financial Regulator may refer to the Garda Síochána any matter which it may reasonably suspect could constitute an offence by an applicant or a licence holder under the *Non-Fatal Offences against the Person Act 1997* or any other offence involving fraud, dishonesty or violence.

*Subsection (6)* implements the recommendation in paragraph 6.143 that the investigatory powers and administrative sanctions of the Financial Regulator under Part IIIC of the *Central Bank Act 1942* (inserted by the *Central Bank and Financial Services Authority of Ireland Act 2004*) are to apply to the activities of a debt collection undertaking under this Part of the Bill.

### **Code of Practice on Debt Collection Undertakings**

**74.—** (1) The Financial Regulator shall publish, following consultation with appropriate representatives of persons engaged in debt collection, a Code of Practice on Debt Collection Undertakings,<sup>8</sup> which shall specify the standards and obligations to be observed by debt collection undertakings and unfair practices that are prohibited.

(2) Without prejudice to *subsection (1)*, the Code of Practice on Debt Collection Undertakings shall include provisions as to —

- (a) communication between the debt collection undertaking and the debtor, and the employers, relatives and friends of the debtor (which may have regard to the provisions of sections 45, 46 and 49 of the Consumer Credit Act 1995);
- (b) conduct of undertaking employees in visiting a debtor's premises;
- (c) confidentiality requirements;
- (d) requirements regarding tracing and efforts to ascertain a debtor's location;
- (e) complaints handling procedures;

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<sup>8</sup> The Commission recommends that the Code of Practice should have the same status as other Codes issued by the Financial Regulator. In its *Interim Report on Personal Debt Management and Debt Enforcement* (LRC 96-2010), paragraphs 2.48-2.57, the Commission suggested that clarification was needed on the status of some Codes, and the Commission considers that this would best be achieved in the wider context of the general reform of financial services legislation currently (December 2010) in progress.

- (f) general prohibitions on false, misleading or deceptive practices;
- (g) furnishing of receipts and reports to clients;
- (h) handling of client money and the maintenance of trust accounts;
- (i) accounting and reporting practices; and
- (j) fees charged to debtors by debt collection undertakings.

***Explanatory note***

*Subsection (1)* implements the recommendation in paragraph 6.132 that the Financial Regulator must publish, following consultation with appropriate representatives of persons engaged in debt collection, a Code of Practice on Debt Collection Undertakings, which shall specify the standards and obligations to be observed by debt collection undertakings and prohibited unfair practices.

*Subsection (2)* implements the recommendations in paragraphs 6.133 and 6.134 that the Code of Practice on Debt Collection Undertakings must include provisions as to: (a) communication between the debt collection undertaking and the debtor, and the employers, relatives and friends of the debtor (which may have regard to the provisions of sections 45, 46 and 49 of the *Consumer Credit Act 1995*); (b) conduct of undertaking employees in visiting a debtor's premises; (c) confidentiality requirements; (d) requirements regarding tracing and efforts to ascertain a debtor's location; (e) complaints handling procedures; (f) general prohibitions on false, misleading or deceptive practices; (g) furnishing of receipts and reports to clients; (h) handling of client money and the maintenance of trust accounts; (i) accounting and reporting practices; and (j) fees charged to debtors by debt collection undertakings.

**Role of Financial Services Ombudsman**

**75.—** (1) The powers and functions of the Financial Services Ombudsman under Part VIIB of the Central Bank Act 1942 (inserted by the Central Bank and Financial Services Authority of Ireland Act 2004, and as further amended) shall apply to the activities of a debt collection undertaking under this Part.

(2) The Financial Services Ombudsman may refer to the Garda Síochána any matter which he or she may reasonably suspect could constitute an offence by a licenced debt collection undertaking under the Non-Fatal Offences against the Person Act 1997 or any other offence involving fraud, dishonesty or violence.

***Explanatory note***

*Subsection (1)* implements the recommendation in paragraph 6.146 that the powers and functions of the Financial Services Ombudsman under Part VIIB of the *Central Bank Act 1942* (inserted by the *Central Bank and Financial Services Authority of Ireland Act 2004*, and as further amended) shall apply to the activities of a debt collection undertaking under this Part.

*Subsection (2)* implements the recommendation in paragraph 6.146 that the Financial Services Ombudsman may refer to the Garda Síochána any matter which he or she may reasonably suspect could constitute an offence by a licenced debt collection undertaking under the Non-Fatal Offences against the Person Act 1997 or any other offence involving fraud, dishonesty or violence.



## **Offences [and penalties]**

76.— (1) A person commits an offence where she or she—

- (a) without holding a debt collection licence, carries on business as a debt collection undertaking or holds himself or herself out as a debt collection undertaking, or
- (b) holding a debt collection licence, carries on business as a debt collection undertaking under a name not specified in the debt collection licence.

(2) A person commits an offence where she or she —

- (a) knowingly engages or uses the services of a debt collection undertaking that is not licensed, or
- (b) knowingly sells or otherwise assigns a debt to a debt collection undertaking that is not licensed where the person has reason to believe that the unlicensed undertaking is purchasing the debt for the purposes of collecting that debt.

