



LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

INTERIM REPORT

PERSONAL DEBT MANAGEMENT AND DEBT ENFORCEMENT

[LRC 96-2010]



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Law Reform Commission

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TABLE OF CONTENTS

INTRODUCTION	1
A Background to the Project	1
B The Current Economic and Social Context	1
C The Commission's Annual Conference 2009	2
D The Commission's Working Group and this Interim Report	3
E The Government's Mortgage Arrears and Personal Debt Review Group	5
F Overview of the Interim Report	6
CHAPTER 1 DEVELOPMENTS LEADING TO THIS INTERIM REPORT	9
A Introduction	9
B <i>Consultation Paper on Personal Debt Management and Debt Enforcement</i>	9
(1) Debt Management	10
(2) Personal Insolvency Law	12
(3) Debt Enforcement Procedures	13
C Developments since the Publication of the Commission's <i>Consultation Paper</i>	13
D The Current Economic and Social Context	15
E Establishment of the Commission's Working Group on Personal Debt Management and Debt Enforcement	24
F Mortgage Arrears and Personal Debt Review Group	27
G Specific Issues Discussed in this Interim Report	28
CHAPTER 2 INITIATIVES AND ACTIONS IN PLACE OR IN TRAIN	31
A Introduction	31
B Financial Regulation	31
(1) Introduction	31
(2) Reforms to the Central Bank and Financial Services Regulatory Structure	32
(3) Regulation of Money Advice Undertakings	34
(4) Regulation of Debt Collection Undertakings	39
(5) Regulation of Credit Unions	41
(6) Credit Reporting	43
C Codes of practice	44
(1) Introduction	44
(2) The IBF-MABS Operational Protocol	44

	(3) Status of Statutory Codes of Practice in Legal Proceedings	49
D	Legal Processes	52
	(1) Introduction	52
	(2) Pre-Action Protocol in Consumer Debt Claims	53
	(3) Participation Rights for Money Advisors in Court Proceedings	57
	(4) Legal Advice and Legal Aid for Defendants in Consumer Debt Proceedings	60
	(5) Reform of the Bankruptcy Act 1988	61
E	Distribution of information to borrowers in difficulty	66
CHAPTER 3	ISSUES REMAINING FOR DISCUSSION IN THE COMMISSION'S FINAL REPORT	69
	A Introduction	69
	B Debt Management: Regulation of Debt Collection Undertakings	69
	C Personal Insolvency Law	71
	D Debt Enforcement Procedures	73
	E Financial Exclusion	76
APPENDIX A	WORKING GROUP ACTION PLAN	79
APPENDIX B	NATIONAL RESPONSE TO PROBLEMS OF PERSONAL INDEBTEDNESS: MEASURES UNDERTAKEN BY STAKEHOLDERS	81
APPENDIX C	CONSUMER DEBT CLAIMS PRE-ACTION PROTOCOL: MODEL RULES OF COURT	93

TABLE OF LEGISLATION

			Pg No.
Act of Sederunt (Debt Arrangement and Attachment (Scotland) Act 2002) 2002	2002 No. 560	Scot	59
Bankruptcy Act 1988	No. 27/1988	Irl	12
Central Bank Act 1942	No. 22/1942	Irl	51
Central Bank Act 1989	No. 16/1989	Irl	50
Central Bank and Financial Services Authority of Ireland Act 2003	No. 12/1003	Irl	50
Central Bank Reform Bill 2010	Bill No. 12/2010	Irl	32
Citizens Information Act 2007	No. 2/2007	Irl	85
Civil Legal Aid Act 1995	No. 32/1995	Irl	61
Civil Liability and Courts Act 2004	No. 31/2004	Irl	59
Collections Act	RSNL1990 Chapter C-22	Newfo undlan d	39
Comhairle Act 2000	No. 1/2000	Irl	85
Consumer Credit Act 1974	1974 c. 39	UK	35
Consumer Credit Act 1995	No. 24/1995	Irl	50
Consumer Protection Act 2007	No. 19/2007	Irl	50
Credit Union Act 1997	No. 15/1997	Irl	42
Credit Union Act 1997 (Section 85) Rules 2009	S.I. No. 344/2009	Irl	42
Debt Arrangement and Attachment (Scotland) Act 2002	2002 asp 17	Scot	59
Directive on Credit Agreements for Consumers	Directive 2008/48/EC	EU	77
District Court (Enforcement of Court Orders) Rules 2010	SI No. 129/2010	Irl	58
Enforcement of Court Orders (Amendment) Act 2009	No. 21/2009	Irl	54

			Pg No.
Enforcement of Court Orders Act 1940	No. 23/1940	Irl	54
Fair Debt Collection Practices Act	Title 15 US Code. §§ 1692	USA	39
Fair Trading Act Collection and Debt Repayment Practices Regulation	AR 194/1999	Alberta	36
Hire Purchase (Amendment) Act 1960	No. 15/1960	Irl	96
Hire Purchase Act 1946	No 16/1946	Irl	96
Insurance Act 1989	No. 3/1989	Irl	50
Money-Lenders Act 1900	1900 c. 51 (63 & 64 Vict.)	UK	96
Moneylenders Act 1933	No. 36/1933	Irl	96
Social Welfare (Miscellaneous Provisions) Act 2008	No. 22/2008	Irl	85
Unfair Commercial Practices Directive	Directive 2005/29/EC	EU	50
US Bankruptcy Code	Title 11 US Code	USA	35

TABLE OF CASES

			Pg No.
Grace v Ireland and the Attorney General	[2007] IEHC 90	Irl	66
McCann v The Judge of Monaghan District Court and Ors	[2009] IEHC 276; [2010] 1 ILRM 17	Irl	75
McKenzie v McKenzie	[1970] 3 All ER 1034	Eng	59

INTRODUCTION

A Background to the Project

1. This Interim Report forms part of the Commission's *Third Programme of Law Reform 2008-2014*¹ and follows the publication in September 2009 of the Commission's *Consultation Paper on Personal Debt Management and Debt Enforcement*.² That Consultation Paper examined the law on personal indebtedness in Ireland in its wider policy setting, but with the Commission placing particular emphasis on reform of the law concerning debt enforcement and the pre-judgment and enforcement procedures for the recovery of debt. The Commission intends to publish its final *Report on Personal Debt Management and Debt Enforcement*, containing its final recommendations and draft legislative proposals for long-term reform, by the end of 2010.

B The Current Economic and Social Context

2. The Commission is conscious of the economic and social context in which its examination of this area of the law takes place. In its *Consultation Paper*, the Commission noted the huge increases in the levels of personal debt in Ireland in recent years, and commented that the law must keep pace with the changing needs of Irish society and recognise the role of consumer credit in the modern economy.³ 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 2009.⁴ 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

¹ 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.

² (LRC CP 56-2009).

³ (LRC CP 56-2009) at paragraph 1.16.

⁴ *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).

debt difficulties for many households.⁵ 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.⁶ 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.

3. The Commission however 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 Financial Regulator, the Courts Service, and the Money Advice and Budgeting Service.⁷ 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.

C The Commission's Annual Conference 2009

4. In early 2009, bearing in mind the importance of reform in this area, the Commission had already decided that its Annual 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 with the growing problem of personal indebtedness in the short term.

5. 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,

⁵ (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.

⁶ *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
(Accessed 6 May 2010).

⁷ See paragraphs 1.22 to 1.30 below.

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 Minister for Justice and Law Reform, Dermot Ahern, who was one of the Conference speakers, reaffirmed that the Government attaches great importance to the examination of the law on personal debt, and that the system for dealing with personal debt must become humane, more efficient and more effective. The Minister indicated that the "Commission's considered conclusions in this area will form the template for that new system." The Minister also emphasised that the new measures must be put in place quickly, and that a system for debt collection and enforcement must acknowledge the exceptional circumstances currently existing. Therefore the Minister requested that the Commission's consultation process be concluded "in as timely a fashion as is possible." The Minister also asked that the Commission should consider releasing some finalised proposals as soon as they are concluded, rather than awaiting the completion of its final Report.

6. The Commission notes that the Government's commitment to urgent reform, reflected in the Minister's comments, 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.

D The Commission's Working Group and this Interim Report

7. 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.

8. The Commission also adopted in advance draft terms of reference for the members of the Working Group. These draft terms of reference were agreed at the first meeting of the Working Group. The Commission emphasised that each member of the Working Group, including the Commission, retained the right to reserve its position on any matter tabled for consideration at the

meetings of the Working Group. Ultimately, the actions set out in this Interim Report contain completed and committed activities and proposals to which members contributed where appropriate. It should be noted however that it was not the case that the agreement of all representatives was sought in relation to all issues considered by the Group.

9. The Commission willingly and gratefully acknowledges the enormous commitment of the members of the Working Group, both in terms of time and positive engagement. This began with their willingness to become involved in the Working Group, through their active participation in all six meetings held between January and April,⁸ their involvement in the preparation of working papers prepared between meetings, and their contribution to and review of the text of the draft Interim Report. The Commission is also extremely grateful to the active engagement of other representative groups with whom the Commission held bilateral meetings to discuss actions in which those bodies could engage in the context of debt management and debt enforcement. At all times, the Commission was struck by the positive engagement of all parties in this process.

10. In this Interim Report, the Commission departs from its usual approach of setting out a series of recommendations for reform. Instead, the Commission principally notes or records specific actions on debt management and enforcement that have already been put in place, or are in 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. As already indicated, the agreement, or comments, of all representatives was not sought in relation to all issues considered by the Group. The Action Plan in Appendix A lists 14 specific actions under 4 headings, and each action is linked to specific members of the Working Group who have either already progressed that item to a conclusion or may progress it to a conclusion in the near future. Some of these actions, such as the proposed reduction in the 12 year waiting period for a discharge application under the *Bankruptcy Act 1988*, are interim solutions pending a complete and long-term framework to deal with personal indebtedness. Others, such as a Standard Financial Statement and the Model Rules of Court on a Pre-Action Protocol in

⁸ The Working Group met on 13 January, 3 February, 24 February, 16 March, 14 April, and 28 April. The meetings were held in the Commission's offices and the Commission provided the secretariat for the Working Group.

consumer debt proceedings, are likely to be key elements of the long-term framework. In that respect, some of the actions noted in this Interim Report are likely to be part of the complete, holistic, approach to debt management to which the Commission will return in its final Report to be published by the end of 2010.

11. This Interim Report therefore sets out: (a) the Commission's summary of its proposals for immediate reform and/or actions taken by some of the members of the Working Group in this regard (these are set out in Chapter 2 and Appendix A); (b) a digest of other relevant actions already taken or planned, of which the Commission is aware, aimed at tackling the problem of personal indebtedness (these are set out in Appendix B); and (c) a summary of the long-term reform issues which remain to be dealt with by the Commission in its final *Report on Personal Debt Management and Debt Enforcement* to be published by the end of 2010 (these are set out in Chapter 3).

E The Government's Mortgage Arrears and Personal Debt Review Group

12. The Commission is conscious that, in February 2010, the Government established the Mortgage Arrears and Personal Debt Review Group. As its title clearly indicates, the terms of reference of the Review Group extend to both mortgage and non-mortgage personal debt. It is also mandated to consider proposals made by the Commission. To a large extent, for the reasons given in the 2009 *Consultation Paper on Personal Debt Management and Debt Enforcement*, the Commission has focused on non-mortgage personal debt. Nonetheless, as is clear from the deliberations leading to, and the contents of, this Interim Report, the holistic approach to personal debt - as advocated in the Commission's Consultation Paper - requires that both mortgage and non-mortgage personal debt must be considered in order to provide satisfactory solutions to the problem of personal indebtedness.

13. The Commission emphasises, therefore, that its Working Group has not considered to any significant extent the issue of mortgage debt, particularly because it is clear that the Government's Review Group is currently (May 2010) considering this. Having said that, there is general agreement that two aspects of mortgage debt mark it out as different from other personal debt: first, from a legal point of view, the fact that it is a secured debt; and, second, from a personal point of view, its connection with people's sense of safety and security in their family home. While the Commission does not, therefore, attempt in this Interim Report to present or suggest solutions to the mortgage debt situation as such, it has included references to the various initiatives and actions that have been developed or planned for mortgage debt, in particular where these clearly overlap with initiatives concerning non-mortgage debt. The Commission's

intention in this respect is to assist the Government's Review Group with relevant material for its consideration at this point. Of course, the Commission remains committed to dealing with the remaining issues concerning reform of the law on personal debt in its final *Report on Personal Debt Management and Debt Enforcement*.

14. The Commission now turns to provide an overview of the content of the Interim Report.

F Overview of the Interim Report

15. In Chapter 1, the Commission describes the main developments since the publication in September 2009 of the *Consultation Paper on Personal Debt Management and Debt Enforcement*, culminating in the publication of this Interim Report. These include the Commission's Annual Conference in November 2009, the establishment of the Commission's Working Group in January 2010 and of the Government's Mortgage Arrears and Personal Debt Review Group in February 2010. Chapter 1 also describes the terms of reference and membership of the Commission's Working Group and its working methods between January and May 2010.

16. In Chapter 2, the Commission describes the key issues dealt with by the Working Group, under four major headings:

- Financial Regulation
- Codes of Practice
- Legal Processes
- Distribution of Information to Consumers

17. The Commission describes the 14 specific initiatives and actions already undertaken or in train by members of the Working Group under these four major headings. These are:

1. Reform of financial services regulation legislation
2. Proposal for the regulation of money advice undertakings
3. Proposal for the regulation of debt collection undertakings
4. Reform of the credit union regulatory structure
5. Proposal for the regulation of credit reporting practices
6. Extension of the IBF-MABS Operational Protocol
7. Review of the IBF-MABS Operational Protocol
8. Development of a Standard Financial Statement

9. Proposal to clarify the status of statutory codes of practice in court proceedings
10. Proposal for a Pre-Action Protocol, based on Model Rules of Court, in consumer debt proceedings
11. Proposal for a right of participation for money advisers in court proceedings
12. Consideration of legal advice and legal aid for debtors
13. Proposal to reduce the waiting period for a discharge application under the *Bankruptcy Act 1988*
14. Compilation and distribution of useful information to consumer debtors.
18. In Chapter 3, the Commission describes the remaining issues concerning reform of the law on personal debt which are to be dealt with in its final *Report on Personal Debt Management and Debt Enforcement*, to be published by the end of 2010.
19. Appendix A sets out in tabular form the 14 specific initiatives and actions already undertaken or in train (as of May 2010) by members of the Working Group.
20. Appendix B contains a digest of the main initiatives and actions already undertaken or in train by members of the Working Group and other bodies of which the Commission is currently (May 2010) aware.
21. Appendix C contains Model Rules of Court embodying the Commission's proposal for the introduction of a Pre-Action Protocol in consumer debt proceedings.

CHAPTER 1 DEVELOPMENTS LEADING TO THIS INTERIM REPORT

A Introduction

1.01 In this Chapter, the Commission describes the main developments since the publication in September 2009 of the *Consultation Paper on Personal Debt Management and Debt Enforcement*, culminating in the publication of this Interim Report. These include the Commission's Annual Conference in November 2009, the establishment of the Commission's Working Group on Personal Debt Management and Debt Enforcement in January 2010 and of the Government's Mortgage Arrears and Personal Debt Review Group in February 2010. The Commission also describes the terms of reference and membership of the Commission's Working Group and its working methods between January and May 2010.

B Consultation Paper on Personal Debt Management and Debt Enforcement

1.02 In September 2009, the Commission published its *Consultation Paper on Personal Debt Management and Debt Enforcement*.¹ The Consultation Paper examined the law on personal indebtedness in Ireland in its wider policy setting, but with the Commission placing particular emphasis on reform of the law concerning debt enforcement and the pre-judgment and enforcement procedures for the recovery of debt. In this respect, 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 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,² approached the subject on the basis of six "building blocks" of:

¹ (LRC CP 56-2009).

² *Towards A Common Operational European Definition of Over-Indebtedness* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities 2008).

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

1.03 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 its 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.

1.04 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.³ 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.

(1) Debt Management

1.05 In Chapter 4 of the Consultation Paper the Commission discussed the first four “building blocks” of responsible borrowing, responsible lending, responsible arrears management and debt counselling, recognising that solutions in these areas may need to be considered by bodies other than the Commission. Therefore this Chapter took the view that they could be more

³ (LRC CP 56-2009) at paragraphs 1.61 to 1.74.

appropriately addressed by, for example, the Financial Regulator or in the context of the development of the new statutory framework for financial services law in Ireland.

1.06 In the area of responsible lending, the Consultation Paper raised several issues for consideration by relevant bodies in order to promote responsible lending. These included reforms to credit reporting regulation and practices,⁴ as well as possible methods of enforcing responsible lending standards through licensing conditions,⁵ private law mechanisms or levies on financial institutions.⁶

1.07 Regarding responsible arrears management, the Consultation Paper had first discussed the possibility of introducing reforms to the Financial Regulator's Code of Conduct on Mortgage Arrears.⁷ In particular, the Commission questioned the non-application of the Code to debtors who have not yet defaulted on their mortgage repayments; the status of the Code in court proceedings; and the limited requirements placed on lenders to refer debtors to money advice services. The Consultation Paper also noted that no arrears management code exists in respect of non-mortgage debts, and so suggested that consideration should be given to introducing such a code.⁸ The final topic considered in the area of responsible arrears management was the provisional recommendation of the Commission that a system for the regulation of the commercial debt collection industry should be established.⁹

1.08 In relation to debt counselling and money advice, the Commission provisionally recommended that a regulatory system for debt management undertakings should be established.¹⁰

1.09 The approach of the Consultation Paper to these issues was to recognise that they lie outside the core concern of a law reform body, and would therefore be most appropriately addressed by bodies such as the Financial Regulator or in the context of the development of the new statutory framework for financial services law in Ireland.¹¹ With the exception of the subjects of the

⁴ (LRC CP 56-2009) at paragraphs 4.41 to 4.97.

⁵ (LRC CP 56-2009) at paragraphs 4.100 to 4.110.

⁶ (LRC CP 56-2009) at paragraphs 4.111 to 4.145.

⁷ (LRC CP 56-2009) at paragraphs 4.175 to 4.185.

⁸ (LRC CP 56-2009) at paragraphs 4.186 to 4.195.

⁹ (LRC CP 56-2009) at paragraphs 4.196 to 4.234.

¹⁰ (LRC CP 56-2009) at paragraphs 4.235 to 4.254.

¹¹ (LRC CP 56-2009) at paragraphs 25 to 27; 4.01 to 4.05.

regulation of debt advice and debt collection companies, the Commission thus did not make provisional recommendations on these issues of debt management. In view of the wide-ranging membership of the Commission's Working Group on Personal Debt Management and Debt Enforcement, many of these issues are however discussed in this Interim Report.

(2) Personal Insolvency Law

1.10 Chapter 5 of the Commission's *Consultation Paper on Personal Debt Management and Debt Enforcement* contained provisional recommendations for the reform of personal insolvency law in Ireland.¹² The key provisional recommendations were that the *Bankruptcy Act 1988* should be reviewed and replaced by a new court-based bankruptcy system¹³ and that a non-judicial debt settlement system should also be introduced.¹⁴ The Commission also provisionally recommended that a non-judicial format was to be preferred for the settlement of personal debt issues,¹⁵ but that a two-tiered system should exist, with judicial bankruptcy remaining an option in cases where non-judicial procedures are inappropriate or have failed to reach a resolution of the situation.¹⁶ The Commission did not make any provisional recommendations in relation to the detail of the reform of bankruptcy law and procedures. The Commission provided, however, a series of detailed provisional recommendations as to how the proposed non-judicial debt settlement system could operate, with the content of its provisional recommendations capable of being divided into institutional or structural issues and substantive issues.

1.11 As discussed in Chapter 3 below, the Commission has identified these issues as being most appropriately addressed on a long-term basis through legislative reform, and thus suitable for consideration by the Commission in its final *Report on Personal Debt Management and Debt*

¹² See *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 5.01 to 5.179.

¹³ *Ibid* at paragraph 5.69.

¹⁴ *Consultation Paper on Personal Debt Management and Debt Enforcement* at paragraph 5.71.

¹⁵ *Ibid* at paragraph 5.78.

¹⁶ *Consultation Paper on Personal Debt Management and Debt Enforcement* at paragraph 5.82. Nonetheless, as the Commission expressed a clear preference for non-judicial debt settlement it invited submissions as to how the proposed non-judicial system should be encouraged over judicial procedures: paragraph 5.89.

Enforcement. In the interim, however, in Chapter 2 the Commission discusses a suggested reduction in the current 12 year discharge period in the *Bankruptcy Act 1988*, which is very long by comparison with international norms.

(3) Debt Enforcement Procedures

1.12 Chapter 6 of the Commission's *Consultation Paper on Personal Debt Management and Debt Enforcement* addressed the current procedures for the enforcement of money judgments and made several provisional recommendations in this regard.¹⁷ The Commission examined systems of debt enforcement in a number of other countries, and provisionally recommended that the Irish system needs fundamental reform. The proposed new system would be based on the introduction of a central Debt Enforcement Office (which could build on the current arrangements) and the removal of much (but not all) of debt enforcement proceedings from the courts.¹⁸ The key principles which should underpin this new system were then identified, in particular: proportionate, balanced and appropriate enforcement in each individual case; improved access to information on the means of debtors; clear and simplified enforcement procedures; increased efficiency and accountability in enforcement; a holistic approach to enforcement through interaction with the proposed debt settlement system; and the encouragement of increased participation of debtors in enforcement proceedings.

1.13 The Chapter concluded by discussing potential reforms of the individual enforcement methods and by considering how these individual enforcement methods could operate under the proposed new system.

C Developments since the Publication of the Commission's Consultation Paper

1.14 Several significant developments have taken place since the publication of the Commission's Consultation Paper in September 2009. These are likely to have an influential bearing on the scope, content and timeframe of the Commission's final Report in this area. This Part therefore outlines the events that have taken place since then.

1.15 In October 2009, the *Renewed Programme for Government*¹⁹ indicated general support for consideration of the provisional recommendations

¹⁷ See *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 6.01 to 6.445.

¹⁸ *Consultation Paper on Personal Debt Management and Debt Enforcement* at paragraph 6.45.

¹⁹ *Renewed Programme for Government*, 10 October 2009. Available at:

in the Commission's Consultation Paper. Under a section entitled "Helping Those in Debt", the Programme stated that the Government "will reform debt enforcement in light of the deliberations of the Law Reform Commission..."²⁰ In particular, the Programme indicated that the Government "will create a new system of personal insolvency regulations allowing for a statutory non-court-based debt settlement system."²¹ The Government also indicated its intention to "establish a central Debt Enforcement Office to remove as many debt enforcement proceedings from the courts as possible." Finally, the Programme stated that the Government will regulate debt collection agencies.

1.16 In November 2009, the Commission held its Annual Conference. As noted in the Introduction to this Interim Report, the Commission had decided in early 2009 that the Conference should focus on the subject of *Reforming the Law on Personal Debt*.²² The Conference provided a platform for the discussion of the provisional recommendations made by the Commission in its Consultation Paper, and formed part of the Commission's usual consultative process. Presentations were made by national and international experts on issues of financial regulation, debt counselling, personal insolvency law and debt enforcement procedures.²³ Conference speakers drew attention to the

http://www.taoiseach.gov.ie/eng/Publications/Publications_2009/Renewed_Programme_for_Government,_October_2009.pdf (accessed 6 May 2010).

²⁰ *Renewed Programme for Government* at 15.

²¹ *Ibid.*

²² See paragraphs 4 to 5 of the Introduction to this *Interim Report*.

²³ The following speakers participated at the Conference:

Mrs Justice Catherine McGuinness, President of the Law Reform Commission (Conference Chairperson)

Minister Dermot Ahern, TD, Minister for Justice, Equality and Law Reform

Paul Joyce, Senior Policy Researcher, FLAC (Free Legal Advice Centres Limited)

Mary O'Dea, then-Consumer Director and Acting Chief Executive, Financial Regulator

Michael Culloty, Social Policy and Communications Officer, MABS (Money Advice & Budgeting Services)

Patricia T Rickard-Clarke, Commissioner, Law Reform Commission

Professor Iain Ramsay, Kent Law School, University of Kent, England

Marc Rothemund, Research Fellow, Centre for European Policy Studies (CEPS), European Credit Research Institute (ECRI)

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 (notably the Minister for Justice, Equality and Law Reform, who opened the Conference) acknowledged that this had already been reflected in the inclusion of a commitment in the September 2009 *Renewed Programme for Government* to take steps to implement key aspects of the Commission's provisional recommendations in the Consultation Paper and to establish an inter-Departmental Working Group to co-ordinate these measures. The Commission notes that the general focus of this Government commitment has received widespread support politically and in media comments.

D The Current Economic and Social Context

1.17 As noted in the Introduction to this Interim Report, the Commission is conscious of the economic and social context in which its examination of this area of the law takes place. In its Consultation Paper, the Commission noted the huge increases in the levels of personal debt in Ireland in recent years, with the ratio of household debt to disposable income rising by almost 300% between 1995 and 2009.²⁴ The Commission recognised that the high levels of debt being carried by Irish households, combined with difficult economic conditions, have led to rising levels of over-indebtedness and serious debt difficulties for many households.²⁵ The Consultation Paper noted that the literature in this area accepts 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 a household which has experienced an improvement in income.²⁶ Economic and social data illustrating the rise in

Dr David Capper, Reader, School of Law, Queen's University Belfast NI

²⁴ (LRC CP 56-2009) at paragraph 1.16.

²⁵ (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.

²⁶ (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 6 May 2010).

unemployment and fall in average income in Ireland in recent years demonstrates the development of economic conditions likely to contribute to rising levels of over-indebtedness.²⁷

1.18 Since the publication of the Consultation Paper, further statistical data indicates that this trend is continuing and that the levels of over-indebtedness and debt difficulties in Ireland remain high. This data is now discussed.

(a) Survey on Income and Living Conditions 2008

1.19 The CSO's 2008 *Survey on Income and Living Conditions* (2008 SLIC), published in November 2009, included a special module on over-indebtedness and financial exclusion, which provided a useful picture of the extent of debt difficulties being experienced by Irish households.²⁸ This module asked households questions relating to the type and amount of arrears accrued by them in five categories of:

- Overdrawn bank account;
- Credit card balance outstanding;
- Mortgage, rent or utility arrears;
- Arrears on other bills;
- Arrears on other loans.

The households were divided into five income categories so that an analysis could be conducted of the levels of arrears relative to the income of a household. Overall, 20.3% of households were in arrears on at least one of the five types of arrears included, while 7.7% of households were in arrears on two or more items in 2008. The two most common forms of arrears reported in this survey were mortgage, rent or utility arrears (9.4% of households) and an outstanding credit card balance (9.1% of households). Overdrawn bank accounts were the next most common form of arrears at 4.8%, while the residual category of arrears on other bills (2.6%) and other loans (2.4%) were the least commonly reported.