(3) Summary proceedings in relation to an offence under this Part may be brought and prosecuted by the Financial Regulator.

(4) [Penalites for offences].

### ***Explanatory note***

*Subsection (1)* implements the recommendations in paragraph 6.86 that a person commits an offence where she or she: (a) without holding a debt collection licence, carries on business as a debt collection undertaking or holds himself or herself out as a debt collection undertaking; or (b) holding a debt collection licence, carries on business as a debt collection undertaking under a name not specified in the debt collection licence.

*Subsection (2)* implements the recommendation in paragraph 6.135 that a person commits an offence where she or she: (a) knowingly engages or uses the services of a debt collection undertaking that is not licensed, or (b) knowingly sells or otherwise assigns a debt to a debt collection undertaking that is not licensed where the person has reason to believe that the unlicensed undertaking is purchasing the debt for the purposes of collecting that debt.

*Subsection (3)* implements the recommendation in paragraph 6.145 that summary proceedings in relation to an offence under this Part may be brought and prosecuted by the Financial Regulator.

As to *subsection (4)*, the Commission considers that the details of the penalties for offences under the Bill could be modelled on those available to, for example, the Central Bank of Ireland or the Office of the Director of Corporate Enforcement. The Commission has not made specific recommendations on this because it is primarily a policy issue which will be determined in the general context of implementing the thrust of this Report.

## **Civil liability**

**77.—** (1) Any money advanced to a person carrying on debt collection activities without a debt collection licence shall be refunded to the payer.

(2) Any contract or contractual term that contravenes any provision relating to debt collection activities in this Part or in any provision of the Code of Practice made under this Part shall be unenforceable and void, unless, in the case of a provision in the Code of Practice on Debt Collection Undertakings the Code of Practice otherwise provides.

***Explanatory note***

*Subsection (1)* implements the recommendation in paragraph 6.143 that any money advanced to a person carrying on debt collection activities without a debt collection licence must be refunded to the payer.

*Subsection (1)* implements the recommendation in paragraph 6.144 that any contract or contractual term that contravenes any provision relating to debt collection activities in this Part or in any provision of the Code of Practice made under this Part shall be unenforceable and void, unless, in the case of a provision in the Code of Practice on Debt Collection Undertakings the Code of Practice otherwise provides.

**APPENDIX C:**

**OUTLINE SCHEME OF AMENDMENTS TO JUDICIAL BANKRUPTCY LEGISLATION<sup>9</sup>**

**ARRANGEMENT OF HEADS**

**Head 1. Minimum debt level of €50,000 to bring creditor's petition of bankruptcy**

**Head 2. Removal of requirement of debtor's available estate**

**Head 3. Pre-Action Protocol**

**Head 4. Stay of proceedings to consider alternative means**

**Head 5. Conditions of automatic bankruptcy discharge**

**Head 6. Automatic discharge period reduced to 3 years**

**Head 7. Court may order payments for up to 5 years**

**Head 8. Objections to discharge by Official Assignee/Personal Insolvency Trustee**

**Head 9. Removal of requirement to pay expenses, fees etc before discharge**

**Head 10. Reduction in number of priority debts**

**Head 11. Restrictions and disqualifications**

**Head 12. Exempted assets to ensure reasonable living standard**

**Head 13. Licensing of Personal Insolvency Trustee acting in bankruptcy**

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<sup>9</sup> The Commission has not included these provisions in the draft *Personal Insolvency Bill* in Appendix A as it understands that a new legislative framework to reform the *Bankruptcy Act 1988* is currently (December 2010) under consideration.

## OUTLINE SCHEME OF AMENDMENTS TO JUDICIAL BANKRUPTCY LEGISLATION<sup>10</sup>

### Head 1. Minimum debt level of €50,000 to bring creditor's petition of bankruptcy

Provide for increase from €1,900 to €50,000 for the minimum debt level of required to bring a creditor's petition of bankruptcy (currently in section 11(1) of the *Bankruptcy Act 1988*).

*Note: recommendation in paragraph 3.19 of Report.*

### Head 2. Removal of requirement of debtor's available estate

(1) Provide for removal of pre-condition (currently in section 15 of the *Bankruptcy Act 1988*) that a debtor's available estate must be capable of realising at least €1,900 before he or she may petition for his or her bankruptcy.

(2) Provide that this condition should be replaced with a provision to the effect that the value of the debtor's assets available for distribution to creditors should be considered by the court when assessing whether it may be appropriate to stay proceedings for the purposes of allowing the debtor to attempt to reach a Debt Settlement Arrangement.

*Note: recommendation in paragraph 3.25 of Report.*

### Head 3. Pre-Action Protocol

Provide that the Consumer Debt Claims Pre-Action Protocol proposed in the *Interim Report on Personal Debt Management and Debt Enforcement* (LRC 96-2010) be extended to creditor petitions for bankruptcy.