²⁷ See e.g. Duffy "Prospects for the Housing Market", Paper presented at *IBF/Accenture Conference: Delivering a Sustainable Mortgage Market*, Dublin, 20 April 2010.

²⁸ *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
(Accessed 6 May 2010).

1.20 Overdrawn bank accounts and outstanding credit card balances were more common among households with higher incomes, and the levels of arrears were also higher for these households. Thus over 10% of households in the top three income categories had outstanding credit card balances, while only 2.7% of households in the lowest income category had such outstanding balances. 6.2% of households in the highest income category reported a credit card debt of more than €2,850, while a further 5.8% had a credit card debt of between €571 and €2,850. In contrast, arrears on mortgage, rent or utilities were more common among households with lower incomes. Almost 14% of households in the lowest income category were in arrears on their mortgage, rent or utility bills, compared with just 1.3% of the households in the top income category. It should be noted that the most frequently reported level of arrears on mortgage, rent and utility bills was less than €571, with 7.7% of households in the lowest income category reporting arrears at this level. In relation to the residual categories of other bills and other loans, it was of note that the first four income categories exhibited similar levels of arrears in respect of these types of borrowing, while the highest income category demonstrated much lower levels of arrears of this kind, almost falling to zero. The following table summarises these findings of the 2008 SILC:

PERCENTAGE OF HOUSEHOLDS REPORTING ARREARS BY INCOME QUINTILE (TYPE AND LEVEL OF ARREARS)

	<u>Net disposable income quintiles</u>					% of households
	<€424.53	<€687.87	<€1,125.72	<€1,729.64	>€1,729.64	State
State	100.0	100.0	100.0	100.0	100.0	100.0
Number of items in arrears						
0	81.8	80.1	75.2	78.5	83.0	79.7
1	10.8	10.6	15.1	13.5	13.1	12.6
2+	7.4	9.3	9.7	8.1	4.0	7.7
	%	%	%	%	%	%
Had an overdrawn bank account	<u>2.4</u>	<u>3.6</u>	<u>5.4</u>	<u>6.3</u>	<u>6.1</u>	<u>4.8</u>
€1-€570	0.8	1.1	2.0	1.9	1.0	1.4
€571-€2,850	1.0	0.7	2.5	3.7	3.0	2.2
>€2,850	0.6	1.6	0.6	0.6	2.1	1.1
Not stated	0.0	0.2	0.3	0.1	0.0	0.1
Had a credit card balance owing	<u>2.7</u>	<u>4.3</u>	<u>10.6</u>	<u>14.6</u>	<u>13.6</u>	<u>9.1</u>
€1-€570	1.3	1.1	3.2	3.8	1.1	2.1
€571-€2,850	0.9	2.0	4.8	6.4	5.8	4.0
>€2,850	0.5	1.2	2.5	4.3	6.2	2.9
Not stated	0.0	0.0	0.1	0.1	0.5	0.1

Had mortgage, rent or utility arrears	<u>13.7</u>	<u>13.1</u>	<u>13.1</u>	<u>5.6</u>	<u>1.3</u>	<u>9.4</u>
€1-€570	7.8	4.6	6.9	2.3	0.8	4.4
€571-€2,850	1.5	2.3	2.7	0.4	0.0	1.4
>€2,850	0.0	0.6	0.2	1.0	0.0	0.4
Not stated	4.4	5.6	3.3	1.9	0.5	3.2
Had arrears on other bills	<u>2.5</u>	<u>2.7</u>	<u>4.3</u>	<u>3.1</u>	<u>0.1</u>	<u>2.6</u>
€1-€570	1.6	1.8	2.7	2.6	0.1	1.8
€571-€2,850	0.2	0.3	0.2	0.1	0.0	0.2
>€2,850	0.1	0.4	0.2	0.0	0.0	0.1
Not stated	0.6	0.2	1.2	0.4	0.0	0.5
Had arrears on other loans	<u>2.7</u>	<u>3.9</u>	<u>3.8</u>	<u>1.7</u>	<u>0.2</u>	<u>2.4</u>
€1-€570	1.8	1.5	1.2	1.4	0.0	1.2
€571-€2,850	0.5	1.0	0.7	0.0	0.0	0.4
>€2,850	0.1	0.9	0.7	0.0	0.0	0.3
Not stated	0.3	0.5	1.2	0.3	0.2	0.5

1.21 The Commission welcomes the inclusion of a module on over-indebtedness and financial exclusion in the 2008 SILC, and acknowledges that the data provided is most valuable from a policy and law reform perspective. In the present context it is particularly useful in illustrating how the majority of borrowers are in a position to make full repayments of their obligations without falling into arrears, but that a large minority of households do struggle to repay their debts. The Commission however also recognises that as the data compiled relates to the year 2008, subsequent economic developments may mean that it may not wholly reflect the current position relating to over-indebtedness and household debt difficulties in Ireland. The Commission therefore now discusses other more recent data in order to provide an outline of current economic and social conditions in relation to personal indebtedness.

(b) Mortgage Arrears

1.22 In December 2009, the Financial Regulator published data on mortgage arrears and repossessions based on the quarter to the end of September 2009.²⁹ These statistics provide an insight into the difficulties being experienced by Irish households in meeting mortgage loan repayments. The statistics illustrated that of a total of 791,634 private residential mortgage loans, 8,504 were in arrears for a period of between 91 and 180 days. 17,767

²⁹ *Residential Mortgage Arrears and Repossessions Statistics* (Financial Regulator December 2009), available at: <http://www.financialregulator.ie/press-area/press-releases/Pages/NewDataonResidentialMortgageArrearsandRepossessionspubliched.aspx> (accessed 6 May 2010).

mortgage loans were in arrears for a period of over 180 days, which is 2.2% of the total number of mortgage loans. If these figures are combined the result is that 3.3% of the total number of private residential mortgage accounts are in arrears for a period of over 90 days. By the end of September 2009, a formal demand had been issued by the mortgage lender to the borrower in 4,565 cases, while court proceedings for the enforcement of the mortgage debt or security have been issued in 3,617 cases. During the quarter to the end of September 2009, mortgage lenders commenced possession proceedings in 491 cases, while 218 cases came to a conclusion during this period. Of these 218 cases, 79 resulted in a court order for possession of the asset forming the mortgage security, while 101 resulted in a settlement between the mortgage lender and borrower. 28 properties were voluntarily surrendered, while 10 were abandoned. The following table provides a summary of these statistics:

RESIDENTIAL MORTGAGE ARREARS AND REPOSSESSIONS

Particulars	Quarter Ended September 2009		
	Number	Balance (Note 1) '000 €	Arrears (Note 3) '000 €
Outstanding:			
Total residential mortgage loan accounts outstanding - at end of quarter (Note 2)	794,609	118,648,678	
Arrears: (Note 3)			
Total mortgage arrears cases outstanding - at end of quarter which are:			
- In arrears 91 to 180 days	8,504	1,589,274	47,684
- In arrears over 180 days	17,767	3,238,395	306,730
Total mortgage arrears cases outstanding - at end of quarter where:			
- Formal demand has been issued (but where Court proceedings have not been issued) (Note 4)	4,525	965,321	58,948
- Court proceedings have been issued to enforce debt/security on a mortgage (Note 5)	3,302	679,223	82,746
Court proceedings:			
Cases where legal proceedings have been issued to enforce the debt/security on a mortgage - during the quarter (Note 6)	481	117,131	9,755
Court proceedings concluded for the following reasons - during the quarter (Note 7)	230	47,318	4,732
of which:			
Orders for Possession/Sale obtained: (Note 8)			
- To enforce the debt/security on a mortgage	83	17,962	2,442
- To perfect title because property voluntarily surrendered	6	1,484	225
- Because the property has been abandoned	2	598	66
No order for Possession/Sale obtained as:			
- Property voluntarily surrendered	28	7,599	691
- Concluded by abandonment	10	3,407	292
- The terms and/or conditions of the mortgage are renegotiated, i.e. a new arrangement made (Note 9)	86	14,856	1,003
- Settled on other terms	15	1,412	13
Repossessions:			
Residential properties in possession - at the beginning of quarter (Note 10)	243		
Residential properties repossessed on foot of an Order during this quarter	31		
Residential properties voluntarily surrendered/abandoned during this quarter	79		
Residential properties disposed of during this quarter	22		
Residential properties in possession - at end of quarter (Note 10)	331		

Note. Some of the figures for the period ended 2008 have been revised

1.23 Statistics provided to the Commission by the Courts Service also provide some insight into the current extent of default in repaying mortgage loans. In 2009, 304 orders for possession were made by the Circuit Court, an increase of approximately 35% from the figure in 2008 of 225. The number of possession claims brought in the High Court rose by 22% in 2009, with 974 such claims brought in 2009, compared to 759 in 2008.

1.24 These statistics illustrate that a large number of Irish households are experiencing difficulties in repaying their mortgage loans, and that there has been a marked increase in the number of claims for possession orders in respect of private residential mortgage loans in 2009. This highlights the current problems of debt difficulties and personal over-indebtedness in Ireland.

(c) Negative Equity

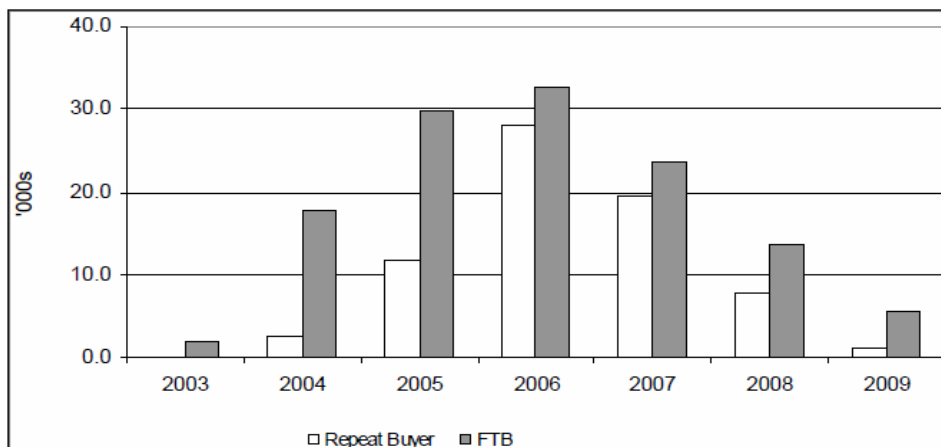
1.25 A further issue that has caused considerable public concern is negative equity. Negative equity arises where, due to fall in house prices, the remaining amount to be repaid under the mortgage loan agreement exceeds the market value of the house. An ESRI³⁰ Working Paper published in October 2009 estimated that the number of mortgage loan borrowers in this position was approximately 116,000, a figure amounting to almost 18% of all households holding a mortgage loan.³¹ This Working Paper estimated that if house price values continue to fall in 2010 at a similar rate to the fall in 2009, the number of mortgage loan borrowers in negative equity could rise to over 196,000, a figure representing approximately 29.6% of mortgagor households. The paper also cautioned that these figures may not capture comprehensively the scale of the problem of negative equity due to the large extent to which “top-up” mortgages and refinancing took place in recent years, types of borrowing which are not recorded in the data used to formulate the above estimates. These estimates of the number of Irish households in a situation of negative equity are summarised in the following table:³²

³⁰ Economic and Social Research Institute, www.esri.ie.

³¹ Duffy *Negative Equity in the Irish Housing Market* (ESRI Working Paper No. 319 2009) at 8, available at: <http://www.esri.ie/UserFiles/publications/20091012160331/WP319.pdf> (accessed 6 May 2010).

³² *Ibid* at 9.

NO. OF MORTGAGE BORROWERS IN NEGATIVE EQUITY BY END-2010 (BY YEAR OF LOAN DRAWDOWN)



Economic data that has become available since the publication of this ESRI Working Paper has caused the author of the Paper to revise these estimates to the point that, based on a peak-to-trough fall in house prices of 40-45%, it is judged that the number of households in negative equity by the end of 2010 will be approximately 270,000.³³

1.26 It is important to note that while the issue of negative equity has received much attention and has caused considerable public concern, it is only indirectly related to the issues of personal over-indebtedness and debt repayment difficulty which form the core concerns of the Commission in this Interim Report. As is recognised by the ESRI Working Paper, research in this area has shown that in the majority of cases negative equity will not have an important effect on the issues of over-indebtedness and debt management.³⁴ Many of those mortgage loan borrowers who find themselves in negative equity will be unaffected and will continue to repay their mortgage loans. Research has shown that negative equity does not lead to default; studies conducted in the United States suggesting that the levels of default to be expected among negative equity borrowers is as low as 6-8%.³⁵ The ESRI Paper cites the

³³ Duffy "Prospects for the Housing Market", Paper presented at *IBF/Accenture Conference: Delivering a Sustainable Mortgage Market*, Dublin, 20 April 2010.

³⁴ Duffy *Negative Equity in the Irish Housing Market* op cit. at 2-3.

³⁵ Duffy *Negative Equity in the Irish Housing Market* (ESRI Working Paper No. 319 2009) at 3, citing Foote, Gerardi and Willen, *Negative Equity and Foreclosure: Theory and Evidence* (Federal Bank of Boston Public Policy Discussion Papers No. 08-3, 2008).

potential negative impact on a borrower's credit rating as an important incentive to American borrowers to continue to repay a mortgage in a position of negative equity rather than default. It should be noted that, unlike the position in the majority of US states, Irish law requires that mortgage defaulters in negative equity usually remain liable for any remaining sum due after the enforcement of the mortgage security. This means that there is little, if any, incentive for default by a negative equity borrower in Ireland.³⁶ In any case, the ESRI Working Paper reflects much of the literature in this area by recognising that the key causes of mortgage default are not any deliberate refusals to pay on the part of borrowers, but rather "income shocks" or falls in the income of borrowers, due to factors such as job loss, relationship breakdown or illness.³⁷ In this light it can be seen that the question of negative equity is not directly related to the Commission's discussion of personal over-indebtedness and repayment difficulties. The adverse consequences of negative equity, which are of great importance, involve wider policy issues beyond the scope of this Interim Report.³⁸

1.27 The primary aspect of the negative equity issue which is of interest in the context of the law on debt enforcement is how the deficiency obligation owed by a mortgage loan borrower should be addressed in the event of mortgage default and the sale of the property forming the security for the mortgage loan. This issue is a complex one and will be reconsidered by the Commission in the context of its discussion of the reform of personal insolvency law in its final Report.

(d) *Rising Levels of Debt-Related Litigation*

1.28 Statistics provided to the Commission by the Courts Service contained in the table below illustrate the extent to which the level of litigation for the recovery of civil debt has risen substantially in 2009. This reflects the heightened level of default and repayment difficulty being experienced in Ireland

³⁶ For a useful discussion of the implications of negative equity where a mortgaged house is repossessed, see Free Legal Advice Centres *Guidelines on Mortgage Arrears* (FLAC 2010), available at: <http://www.flac.ie/campaigns/current/credit-and-debt-campaign/1> (accessed 6 May 2010).

³⁷ Duffy *op cit.* at 13. See also *Consultation on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 1.32 to 1.36.

³⁸ These include drops in consumer spending, as consumers feel less wealthy and also feel that they no longer have access to funds via housing equity. Negative equity can also negatively affect mobility in the labour market as workers become locked into a geographical location as they are reluctant to sell their homes where such a sale would result in a loss: Duffy *op cit.* at 3.

at present. In addition, the figures for judgment mortgage affidavits are worthy of note. This type of proceedings involves registering non-mortgage personal debt on property such as houses. This indicates that unsecured personal debt can ultimately become a charge on the family home or other property.

Court Proceedings	2008	2009	% +/-
Circuit Court			
Orders for possession	225	304	+35
Execution Orders	6, 844	9, 655	+41
Judgment mortgage affidavit	1, 571	2, 396	+53
Satisfaction piece	224	140	-38
Judgment marked in the office	10,224	13,613	+33
District Court			
Summary judgment	24, 873	29, 285	+18
Summons for attendance of debtor	13, 079	13, 067	-0.001
Instalment orders	9, 271	9, 523	+3
Committal orders	4, 620	2, 761	-40
High Court			
New claims for liquidated sum	3, 808	5, 648	+46
Judgment in default of appearance (judgment in office)	1, 137	1, 884	+65
Judgment pursuant to Master's order	241	347	+44
Liberty to enter judgment (Master)	437	660	+51
Adjourn for plenary hearing (Master)	119	185	+55
Judgment on summary summons	79	122	+54
Judgment Mortgage Affidavit	643	1058	+65
New claims for possession of real property	759	974	+22
New bankruptcy adjudications	8	17	+112
New arranging debtors	1	7	+600
New winding up petitions to High Court	203	330	+63
Winding up orders made	77	128	+66
Registration of judgments (High Court only)	418	912	+118

(e) Rising Levels of Money Advice and Budgeting Services Clients

1.29 In addition, the latest statistics made available by the Money Advice and Budgeting Service (MABS) demonstrate a similar upward trend in the levels of personal over-indebtedness and repayment difficulties in 2009 and 2010.³⁹ In the table below, the Commission compares the statistics for the number of

³⁹ See *Statistics for Q1 2010* (the Money Advice and Budgeting Service), available at: http://www.mabs.ie/publications/STATS/Stats_index.html (accessed 6 May 2010).

MABS clients for the first quarters of 2008, 2009 and 2010 in order to illustrate the numbers of individuals availing of the assistance of the MABS to address their debt difficulties. It is notable that the number of individuals contacting the MABS has increased only marginally in 2010, suggesting that the rate at which debt difficulties have been increasing is slowing. The number of people requiring the assistance of the MABS however remains high when compared with the pre-recession levels of early 2008.

Scheme	Q1 2008	Q1 2009	% +/- Q1 2008 to Q1 2009	Q1 2010	% +/- Q1 2009 to Q1 2010
Special Account	691	852	+23%	547	-36
Budget Negotiable	3241	4438	+37%	5003	+13
Information Only	630	945	+50%	903	+4
Total	4562	6235	+37%	6453	+3.5%

1.30 This discussion has aimed at presenting the social and economic context in which the Commission approaches the issue of the reform of the law on personal debt management and debt enforcement. The data presented illustrates the high levels of over-indebtedness and repayment difficulties currently being experienced in Ireland, and demonstrates the need for urgent action to take place to address these issues. In particular, the outdated legal framework for dealing with personal debt in Ireland must be modified to take account of these circumstances. The Commission has prepared this Interim Report with the aim of responding to this need for immediate action to remedy the flaws in the legal system exposed by the current difficult economic and social conditions.

E Establishment of the Commission’s Working Group on Personal Debt Management and Debt Enforcement

1.31 With this need for urgent action 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 which would be included in its final Report *on Debt Management and Debt Enforcement* and which may (even with the benefit of general approval in the Oireachtas) take some time to implement.

1.32 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. The Commission focused on those – Government Departments, statutory bodies and representative bodies – who were in a position to agree and implement specific solutions. The Commission received positive replies from all those bodies invited to participate

in the Working Group. In addition to representatives of the Commission, the Group was composed of representatives of the following:

- Department of Finance
- Department of Justice and Law Reform
- Financial Regulator
- Money Advice and Budgeting Service
- Courts Service Management
- Irish Banking Federation.

1.33 In January 2010, the Commission adopted draft terms of reference in advance of the first meeting of the Working Group. These were:

- to examine in relation to personal debt the subjects of Lending Policy, Financial Regulation, Consumer Protection and Codes of Practice with a view to promoting a holistic approach to debt management and enforcement;
- to identify specific procedures and efficiencies which could be adopted and promoted by the stakeholder bodies represented on the Working Group as a matter of urgency to achieve a fair balance between the rights of creditors and debtors in the context of the current situation on consumer debt; and
- to make recommendations and set out an implementation plan by end April 2010 on these matters.

1.34 These draft terms of reference were agreed at the first meeting of the Working Group. The Commission emphasised that each member of the Working Group, including the Commission, retained the right to reserve its position on any matter tabled for consideration at the meetings of the Working Group. Ultimately, the actions set out in this Interim Report contain completed and committed activities and proposals to which members contributed where appropriate. It should be noted however that it was not the case that the agreement of all representatives was sought in relation to all issues considered by the Group.

1.35 As noted in the Introduction to this Interim Report, the initiatives and actions set out in Appendix A have been developed through the active and positive engagement of each member of the Commission's Working Group, and the Commission is extremely grateful for the approach taken by all members of the Group.

1.36 The Commission has, in addition, held meetings on an individual basis both with individual members of the Group and with other bodies who are

in a position to assist the Commission in achieving its objectives of delivering tangible measures in the short term to address the current personal indebtedness situation. The Commission also gratefully acknowledges the assistance provided by all these bodies.

1.37 The Commission's aim in this Interim Report is, therefore, to set out a list of measures providing urgent reforms in the short-term to deal with personal indebtedness. Recommendations for reform in the medium to long term will be addressed by the Commission in its final Report. This Interim Report therefore sets out: (a) the Commission's summary of its proposals for immediate reform and/or actions taken by some of the members of the Working Group (these are set out in Chapter 2 and Appendix A); (b) a digest of other relevant actions already taken or planned, of which the Commission is aware, aimed at tackling the problem of personal indebtedness (these are set out in Appendix B); and (c) a summary of the long-term reform issues which remain to be dealt with by the Commission in its final *Report on Personal Debt Management and Debt Enforcement* to be published by the end of 2010 (these are set out in Chapter 3).

1.38 The Commission and Working Group recognised that the issues outlined in the terms of the reference were quite broad. The Commission therefore identified, on a rolling basis, specific categories in which recommendations could be made and reforms could be achieved. The Commission and the Working Group highlighted four general subject areas which are addressed in this Interim Report. These four areas, discussed in Chapter 2 are:

- Financial Regulation
- Codes of Practice
- Legal Processes
- Distribution of Information to Consumers.

1.39 Under these four headings 14 specific activities and measures were identified for consideration. These subject areas and specific measures include several identified by the Commission in its *Consultation Paper on Personal Debt Management and Debt Enforcement*, as is seen in the detailed discussion in Chapter 2.⁴⁰

1.40 The Working Group held six meetings at the Commission's offices between January and April 2010. A rolling List of Issues for Consideration and a Working Group Activity Plan formed the basis for each meeting of the Group. In addition, several Memoranda and Working Papers were prepared by the

⁴⁰ See paragraphs 1.47 below.

Commission and other members of the Group and were distributed for discussion. The deliberations of the Group have fully informed the content of this Interim Report.

F Mortgage Arrears and Personal Debt Review Group

1.41 Another significant development since the publication of the Commission's *Consultation Paper on Personal Debt Management and Debt Enforcement* has been the establishment of two committees examining the issues of mortgage arrears and personal debt: the Inter-Departmental Mortgage Arrears Review Group and the Mortgage Arrears and Personal Debt Review Group.

1.42 In November 2009, after the publication of the *Renewed Programme for Government* and the Government's decision to review the mortgage arrears issue,⁴¹ the Minister for Finance approved the establishment of an Inter-Departmental Mortgage Arrears Review Group, for the purpose of bringing together all relevant information in Departments and examining options in relation to the matter of support for home owners facing the problems of mortgage arrears and repossessions. This Group met on two occasions. On 25 February 2010, after consultations with members of the Cabinet, the Minister for Finance and the Minister for Communications, Energy and Natural Resources informed the Government of proposals to expand the membership of the Group to include external experts, and this led to the establishment of the Mortgage Arrears and Personal Debt Review Group.⁴² This group of experts was appointed to work with the Government on its response to the issue of indebtedness. The Chair of the Review Group is Hugh Cooney, an insolvency accountant. The other members are:

- Matthew Elderfield, Financial Regulator
- David Duffy, Economic and Social Research Institute
- Pat Farrell, Irish Banking Federation
- Tom Foley, retired banker
- Paul Joyce, Free Legal Advice Centres (FLAC)

⁴¹ See *Renewed Programme for Government* 10 October 2009 at 15. Available at: http://www.taoiseach.gov.ie/eng/Publications/Publications_2009/Renewed_Programme_for_Government,_October_2009.pdf (accessed 6 May 2010).

⁴² *Government appoints experts to fulfil Programme for Government commitments on debt* (Department of Finance Press Release, 25 February 2010), available at: <http://www.finance.gov.ie/viewdoc.asp?DocID=6220> (accessed 6 May 2010).

- Patricia Rickard-Clarke, Commissioner, Law Reform Commission
- Brendan Burgess, FCA, and founder of www.askaboutmoney.ie
- Senior officials from the Department of the Taoiseach, Department of Finance, Department of Justice and Law Reform, Department of Social Protection, Department of Environment, Heritage and Local Government, and Department of Communications, Energy and Natural Resources.

1.43 The Expert Review Group is mandated to present their recommendations on a rolling basis to the Minister for Finance, for consideration by Government.

1.44 The Terms of Reference of the Expert Review Group are based on the October 2009 *Renewed Programme for Government* and include mortgage and non-mortgage debt. They include an examination of measures to assist those in mortgage arrears to keep possession of their family home with reference to the measures adopted in other jurisdictions. The Review Group will also consider the ongoing deliberations of this Commission, specifically its proposals for the reform of personal insolvency, bankruptcy law and debt enforcement.

1.45 The Review Group began its deliberations in March 2010 and has focused initially on bringing forward recommendations to deal with the mortgage arrears problem, before later addressing the personal debt issue. It is expected that these recommendations will be made to Government on a rolling basis as the Group progresses with its review. The Minister for Finance has indicated that the costs of all proposals will need to be examined before they may be recommended to Government, and any proposals must represent value for money from the point of view of the Government and taxpayers.

1.46 The Commission now turns to set out a summary of the subjects addressed by the Commission with the Working Group for inclusion in the Interim Report arising out of the issues which were discussed in the Commission's Consultation Paper.

G Specific Issues Discussed in this Interim Report

1.47 A number of specific issues, discussed in the Commission's Consultation Paper, were raised by the Commission with the Working Group. These are:

- financial services regulatory structures

- regulation of money advice undertakings⁴³
- regulation of debt collection agencies
- regulation of credit unions
- 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 review and extension of the IBF-MABS Operational Protocol)
- liberalisation and modernisation of Irish bankruptcy law and
- development of a Pre-Action Protocol/pre-litigation notice in consumer debt proceedings.

1.48 In addition, the Commission also discussed with the Working Group the following issues:

- distribution of information to borrowers in difficulty
- availability of legal advice and legal aid for consumer debtors
- development of a Standard Financial Statement and
- introduction of a limited right of participation for money advisers in court proceedings.

The Commission's final Report will, therefore, focus on personal insolvency law and debt enforcement procedures: see the discussion in Chapter 3, below. Some of the issues discussed in this Interim Report, notably the question of the provision of legal advice and legal aid to defendants in debt proceedings and the regulation of debt collection undertakings, will also be considered by the Commission in its final Report.

⁴³ It should be noted that the Commission uses the terms "money advisor", "debt advisor" and "money advice undertaking" interchangeably throughout this *Interim Report*: see paragraph 2.12 below.