*Note: recommendation in paragraph 3.30 of Report.*

### Head 4. Stay of proceedings to consider alternative means

Provide that where a debtor petitions for bankruptcy, the court should be given discretion to stay proceedings where it considers it appropriate that the debtor and his or her creditors should consider whether the case could be resolved by alternative means, and particularly through a Debt Settlement Arrangement.

*Note: recommendation in paragraph 3.31 of Report.*

### Head 5. Conditions of automatic bankruptcy discharge

(1) Provide that, as part of the introduction of an automatic bankruptcy discharge, the condition that a debtor's estate must be fully realised before a debtor may be discharged should be abolished.

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<sup>10</sup> The Commission has not included these provisions in the draft *Personal Insolvency Bill* in Appendix A as it understands that a new legislative framework to reform the *Bankruptcy Act 1988* is currently (December 2010) under consideration.

(2) Provide that the debtor's unrealised property should remain vested in the Official Assignee after discharge, and the debtor should be placed under a duty after discharge to cooperate with the Official Assignee in the realisation and distribution of such of his or her property as is vested in the Official Assignee.

*Note: recommendation in paragraph 3.50 of Report.*

## **Head 6. Automatic discharge period reduced to 3 years**

Provide that bankrupt debtors should be automatically discharged on the expiry of a period of 3 years from the adjudication of bankruptcy.

*Note: recommendations in paragraphs 3.54 and 3.61 of Report, and note that all property remains with Official Assignee: see Head 5, above.*

## **Head 7. Court may order payments for up to 5 years**

Provide that the court should be given discretion to make an order requiring the bankrupt debtor to make payments from his or her income to the Official Assignee/Personal Insolvency Trustee for the benefit of his or her creditors for a period lasting up to 5 years.

*Note: recommendation in paragraph 3.62 of Report.*

## **Head 8. Objections to discharge by Official Assignee/Personal Insolvency Trustee**

(1) Provide that the Official Assignee/Personal Insolvency Trustee should be empowered to apply to the court, on his/her own motion or under the request of a creditor, to object to the debtor's discharge on the grounds of the debtor's lack of cooperation, dishonesty or other wrongful conduct.

(2) Provide that under such circumstances the court should be empowered to suspend the discharge pending a further investigation of the debtor's affairs, or to extend the discharge waiting period for a period of a further 2 years.

(3) Provide that where a debtor entering the bankruptcy process has previously availed of bankruptcy discharge, a presumption of dishonesty or wrongdoing should exist, but that this presumption should be capable of being rebutted where the debtor proves to the court that he or she has acted honestly and responsibly, or where the Official Assignee/Personal Insolvency Trustee, having examined the debtor's affairs, provides the court with a certificate to that effect.

*Note: recommendations in paragraph 3.63 of Report.*

## **Head 9. Removal of requirement to pay expenses, fees etc before discharge**

Provide that, as part of the introduction of an automatic discharge from bankruptcy, the condition for discharge that all the expenses, fees, costs and preferential payments must be paid before a debtor may be discharged (currently in section 85(4) of the *Bankruptcy Act 1988*) should be abolished.

*Note: recommendation in paragraph 3.88 of Report.*

## **Head 10. Reduction in number of priority debts**

Provide for significant reduction in number of priority debts in bankruptcy (including Revenue debts).

*Note: recommendation in paragraph 3.94 of Report.*

### **Head 11. Restrictions and disqualifications**

Provide for system under bankruptcy regime analogous to the procedures for the restriction and disqualification of culpable directors of insolvent companies, as a means of sanctioning bankrupts who have been found to have acted dishonestly and/or irresponsibly, while not subjecting honest and responsible debtors to such sanctions.

*Note: recommendation in paragraph 3.110 of Report.*

### **Head 12. Exempted assets to ensure reasonable living standard**

Provide that the provisions for the exemption of certain assets of the debtor from liquidation (currently in section 45(1) of the *Bankruptcy Act 1988*) should be amended to reflect modern reasonable living standards.

*Note: recommendation in paragraph 3.166 of Report.*

### **Head 13. Licensing of Personal Insolvency Trustee acting in bankruptcy**

Provide that a Personal Insolvency Trustee acting in bankruptcy proceedings must be licensed under the unitary licensing system overseen by the proposed Debt Settlement Office.

*Note: recommendation in paragraph 1.107 of Report.*





The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law.

This role is carried out primarily under a Programme of Law Reform. The Commission's *Third Programme of Law Reform 2008-2014* was prepared and approved under the 1975 Act following broad consultation and discussion. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act. Since 2006, the Commission's role also includes two other areas of activity, Statute Law Restatement and the Legislation Directory. Statute Law Restatement involves incorporating all amendments to an Act into a single text, making legislation more accessible. The Legislation Directory (previously called the Chronological Tables of the Statutes) is a searchable guide to legislative changes.

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The Law Reform Commission is a statutory body established by the Law Reform Commission Act 1975