CHAPTER 2 INITIATIVES AND ACTIONS IN PLACE OR IN TRAIN

A Introduction

2.01 In this Chapter, the Commission details the specific initiatives and actions already in place or in train arising from the deliberations of the Commission's Working Group. As noted in Chapter 1, the Commission and the Working Group identified four general subject areas for discussion:

- Financial Regulation
- Codes of Practice
- Legal Processes and
- Distribution of Information to Consumers.

2.02 In respect of each of these four headings, 14 specific activities and measures have been identified for treatment. These subject areas and specific measures include several of the issues identified by the Commission in its *Consultation Paper on Personal Debt Management and Debt Enforcement*. This Chapter therefore outlines the measures achieved and further reforms recommended in each of these subject areas in turn.

B Financial Regulation

(1) Introduction

2.03 Several issues were raised by the Commission and discussed by the Working Group in the area of financial regulation. This is also an area in which certain members of the Working Group, notably the Department of Finance and the Financial Regulator, have recently introduced reform measures. This Part therefore outlines issues considered by the Commission in the subject areas of general reforms to the legislation concerning the Central Bank and the financial services regulatory structure; the proposed regulation of money advice undertakings; the proposed regulation of the commercial debt collection industry; reforms to the regulatory framework for credit unions; and the proposed regulation of the credit reporting industry. These subjects are now discussed in turn.

(2) Reforms to the Central Bank and Financial Services Regulatory Structure

2.04 The Department of Finance has proposed comprehensive reforms to the structure for regulation of financial services in Ireland. The Commission now presents the Department's account of these proposals.

(a) Purpose of the reforms

2.05 The main purpose of the proposed new structure to be put in place through a comprehensive three-stage legislative programme is to ensure that the domestic regulatory framework for financial services meets Government objectives for the maintenance of the stability of the financial system as well as effective and efficient supervision of the financial institutions and markets and to safeguard the interests of consumers and investors.

2.06 The aim of the programme is to underpin confidence, to have more responsible and transparent management and lending policies in financial institutions, consistent with their long-term sustainability, to support the availability of appropriate credit to businesses and individuals, and to ensure a more focused and proactive financial services sector that acts in the interests of customers and the economy as well as shareholders.

2.07 The legislative programme involves three Bills. The first, the *Central Bank Reform Bill 2010*, will focus mainly on the organisational changes in the Central Bank and Financial Services Authority of Ireland (CBFSAI). The *Central Bank Reform Bill 2010* was published in March 2010 and the intention is that it will be enacted as quickly as possible. Measures which are necessary or desirable to modify or enhance the powers of the newly-structured institution, in accordance with the terms of the Government decision of June 2009, will be provided for in a second Bill to be brought forward in Autumn 2010. Finally, a third Bill will be introduced to consolidate all the Central Bank legislation in a single enactment.

(b) Main elements of the Bill

2.08 The central aspect of the Bill is to address the need for increased cooperation and coordination between those responsible for monitoring financial stability and those charged with the prudential supervision of individual institutions as well as conduct of business regulation.

2.09 The main elements contained in the *Central Bank Reform Bill* are as follows;

- The CBFSAI will be reformed as the Central Bank of Ireland (the Bank).
- The Irish Financial Services Regulatory Authority (IFSRA), which is a constituent part of the CBFSAI, will be dissolved, the posts of Chief

Executive of the Regulatory Authority and Consumer Director will be abolished. Two new posts – Head of Financial Regulation and Head of Central Banking – will be established. The Registrar of Credit Unions will continue to exist and will be appointed by the Commission.

- The Bank will be a single fully-integrated structure with a unitary Board, “the Central Bank Commission”, which will be chaired by the Governor.
- The Bank will be responsible for the stability of the financial system overall, for prudential regulation of financial institutions and for the protection of consumer interests. The Governor will remain solely responsible for European System of Central Banks (ESCB) related functions.
- The Bank’s current statutory function of promoting the development within the State of the financial services industry is being removed.
- The Bank will have power to impose levies for the purpose of funding the regulation of financial service providers.
- New enhanced accountability and oversight mechanisms will include:
 - A specific focus of the Commission to be on regulatory performance, including development of performance benchmarks.
 - Annual Performance Statements on regulatory performance prepared by the Bank, presented to the Minister for Finance and laid before the Houses of the Oireachtas. (Note that this will be in addition to the Bank’s Strategy Statement which is to be prepared at least every three years and its Annual Report and Accounts).
 - Regular international peer reviews of regulatory performance with the report of same forming part of the Performance Statement for the relevant year.
 - A committee of the Oireachtas may call the Governor and/or the Heads of Functions to be examined on the Performance Statement.
 - The Consumer and Industry Panels will be replaced with new arrangements to advise the Bank on the exercise of its statutory functions - including on consumer matters. The current statutory monitoring role of the Consumer Panel will be removed.
 - Responsibility for consumer information and education in respect of financial services will transfer to the National

Consumer Agency (NCA) along with associated staff. The NCA will have power to impose levies on financial service providers for the purpose of funding the functions assigned to it under the Bill. The Bank or a body prescribed by the Minister for Finance, including the Pensions Board, the Financial Services Ombudsman and the NCA, may collect the various industry levies as an agent of the others in order to maximise efficiency and minimise the administrative burden on the industry.

2.10 The Bill also provides for

- the amendment of section 35 of the *Credit Union Act 1997* to allow credit unions greater flexibility in re-scheduling loans in arrears subject to appropriate liquidity provision and accounting transparency.¹
- the Bank to regulate appointments within financial service providers to help ensure the fitness and probity of key office-holders.
- Section 59 of the *Insurance Act 1989* will be amended to enable the Bank to appoint employees of the Bank or other suitably qualified persons to be authorised officers for the purposes of the *Insurance Acts*² to give the Bank flexibility in its approach to ensuring compliance with insurance regulations.

2.11 The Commission welcomes these proposed reforms of the legislation governing the regulation of financial services legislation in Ireland. It is hoped that these regulatory reforms will have a positive impact in the areas of consumer protection and the prevention of over-indebtedness.

(3) Regulation of Money Advice Undertakings

2.12 The second issue within the subject of financial regulation considered by the Commission is the regulation of the money advice industry, and particularly those money advice undertakings operating on a commercial basis (it should be emphasised that the Money Advice and Budgeting Service (MABS) provides its services free of charge). In this context, it should be noted that the Commission has not attempted at this stage to define the terms “money advice”, or “money advisor”, as it takes the view that this term should be defined in legislation providing for the regulation of this industry. The term “debt advisor” is also used in relation to the Commission’s proposals for a Pre-Action Protocol in consumer debt proceedings,³ and for the introduction of limited

¹ See paragraphs 2.26 to 2.30 below.

² *Insurance Act 1953-2000*.

³ See paragraphs 2.59 to 2.65 below.

participation rights for advisors in consumer debt proceedings.⁴ The Commission draws no distinction of importance between these terms, and considers that for the purposes of this Interim Report and pending the introduction of statutory definitions in legislation, the terms “money advisor”, “money advice undertaking” and “debt advisor” have the same meaning. For present purposes the Commission uses the terms “money advice”, and “money advice undertaking”/“debt advisor” in a very 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. The Commission understands these services to include the following activities, among others (as are recognised in comparative legal systems as falling within the scope of regulated money advice activities):

- providing counselling with respect to a client’s credit problems, including an analysis of such client’s current financial condition, factors that caused such financial condition, and how such client can develop a plan to respond to the problems without incurring negative amortisation of debt;⁵,
- giving of advice to debtors about the liquidation of debts due;⁶
- negotiating with the creditor or owner, on behalf of the debtor or hirer, terms for the discharge of a debt;⁷
- acting as an intermediary between an individual and one or more creditors of the individual for the purpose of obtaining concessions;⁸
- taking over, in return for payments by the debtor, his or her obligations to discharge a debt;⁹

⁴ See paragraphs 2.66 to 2.75 below.

⁵ See section 111(c)(2) of the *US Bankruptcy Code*, Title 11 US Code.

⁶ See the definition of “debt counselling” under section 145(6) of the *Consumer Credit Act 1974*.

⁷ See the definition of “debt adjusting” under section 145(5) of the *Consumer Credit Act 1974*.

⁸ See the definition of “debt management services” in section 2 of the United States National Conference of Commissioners on Uniform State Laws (NCCUSL) *Uniform Debt Management Services Act*.

⁹ See the definition of “debt adjusting” under section 145(5) of the *Consumer Credit Act 1974*.

- offering or undertaking to act for a debtor in arrangements or negotiations with the debtor's creditors or receiving money from a debtor for distribution to the debtor's creditors;¹⁰

The Commission wishes to emphasise however that debt collection undertakings of the type discussed in paragraphs 2.21 to 2.25 below fall outside the category of money advice undertaking/debt advisor which forms the object of the present discussion.

(a) *Provisional Recommendations of the Consultation Paper*

2.13 As noted above,¹¹ the Commission's *Consultation Paper on Personal Debt Management and Debt Enforcement* identified the lack of regulation of money advice undertakings as a problematic issue in the field of debt management which should be addressed by legislation.¹² The Consultation Paper indicated that a strong case exists for the introduction of a comprehensive regulatory system for debt management companies due to the vulnerable situations in which clients of such companies often find themselves.¹³ The fact that this sector is regulated in a majority of European countries was also influential in the Commission's decision to recommend provisionally that debt management and debt advice companies should be subject to a regulatory regime. The Paper indicated that statutory definitions of debt advice and debt management services should be established, and that it should become compulsory to hold a licence to engage in these activities. The Commission provisionally recommended that the Financial Regulator should be responsible for licensing these firms and supervising the regulatory regime.¹⁴ The Paper stated that the Regulator has the requisite knowledge of the consumer credit market and the relevant institutional experience to make it a suitable body for this task. It was further recommended that the Regulator should be empowered under statute to issue legally binding codes of conduct in respect of debt management companies. The Paper also suggested that standards should be established to ensure that debt advisors are required to obtain at least a minimum level of training and skills, with industry representatives participating in establishing such standards. Due to its experience and its status as a model of best practice in money advice, the standards employed by the Money Advice and Budgeting Service were

¹⁰ See the definition of "debt repayment agency" in section 1(g) of the Albertan *Fair Trading Act Collection and Debt Repayment Practices Regulation*.

¹¹ See paragraph 1.08 above.

¹² (LRC CP 56–2009) at paragraph 3.142. See also paragraph 1.08 above.

¹³ (LRC CP 56–2009) at paragraph 4.247.

¹⁴ (LRC CP 56–2009) at paragraph 4.250.

identified as being influential in this regard. Finally, the Commission invited submissions as to whether the proposed licensing regime for debt advice and debt management companies should be extended to non-profit, non fee-charging organisations.¹⁵

2.14 The following paragraphs discuss this issue, by first outlining the developments made towards the comprehensive regulation of this industry, while secondly proposing recommendations for immediate measures that could be introduced on a short-term basis pending the introduction of a comprehensive regulatory framework.

(b) Introduction of a Statutory Regulatory Framework

2.15 The Commission has concluded that such money advice undertakings should be subject to a regulatory regime, and that in particular codes of practice should be established to govern the business practices of such operators.

2.16 The Commission recognises that the regulation of money advice/debt management undertakings requires the enactment of an Act (primary legislation) and so cannot be achieved in the short term however. This is a matter, in the first instance, for examination by the Department of Finance. Legislative measures, if any, may be considered as part of this process.

(c) Immediate reforms

2.17 The Commission therefore concludes that money advice/debt management undertakings should be subject to a comprehensive system of regulation. Indeed responsible representatives of the money advice/debt management sector have publicly supported statutory regulation. The Commission recognises however that the legislation required to introduce such a system would be of a complex nature and would take some time to draft and enact. Therefore the Commission wishes to highlight developments that have taken place towards the establishment of best practice standards and voluntary regulation in this area.

2.18 As noted in the Commission's Consultation Paper, voluntary industry codes exist in the money advice sector in the United Kingdom.¹⁶ There are two organisations who seek to promote standards in this industry in the UK, the Debt Managers Standards Association (DEMMSA) and the Debt Resolution

¹⁵ (LRC CP 56-2009) at paragraph 4.254.

¹⁶ (LRC CP 56-2009) at paragraph 4.246.

Forum (DRF).¹⁷ Both of these organisations have produced codes of practice covering issues such as:

- standards that should be applied for interaction between their members and debtors and creditors;
- members' training and qualifications;
- handling of clients' funds;
- advertising;
- fees and charges; and
- complaints

The DEMSA code of practice¹⁸ has been approved by the Office of Fair Trading in the UK under its Consumer Codes Approval Scheme, while the DRF is working towards seeking similar accreditation in respect of its standards.¹⁹

2.19 The Commission understands that some money advice undertakings operating in Ireland have voluntarily adopted the standards contained in the DEMSA code of practice. The Commission welcomes this development to enshrine best practice standards in this industry in Ireland. Pending the introduction of a formal comprehensive regulatory regime in Ireland, the adoption of these or similar codes by money advice undertakings in Ireland is to be encouraged. In particular, it is desirable that best practice standards are established in relation to issues identified as causing most concern in the industry, such as the lack of transparency in relation to the fees charged by some commercial money advice undertakings, misleading advertising practices among some undertakings and the lack of standards for the handling of client money.

2.20 Representatives of the Commission have met with representatives of both the Law Society and Chartered Accountants Ireland to discuss issues of personal debt management and debt enforcement. In particular, the

¹⁷ *Debt Management Schemes – delivering effective and balanced solutions for debtors and creditors* (Ministry of Justice; Department for Business, Innovation and Skills; the Insolvency Service Consultation Paper CP09/09) at 21. Available at: <http://www.justice.gov.uk/consultations/debt-management-schemes.htm> (accessed 6 May 2010).

¹⁸ The DEMSA code is available at: <http://www.demsa.co.uk/code-of-conduct/> (accessed 6 May 2010).

¹⁹ The DRF standards are available at: <http://www.debtresolutionforum.org.uk/DRF%20standards.pdf> (accessed 6 May 2010).

Commission has discussed the issue of how a debt advice regulatory regime would apply to members of these respective professions with these bodies. The Commission will continue its dialogue with these bodies on this issue as it proceeds towards its final *Report on Personal Debt Management and Debt Enforcement*.

(4) Regulation of Debt Collection Undertakings

2.21 The following paragraphs discuss the potential introduction of a system for the regulation of debt collection undertakings. By way of introductory comment it should be noted that the Commission does not propose to provide a definition of the term “debt collection undertaking” in this Interim Report. The Commission takes the view that such a term should be defined in future legislation establishing a comprehensive regulatory regime for this industry. For present purposes the Commission uses the terms “debt collection” and “debt collection undertaking” in a very broad sense to refer to all activities recognised as being traditionally carried out by a debt collection undertaking. The Commission understands that these include the following activities, among others (as recognised in comparative legal systems as falling within the scope of regulated debt collection activities):)

- taking of steps to procure payments of debts due under contracts;²⁰
- collecting or attempting to collect, directly or indirectly, consumer debts owed or due or asserted to be owed or due another;²¹
- offering or undertaking to collect debts for others;²²
- soliciting accounts for collection;²³
- posting to debtors or offering or undertaking to mail to debtors, on behalf of a creditor, collection letters;²⁴
- selling or offering for sale a collection system, device or scheme intended to be used to collect debts;²⁵

²⁰ See 145(7) of the UK *Consumer Credit Act 1974*.

²¹ 15 USC 1692a (6) (section 803(6) of the US *Fair Debt Collection Practices Act*).

²² Section 2(a) of the Newfoundland and Labrador *Collections Act*.

²³ Section 2(a) of the Newfoundland and Labrador *Collections Act*.

²⁴ Section 2(a) of the Newfoundland and Labrador *Collections Act*.

²⁵ *Ibid.*

- collecting a consumer debt the person owns, using a name or other artifice that indicates that another party is attempting to collect the consumer claim;²⁶
- 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.²⁷

The Commission notes that this list of activities is descriptive in nature, and does not propose to define the scope of activities that should fall within a definition of debt collection activities or which should be used to define the term “debt collection undertaking” for the purposes of the proposed regulatory regime. The list is merely indicative of the type of activities and undertakings to which the Commission refers in the following paragraphs. The Commission wishes, in particular, to emphasise that for the purposes of the Interim Report, it treats money advice undertakings and debt collection undertakings as distinct forms of undertakings. The Commission recognises however that the definitions contained in future legislation may provide for some overlap between these two types of undertakings. For the purposes of the Commission’s current discussion however, these types of undertakings should be considered to be distinct, and the lists of activities provided in this paragraph and in paragraph 2.12 are used to clarify this distinction.

2.22 As noted above, the Commission’s Consultation Paper recommended that a comprehensive system for the regulation of the debt collection industry should be introduced in Ireland.²⁸ The Commission recognises that the legislation required to introduce a comprehensive regulatory regime would be complex and would take some time to draft and enact however. The Commission therefore concludes that the subject of the regulation of debt collection undertakings falls outside the terms of reference of the Working Group and is not appropriate for consideration in this Interim Report. The Commission will, therefore, consider the issue of the regulation of the debt collection industry in its final Report.

2.23 The Commission notes that, even in the absence of legislative reform in this area, some developments have taken place towards the introduction of standards in this industry on a voluntary basis.

²⁶ See 7 Maryland Code Annotated, Business Regulations, section 101(c).

²⁷ Section 3(1) of the Albertan *Fair Trading Act Collection and Debt Repayment Practices Regulation*.

²⁸ See paragraph 1.07 above.

2.24 The Irish Institute of Credit Management (IICM) has produced a Draft Code of Conduct for Debt Collection Agencies that seeks to establish standards representing best practice for the debt collection sector. This draft code includes rules concerning the following issues:

- General Conduct
- Confidentiality
- Complaints Handling
- Debt Collection, Trace and Debt Purchase Guidelines
- Trace Guidelines
- Purchased Debt Guidelines
- Conduct Regarding Clients

2.25 The Commission therefore welcomes the efforts made by the IICM at introducing a system of self-regulation for the debt collection sector, and encourages debt collection undertakings not falling within the IICM to develop similar standards.

(5) Regulation of Credit Unions

2.26 In its Consultation Paper, the Commission highlighted certain issues for consideration in relation to the observance by credit unions of responsible lending standards. These included introducing an expanded legal framework for credit reporting which would oblige credit unions to participate in data sharing;²⁹ the introduction of binding codes of conduct for credit unions containing responsible lending standards;³⁰ and the extension of the maximum interest rate that can be charged by unions.³¹ The Commission however also acknowledged the important role of credit unions in combating the problem of financial exclusion, and provisionally recommended that research should be undertaken on the impact of any proposed new responsible lending standards on this problem.³²

2.27 Reforms have been made recently to the regulation of the credit union sector, and further future reforms have also been proposed. First, the

²⁹ *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 3.92 to 3.94, 4.87 to 4.88.

³⁰ *Ibid* at paragraph 4.151.

³¹ *Consultation Paper on Personal Debt Management and Debt Enforcement* at paragraphs 4.154 to 4.155.

³² *Ibid* at paragraphs 4.166 to 4.173.

Financial Regulator introduced new rules regarding the Regulatory Reserve Ratio³³ that must be maintained by credit unions, which became effective from 30 September 2009.³⁴ Under these new rules, a credit union must maintain continually a minimum Regulatory Reserve Ratio of at least 10%³⁵. Secondly, the *Central Bank Reform Bill 2010* proposes to amend section 35 of the *Credit Union Act 1997*. The amendment to Section 35 of the *Credit Union Act 1997* would extend the lending limit for loans over five years from 20% to 30% for all credit unions; empower the Registrar of Credit Unions to impose requirements on credit unions in relation to lending practices; and require credit unions to have appropriate systems in place to monitor compliance with Section 35. The overall initiative includes additional requirements with regard to liquidity, provisions for rescheduled loans and formal arrangements in relation to the management and reporting of rescheduled loans. According to the Department of Finance, these reforms are intended to allow credit unions to assist members experiencing financial difficulties so that these members may continue to make repayments on their loans, albeit smaller ones. In this way, borrowers may continue to manage their personal finances and not break the good habit of making regular repayments.³⁶

2.28 Thirdly, another development of interest which has taken place since the publication of the Consultation Paper in this area is that the Minister for Finance has requested the Financial Regulator to carry out a Strategic Review of the Credit Union Sector in Ireland. The Project is being managed by the Registrar of Credit Unions and Department of Finance officials are liaising

³³ The Regulatory Reserve Ratio is defined as “the amount held in the Total Regulatory Reserve of a credit union expressed as a percentage of the Total Assets of a credit union. The “Total Assets” of a credit union are to be calculated after deducting any provisions for bad and doubtful debts. See *Regulatory Reserve Ratio for Credit Unions* (IFSRA Registry of Credit Unions 2009) at 3, available at: <http://www.financialregulator.ie/industry-sectors/credit-unions/Documents/Regulatory%20Reserve%20Ratio%20-%20August%202009.pdf>

³⁴ See *Credit Union Act 1997 (Section 85) Rules 2009*.

³⁵ Rule 3(a) *Credit Union Act 1997 (Section 85) Rules 2009*.

³⁶ *Minister for Finance, Mr Brian Lenihan, TD, announces the extension of longer-term lending limits for Credit Unions* (Department of Finance Press Release), available at:

<http://www.finance.gov.ie/viewdoc.asp?DocID=6246&CatID=1&StartDate=1+January+2010&m=n> (accessed 6 May 2010).

closely with him in relation to the project. The project is expected to be completed by end-March 2011.

2.29 The review will include a financial review and a risk analysis of the credit union sector, an examination of the external support mechanisms required for the protection of members' savings, governance and competency standards and the regulatory and legislative framework. The impact of current and emerging consumer protection requirements, other European Union legislation and services on offer by credit unions will also be included in the review.

2.30 In relation to the further development of the credit union sector, the outcomes for this project are to develop proposals and make recommendations for a modern operational model for credit unions, supported by an appropriate and enabling legislative and regulatory framework. This framework must reflect the needs of credit unions and of their members. It should be able to support the development of the movement into the future.

(6) Credit Reporting

2.31 The final issue to be discussed in the area of financial regulation is that of credit reporting. The Commission's Consultation Paper discussed in detail the subject of credit reporting and its role in facilitating responsible lending practices.³⁷ The Commission described existing Irish credit reporting practices and in particular the role of the primary credit history database in Ireland, the Irish Credit Bureau (ICB). Problems arising in this area, and in particular the difficulty of obtaining a comprehensive credit history assessment in respect of a potential borrower, were highlighted.³⁸ The Commission also presented a detailed description of various different models of credit reporting systems operating in other countries, including public credit registers, private credit bureaus and dual systems.³⁹ The respective advantages of these different systems were presented, as were the arguments for and against the introduction of a more comprehensive credit reporting system in Ireland.⁴⁰ The Commission ultimately did not make any provisional recommendations on the subject of credit reporting, and instead suggested that the issue of introducing a more comprehensive system of credit reporting in Ireland should be considered as part of a review of financial services legislation.

³⁷ (LRC CP 56-2009) at paragraphs 3.57 to 3.70; 3.92 to 3.96; 4.41 to 4.97.

³⁸ (LRC CP 56-2009) at paragraphs 3.92 to 3.96.

³⁹ (LRC CP 56-2009) at paragraphs 4.41 to 4.70

⁴⁰ (LRC CP 56-2009) at paragraphs 4.77 to 4.90.

2.32 In relation to the subject of credit reporting, the Commission acknowledges that it will be difficult to achieve improvements on an immediate basis due to factors such as technological limitations.

2.33 The Department of Finance has indicated its view that it is important that there are facilities available which record and give access to credit history information and help credit institutions to be well informed when making decisions on the provision of credit. The Department is currently looking at 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 be taken. The Department of Finance recognises that consultation with the relevant stakeholders will be required in order to complete a comprehensive analysis of how to achieve effective credit reporting in Ireland.

2.34 The Commission welcomes the fact that the suggestion in its Consultation Paper that the issue of introducing a more comprehensive system of credit reporting in Ireland should be considered as part of a review of financial services legislation is being taken into account by the Department of Finance. The Commission believes that the proposals of the Department to conduct a comprehensive analysis of this subject, involving consultation with relevant stakeholders, have the potential to facilitate responsible lending and arrears management practices as part of a holistic response to the problem of over-indebtedness.

C Codes of practice

(1) Introduction

2.35 The Commission's second major subject for discussion is that of codes of practice on personal debt management and enforcement. Within this subject, two principal issues have again been raised for consideration. These are the use of the *IBF-MABS Operational Protocol* as a means of providing satisfactory solutions to situations of personal indebtedness in the absence of personal insolvency legislative reform; and the clarification of the legal status of statutory codes of practice in court proceedings.

(2) The IBF-MABS Operational Protocol

2.36 In 2009 the Irish Banking Federation⁴¹ and the Money Advice and Budgeting Service launched a Protocol outlining the agreed principles and procedures which will be followed by the MABS and creditor members in

⁴¹ The Irish Banking Federation (IBF) is the leading representative body for the banking and financial services sector in Ireland, representing over 70 member institutions and associates, including licensed domestic and foreign banks and institutions operating in Ireland.

cooperating to resolve individual cases of debt problems.⁴² The Protocol is founded on a partnership approach and the cooperation of IBF Creditors and MABS Advisors to formulate “mutually-acceptable, affordable and sustainable” repayment plans for debtors in difficulty.⁴³ The principle of good faith full disclosure and the concept of debt settlement or partial debt discharge are fundamental to the Protocol.⁴⁴ The Commission discussed the Protocol in detail in the Consultation Paper.⁴⁵

2.37 Certain issues relating to the Protocol and the means by which it can produce short-term solutions to problems of personal indebtedness were discussed by certain members of the Working Group (representatives of the IBF and the MABS) and are now presented by the Commission. These issues include the potential extension of the Protocol to lenders other than those currently subscribing to it; the review of the operation of the Protocol during its first months; and the potential development of a Common Financial Statement by debtor and creditor representatives to facilitate the agreement of sustainable and fair voluntary debt repayment plans.

(a) Extending the application of the IBF-MABS Operational Protocol

2.38 First, the possibility of extending the Irish Banking Federation-MABS Operational Protocol to creditors and creditor representatives other than members of the Federation has been discussed. Further to the review of the Protocol between MABS and IBF members and the refinements identified and detailed below,⁴⁶ MABS wishes to extend the principles and processes contained in the Protocol to other major creditor groups and as such, in addition to ongoing negotiation with the ILCU and others, now hopes to agree protocols with other major utility providers.

2.39 In addition, representatives of the Commission have met with the Commission for Energy Regulation with the aim of discussing the possibility of extending the Protocol to energy providing companies.

2.40 The Commission welcomes the extension of the operation of the *IBF-MABS Operational Protocol* to a wider range of creditors. In its

⁴² *IBF-MABS Operational Protocol: Working Together to Manage Debt* (2009), available at: <http://www.ibf.ie/pdfs/IBF-MABS-Protocol-June09.pdf> (accessed 6 May 2010).

⁴³ Paragraph 1(b) of the Protocol.

⁴⁴ Paragraph 1(e) of the Protocol.

⁴⁵ *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 3.182 to 3.188.

⁴⁶ See paragraphs 2.41 to 2.44 below.

Consultation Paper, the Commission presented this Protocol as a voluntary substitute for the lack of an effective personal insolvency system under Irish law. The Commission wishes to reiterate its support for the important role that the Protocol plays in providing a non-legal framework for the development of mutually-acceptable, affordable and sustainable repayment plans, pending the Commission's proposed introduction of a formal statutory non-judicial debt settlement system.⁴⁷ The Commission believes that the extension of the operation of the Protocol to a wider range of creditors will be an important step towards ensuring that an individual's debt difficulties can be addressed in a standardised, mutually-satisfactory and holistic manner. The extension of the Protocol can therefore provide immediate benefits to both creditors and debtors. As the Protocol may also increase the chances of avoiding legal proceedings in a larger number of cases of debt disputes, the extension of the Protocol should also be of benefit to the State as it reduces the resources expended on such court proceedings.

(b) *Review of the operation of the IBF-MABS Operational Protocol*

2.41 The MABS/IBF Protocol has been operational for over six months (as of May 2010) and is overseen by a Monitoring Group comprising MABS and members of relevant IBF institutions. In addition to the meetings of the Monitoring Group, MABS and individual institutions meet bilaterally to review progress and address any operational issues emerging. More recently, MABS has begun to provide awareness sessions for frontline staff in participating institutions.

2.42 During the first six months or so of operations, the Protocol has delivered generally positive results in terms of agreed repayment arrangements between IBF creditors and MABS clients – confirmed by ongoing monitoring reports. Furthermore, considerable progress has been made on a number of issues as follows:

- Under the Protocol Monitoring Group there is now a structured forum for addressing issues emerging and this is proving to be an effective mechanism of harmonising good practices across participating institutions.
- There is increased awareness of MABS and its approach to money advice within IBF member institutions; MABS has a greater understanding of operations within individual institutions.

⁴⁷ See *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 5.66 to 5.179.

- IBF creditors are establishing effective systems and procedures to facilitate the implementation of the Protocol with MABS. Some have these in place already, while others are progressing in that direction.
- MABS has introduced standardised materials (client authorisation, financial statement, standard letters etc) in support of the Protocol; the use of standard materials provides greater clarity and structure to the process.
- The inclusion of timelines has meant that all parties are endeavouring to reach a resolution for the client/customer within a defined timeframe; this is improving the efficiency of client work.

2.43 Arising from the current scheduled review of the Protocol's operation, a number of action points have been identified which are currently being addressed, as follows:

- Agreement and commitment to provide further clarification in relation to core aspects of the Protocol.
- Review and further development of the Standard Financial Statement, to include client assets, where relevant.
- Greater accommodation of 'Self-Help' clients/customers under the Protocol – MABS is to ensure its 'Self-Help' clients have the required support and information to engage directly with their IBF creditors.
- Systems to ensure that where timelines cannot be met there is ongoing communication between the creditor and MABS.
- Action to ensure 'third party agents' acting on behalf of IBF member institutions are aware of and applying the Protocol in their work on behalf of IBF members.
- The need for an internal escalation process to resolve disagreements in relation to technical casework issues.

2.44 As a result, MABS and the IBF hope that the operation of the Protocol will be even more consistently effective for MABS, IBF members and for clients/customers; and this should be reflected in any similar Protocols between MABS and other major creditor groups.

(c) *The Development of a Standard Financial Statement*

2.45 Representatives of MABS have indicated that, as part of the ongoing review of the *IBF-MABS Operational Protocol*, the MABS Standard Financial Statement is being reviewed and further developed. This Statement is a means to facilitate the agreement of budgeting guidelines to be used in preparing debt management plans between MABS and representatives of lenders. These guidelines are used to specify the amounts of income, assets,

and expenditure required by a debtor to maintain a reasonable standard of living and so provide guidance as to the amounts of repayment which lenders can reasonably expect to receive in voluntary repayment plans. The revised Standard Financial Statement will take account of any assets held by the debtor, and in this manner reflect current economic conditions where there is an increasing prevalence of debtors demonstrating low incomes but possessing some realisable assets.

2.46 The Commission supports strongly the development of the Standard Financial Statement as a considerable advancement towards establishing a framework for the management and resolution of debt difficulties in a holistic manner. At present, a particular difficulty faced by debtors who are seeking to achieve reasonable solutions to their debt problems is the negotiation of a realistic and sustainable repayment schedule that maximises the return to all of a debtor's creditors while also preserving the ability of debtors to maintain a reasonable standard of living. The Commission understands that at present creditors have different standards regarding acceptable amounts of part repayments and regarding the amount of income that a debtor should be permitted to retain for reasonable living expenses. Anecdotal evidence has emerged of some creditors blankly refusing to accept part repayments falling below a certain threshold, irrespective of the other obligations and available income of the debtor. Therefore the development of the Standard Financial Statement in a format acceptable to both creditors and money advisors would be a considerable advancement towards the development of effective and sustainable non-legal methods for managing personal debt difficulties. In this regard it should be noted that a recent review of consumer credit and debt law in the UK identified the development of a Common Financial Statement by the Money Advice Trust, the Finance and Leasing Association and the British Bankers' Association as a best practice measure for providing assistance to vulnerable consumers in debt repayment planning.⁴⁸ The Commission believes that the development of the Standard Financial Statement in Ireland could have similarly beneficial effects for both debtors and creditors on an immediate basis. As the Standard Financial Statement can enable the ability of a debtor to repay to be ascertained on an amicable basis outside of legal proceedings, the development should also be of benefit to the taxpayer as it should reduce the costs currently being expended by the State in running court proceedings. As the means of debtors are currently assessed as part of court proceedings for

⁴⁸ See HM Government *A Better Deal for Consumers: Delivering Real Help Now and Change for the Future* (Department of Business, Innovation and Skills 2009, Cm 7669) at 24.

the enforcement of judgment debts,⁴⁹ the development of a systemised means of conducting this assessment outside of the court process should save court time and costs.

2.47 In addition, the development of the Standard Financial Statement reflects the Commission's belief in the principle of a holistic approach to addressing problems of personal over-indebtedness. The development of a Common Financial Statement would also be beneficial to the negotiation of debt settlement arrangements under the Commission's proposed non-judicial debt settlement system, and so would facilitate the Commission's long-term proposals for reform in this area.⁵⁰ The identification of reasonable repayment levels as part of the balance between maximising the return for creditors and protecting a reasonable standard of living for a debtor and his or her dependents is a fundamental aspect of a debt settlement system,⁵¹ and so the development of the Standard Financial Statement is a key step towards achieving the long-term aim of the establishment of a modern non-judicial statutory debt settlement system. Thus this development has the potential to operate as an immediate aid to achieving reasonable solutions to situations of over-indebtedness in the absence of a legal solution, while ultimately also assisting in the development of a formal legal solution in the medium to long term.

(3) Status of Statutory Codes of Practice in Legal Proceedings

2.48 Within the subject area of codes of practice, the Commission has also considered the issue of the status of statutory codes and codes of practice, as issued by bodies such as the Financial Regulator, in legal proceedings.

(a) The Financial Regulator's Codes

2.49 The Irish Financial Services Regulatory Authority (the "Financial Regulator") may issue statutory codes, or codes of practice, in relation to

⁴⁹ See e.g. the process of discovery in aid of execution ((LRC CP 56-2009) at paragraph 3.237); the use of enforcement by Sheriffs/County Registrars as a means of ascertaining the means of a debtor ((LRC CP 56-2009) at paragraphs 3.242 to 3.257); the examination of means hearing under the instalment order procedure ((LRC CP 56-2009) at paragraphs 3.283 to 3.297); and the ascertainment of a debtor's income for the purposes of a garnishee order ((LRC CP 56-2009) at paragraphs 3.298 to 3.306).

⁵⁰ See *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 5.66 to 5.179.

⁵¹ See *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 5.151 to 5.167.

regulated entities falling under its supervision. The statutory provisions empowering the Financial Regulator to do so include:

- section 117(1) of the *Central Bank Act 1989*;
- section 8H(1)(f) of the *Consumer Credit Act 1995*, as inserted by the *Central Bank and Financial Services Authority of Ireland Act 2003*; and
- Sections 43B to 43FF and 61 of the *Insurance Act 1989*.

2.50 None of these statutory provisions refer to the status of a code of practice issued under these sections if cited in court proceedings however. The Commission in particular noted in its *Consultation Paper on Personal Debt Management and Debt Enforcement* that there is uncertainty as to the extent to which the *Code of Conduct on Mortgage Arrears* is capable of applying in mortgage possession proceedings.⁵² The Commission suggested that consideration should be given to the question of whether this Code should be capable of being taken into account in such proceedings.

(b) Codes of Practice under the Consumer Protection Act 2007

2.51 In parallel with these powers, the *Consumer Protection Act 2007*, which implemented the 2005 EC *Unfair Commercial Practices Directive*, also refers to codes or codes of practice. The 2007 Act refers to voluntary codes developed by a representative group and codes of practice approved by the National Consumer Agency (NCA) under section 88 of the 2007 Act. In addition, section 90 of the 2007 Act provides that the NCA may prepare, issue and publish “guidelines” applicable to traders concerning:

- matters of consumer welfare or protection;
- matters of practical guidance to traders in relation to commercial practices;
- matters relating to the establishment of quality assurance schemes; and
- the manner for submitting voluntary codes of practice to the NCA for approval.

Importantly, section 90(5) provides that in any proceedings before a court, guidelines issued and published under this section are admissible in evidence and, if any provision of the guidelines is relevant to a question arising in those proceedings, the provision may be taken into account in determining that question. Section 90(6) however provides that a failure on the part of any person to observe any provision of guidelines issued and published under this section shall not, of itself, render that person liable to any proceedings.

⁵² (LRC CP 56-2009) at paragraphs 4.179 to 4.181.

2.52 Section 94 of the 2007 Act provides for the concurrent vesting, with the National Consumer Agency, in the Financial Regulator of certain functions under the Act. This section amends the *Central Bank Act 1942* in order to empower the Financial Regulator with parallel functions to those of the Agency for the enforcement of the prohibition of unfair commercial practices in the financial services sector.⁵³ These functions include the publication of guidelines under section 90 of the 2007 Act. Therefore the power to publish guidelines under section 90 of the 2007 Act is shared between the National Consumer Agency and the Financial Regulator by virtue of section 94 of the 2007 Act. The Financial Regulator's power to issue guidelines under section 90 is however limited to issuing guidelines related to financial services provided by regulated financial service providers.

2.53 It should be noted that there are currently provisions of the *Consumer Protection Act 2007* that provide certain limited means of enforcing compliance with *voluntary* codes of practice. Section 42 of the 2007 Act provides that a trader shall not engage in a misleading commercial practice, and the subsequent sections of the 2007 Act specify the various circumstances in which a commercial practice is misleading. Section 45 of the 2007 Act provides that a failure to comply with a voluntary code of practice may amount to a misleading commercial practice and so constitute a criminal offence. In addition, section 89 of the 2007 Act appears to provide for a measure of enforceability of voluntary codes of practice by indicating that such a code is admissible in evidence in court proceedings, and that if any provision of the code is relevant to a question arising in those proceedings, the provision may be taken into account in determining that question. Section 89 of the 2007 Act states:

“In any proceedings before a court, a code of practice (whether approved under section 88 or not) is admissible in evidence and, if any provision of the code is relevant to a question arising in those proceedings, the provision may be taken into account in determining that question.”

2.54 The definition of “code of practice” under the 2007 Act appears to be confined to voluntary codes, thus excluding for example codes imposed on a statutory basis by the Financial Regulator.

⁵³ See section 5A(3A) of the 1942 Act, providing that the functions of the agency specified in subsection 5A(3B) are, in so far as they relate to a financial service provided by a regulated financial service provider, also functions of the [Financial Regulator].

(c) The Commission's View

2.55 Under section 89 of the 2007 Act there is a clear legislative statement that voluntary codes of practice may be taken into account in legal proceedings, and under section 90 of the 2007 Act guidelines produced by the NCA may be taken into account. By contrast, the question as to whether codes issued by the Financial Regulator under statutory authority may be taken into account in court proceedings remains unclear because there is no legislative statement about their effect in the Acts under which such codes may be issued.

2.56 The Commission notes that at present there is considerable uncertainty as to the status of the Financial Regulator's codes when cited in court. The Commission understands that the silence of the relevant legislation on this issue has led to varying approaches being adopted by different courts to the application of such codes in private law proceedings. It is possible for a court in its discretion to have regard to such codes,⁵⁴ but the absence of clarity is likely to lead to inconsistencies. In the Commission's view it would be preferable if there was consistency as to the status of such codes in court proceedings and therefore the Commission considers that the status of such codes when cited in court should be clarified. Should such codes of practice be capable of being taken into account by a court, this would not affect the substantive legal rights of debtors or creditors. Rather a court might, in its discretion, stay proceedings where the provisions of a code of practice have not been observed or award costs against a party found to have failed to comply with a code.

2.57 The Commission notes, however, that this issue of the applicability of regulatory codes in court proceedings may raise issues of economic policy lying outside the scope of the Commission's remit, particularly in the case of proceedings for possession orders in respect of mortgage loans. The Commission has therefore concluded that these factors are best considered in detail by the relevant authorities, including the Department of Justice and Law Reform, the Department of Finance and the Financial Regulator.

D Legal Processes

(1) Introduction

2.58 The third major subject to be addressed by the Commission relates to reform measures in the short term in respect of legal debt enforcement

⁵⁴ Reputable guidance issued by, for example, the Health and Safety Authority is often taken into account in the courts, even where such guidance does not have any formal statutory foundation: see Byrne *Safety, Health and Welfare at Work Law in Ireland* (2nd ed. Nifast (2008)) at 121-122.

proceedings. While this Interim Report clearly indicates that the issues of the long-term reform of the formal legal processes surrounding personal insolvency and debt enforcement are largely reserved for the Commission's final Report,⁵⁵ this Part identifies certain measures that can be taken to introduce reforms on an immediate basis. These reforms, which can be achieved without delay, are nonetheless part of the long-term improvement of legal processes in these areas and are consistent with the principles lying behind the Commission's provisional recommendations for reform as contained in its Consultation Paper.⁵⁶ Following the pattern of the above discussion, several discrete areas have again been identified by the Commission in this subject area. First, this Part discusses the form which Rules of Court on a Pre-Action Protocol in consumer debt cases might take. Secondly, the introduction of limited participation rights for money advisors in court proceedings is discussed. Finally, this Part considers the question of the provision of legal advice to debtors and legal aid to defendants in consumer debt proceedings.

(2) Pre-Action Protocol in Consumer Debt Claims

2.59 The first measure considered in this regard is the introduction, through Rules of Court, of a Pre-Action Protocol in consumer debt cases.

2.60 The Commission's Consultation Paper identified the low participation rates of debtors in the legal processes for debt recovery as a fundamental failing of the current system.⁵⁷ The Commission noted there is a general problem of a lack of engagement of debtors and referred to statistics produced by a 2009 study of the Free Legal Advice Centres (FLAC) as evidence of this problem.⁵⁸ This study for example found that none of 38 debtors surveyed defended the consumer debt claim brought against them, while only 4 of 28 attended an examination of means hearing conducted as part of the instalment order method of enforcing a judgment. Similarly, only 2 of 14 debtors surveyed attended an arrest and imprisonment hearing, a startling statistic when one considers that the potential outcome of that hearing was the

⁵⁵ See paragraphs 3.07 to 3.20 below.

⁵⁶ See *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 5.66 to 5.179; 6.36 to 6.445.

⁵⁷ See *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 3.328 to 3.331.

⁵⁸ See 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).

imprisonment of the debtor for a period of up to three months.⁵⁹ The Commission acknowledged that the lack of debtor participation in enforcement proceedings can be attributed to a number of factors. One such factor is that the documents served on debtors informing them of enforcement proceedings are written in formal legal language and in a format which is not readily understandable to the average individual debtor and especially to those debtors who may be particularly vulnerable.⁶⁰ Secondly, the Commission recognised that the 2009 FLAC study suggested that a key factor contributing to the low participation rates among debtors is the lack of awareness of the assistance available to debtors in the form of money advice.⁶¹ The FLAC study illustrated clearly that the early referral of debtors to the Money Advice and Budgeting Service (MABS) worked well and substantially increased the chances of a settlement to the debt dispute being reached which was satisfactory to both the creditor and debtor. The study also argued that money advice works most effectively as a preventative measure, so debtors should obtain access to advice before their situations have deteriorated too severely. The FLAC study found that a lack of information about the availability of money advice services was the primary reason why the debtors surveyed did not access such services, or why they only accessed such services at a very late stage in the enforcement process.⁶²

2.61 In seeking to address the problem of the lack of debtor engagement and the lack of awareness of debtors of the options available to them, the Commission considered the conclusions of the research conducted by FLAC, as well as the outcomes of research projects undertaken in England and Wales.⁶³ Having done so, it provisionally recommended that before legal proceedings are commenced, creditors should be obliged to send debtors a

⁵⁹ Under section 6 of the *Enforcement of Court Orders Act 1940*, as amended by the *Enforcement of Court Orders (Amendment) Act 2009*: see *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 3.283 to 3.295.

⁶⁰ (LRC CP 56-2009) at paragraph 3.329, citing Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 21-26. In this regard the reforms introduced by the *District Court (Enforcement of Court Orders) Rules 2010* should be noted for the introduction of new documentation intended to be more readily understandable to debtors.

⁶¹ (LRC CP 56-2009) at paragraph 3.330.

⁶² See in particular the tables presented at page 171 of the Commission's *Consultation Paper* (LRC CP 56-2009).

⁶³ (LRC CP 56-2009) at paragraphs 6.146 to 6.154.

pre-litigation notice providing the debtor with certain specified information, expressed in plain language.⁶⁴ The Commission invited submissions as to the contents of the information that should be provided to debtors in the proposed pre-litigation notice,⁶⁵ and the Commission is grateful for the submissions received on this point.

2.62 Based on the submissions received in response to its provisional recommendations and the deliberations of the Working Group, the Commission recommends the introduction, through Rules of Court, of a Pre-Action Protocol for consumer debt cases. The Commission, in conjunction with members of the Courts Service management, has drafted Model Rules of Court to this effect, which can be found in Appendix C.

2.63 The Protocol, applicable solely in defined claims for the recovery of consumer debt, should require certain information to be given by the creditor to the debtor in the form of a “warning letter” in advance of commencing proceedings. In this “warning letter”, the creditor plaintiff, in plain language:

- (a) shall give full particulars of the amount of the debt or liquidated demand claimed;
- (b) shall give a description of the agreement on foot of which it is claimed such as would enable the intended defendant to identify it;
- (c) shall state the circumstances (e.g. the date on which the intended defendant went into arrears) giving rise to the claim for recovery of the amount;
- (d) shall state that he intends to initiate consumer debt proceedings in the Court against the intended defendant;
- (e) shall state whether the intended plaintiff is willing to accept payment of any lesser amount in satisfaction of the amount claimed, and specify any such lesser amount;
- (f) shall state that the intended defendant should urgently consider seeking the assistance of the Money Advice and Budgeting Service or another debt advice service or of a legal adviser, if the intended defendant has not already done so;
- (g) may invite the intended defendant before such proceedings are initiated to use mediation, conciliation, arbitration or another dispute resolution process specified by the intending plaintiff, to settle the claim; and

⁶⁴ (LRC CP 56-2009) at paragraph 6.165.

⁶⁵ (LRC CP 56-2009) at paragraph 6.167.

- (h) in the event that an invitation referred to in paragraph (g) is given, shall indicate that, if the intended defendant wishes to accept the invitation, he or she should confirm this to the intending plaintiff in writing within two weeks of receipt of the warning letter.

The Commission proposes that this warning letter would provide a consumer debtor facing legal proceedings with an understanding of the nature of the proceedings, and with information concerning the options available to the debtor to avoid such proceedings. These include making a part payment to the creditor if acceptable, or settling the claim by means of alternative dispute resolution mechanisms. Most importantly, creditors would be required to advise debtors to consider obtaining the assistance of money advice services to address the problem of the lack of awareness of the availability of such services among debtors involving in debt recovery proceedings. The letter also advises the consumer debtor to consider obtaining legal advice.

2.64 Under existing rules of court, detailed particulars are required to be included in the indorsement of claim in proceedings brought by a moneylender.⁶⁶ The model Rules of Court proposed specify the inclusion in the indorsement of claim in the writ of detailed particulars - including those required by the *Consumer Credit Act 1995* in the case of credit agreements to which Part III of the 1995 Act applies. Existing rules prevent a plaintiff from obtaining judgment in the office in default of appearance in the case of proceedings brought by a moneylender, instead requiring an application to be made before the Master.⁶⁷ Such rules also preclude the obtaining of judgment in default of defence within 12 months of issuance of the writ unless the court permits.⁶⁸ The proposed Rules exclude the procedure for obtaining of judgment in the office in respect of consumer debt proceedings in default of appearance or in default of defence. Instead, an application for leave to enter judgment should be made by motion returnable before the Master of the High Court. The proposed Rules would enable recourse to alternative dispute resolution to be facilitated at a hearing of such proceedings, and enable the Master to adjourn proceedings and impose costs sanctions in the event of non-compliance with the requirement to deliver a warning letter to the defendant. The Commission has concluded that the draft set of Rules of Court contained in APPENDIX C embodying the provisions proposed above in respect of High Court proceedings could be considered by the Superior Courts Rules Committee. The Commission also considers that the draft, with appropriate modifications, could serve as a model for Rules of Court governing consumer debt proceedings in the Circuit

⁶⁶ Order 4 rule 12 *Rules of the Superior Courts 1986 to 2010*.

⁶⁷ Order 13 Rule 14 *Rules of the Superior Courts 1986 to 2010*.

⁶⁸ Order 27 Rule 15 *Rules of the Superior Courts 1986 to 2010*.

Court and District Court (with the Commission recognising that the majority of consumer debt claims are brought in these lower courts).

2.65 It is hoped that these proposed rules would assist in addressing the problem of the lack of participation of debtors in legal proceedings, and in increasing awareness among those debtors facing debt recovery claims of the availability of assistance in the form of money advice. As the 2009 FLAC study has shown, access to money advice and resultant debtor engagement facilitates the early resolution of debt disputes in a manner acceptable to both creditor and debtor, and so it is hoped that these proposed rules would also benefit creditors in allowing debt disputes to be settled in a quick and efficient manner before formal legal proceedings commence. Therefore the Commission suggests that these proposed rules should also assist in reducing recourse to formal legal proceedings for the recovery of consumer debts. In so doing, it is hoped that this reform would also benefit the State and taxpayers by reducing the costs associated with processing such consumer debt claims.

(3) *Participation Rights for Money Advisors in Court Proceedings*

2.66 Secondly, the Commission has considered the potential introduction of measures providing money advisors with a limited right of participation in court proceedings in cases where the claim is limited to one for the recovery of consumer debt. The Commission notes that the problem of the low participation rates of debtors in legal proceedings is a fundamental flaw of the current system of debt enforcement.⁶⁹ In addition to the factors identified above (the lack of understanding of official documentation among debtors and the lack of awareness of the options available to debtors), the Commission recognised that a further cause of the low levels of participation is the intimidation felt by debtors at the prospect of attending court proceedings.⁷⁰

2.67 The Commission's Consultation Paper further identified the related problem of the lack of information available to creditors and to courts as another fundamental failing of the system.⁷¹ These problems lead to several undesirable results. First, inappropriate legal proceedings may be brought against a debtor who is manifestly unable to pay the sum claimed. This not only leads to unnecessary trauma for debtors and wasted expenditure for creditors, but also results in considerable cost to the State and taxpayers in wasted court time and expense. The bringing of legal proceedings against impecunious debtors also calls into question the integrity of the courts, as futile enforcement orders may be made. Secondly, a court lacking information concerning the debtor's ability to

⁶⁹ See paragraph 2.60 above.

⁷⁰ (LRC CP 56-2009) at paragraph 3.330.

⁷¹ (LRC CP 56-2009) at paragraphs 3.332 to 3.335.

pay may make unrealistic or inappropriate orders.⁷² Inappropriate enforcement methods may be used where enforcement could have been effected more efficiently through alternative mechanisms, a situation which prejudices the interests of both creditors and debtors.

2.68 The Commission considers that a reform providing a limited right of participation to money advisors would assist in addressing these problems. It should be noted that under the *District Court (Enforcement of Court Orders) Rules 2010*, it is envisaged that money advisors will provide assistance to debtors in preparing the statement of means which is to be completed by the debtor at the beginning of the instalment order procedure.⁷³ Form 53.3 of Schedule 3, as provided for in Order 53 Rule 4(1) *District Court Rules 1997 to 2010*, provides for the completion of a Statement of Means by the debtor. The form advises the debtor that

“[i]f you need assistance in completing this Statement of Means, you may wish to contact your solicitor (if you have one), the Money Advice and Budgeting Service or a Citizen’s Advice Centre.”

2.69 Building on the evidence of the effectiveness of money advice in facilitating satisfactory solutions to debt disputes, the Commission’s proposal seeks to continue this trend of increased involvement of money advisors in consumer debt cases by providing for a limited right of participation for such advisors in court proceedings. Reports published by FLAC have presented a strong case for the benefits of introducing such a right of participation for money advisors.⁷⁴ These studies have also indicated that at present some District

⁷² In its 2009 report, FLAC noted that of a survey of 25 cases of enforcement by instalment order, in 23 cases the debtor did not even attend the hearing at which his or her means were to be examined by the court and so the instalment order was made without the debtor’s input in relation to his or her financial means. FLAC describes the making of such orders in this manner in the absence of information concerning the debtor’s means as “almost a guarantee that default in instalment order payments would ensue, sooner rather than later.” See 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 71.

⁷³ For a detailed description of the mechanism of enforcement by instalment order, see the *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 3.283 to 3.297.

⁷⁴ See 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 148; Joyce *An End Based on Means?* (Free Legal Advice Centres Dublin 2003) at 25; 116.

Courts allow money advisors to communicate information to the court concerning their clients' circumstances, but that this occurs solely on an informal basis and is not a uniform practice throughout all courts in the country. The Commission also notes that legislation in other countries such as Scotland provides for the participation of money advisors in enforcement proceedings.⁷⁵

2.70 A facility has existed at common law for several decades whereby a lay litigant may be accompanied and assisted at court proceedings,⁷⁶ and this facility has been extended in this jurisdiction under statute to family law proceedings from which a "McKenzie friend" would otherwise be excluded.⁷⁷ The accompanying person has no right to address the court.

2.71 Order 6 rule 2 of the *District Court Rules 1997-2010* allows for family members of a party to proceedings in certain circumstances to appear and be heard. The family member may only appear and be heard where the Court grants leave for him or her to do so, where the Court is satisfied that the relevant party to the proceedings is, from infirmity or other unavoidable cause, unable to appear.

2.72 Many consumer debtors are unable to afford to retain solicitors to represent them. In the case of claims below the jurisdictional threshold of the District Court it would not make sense to retain professional legal representation. Furthermore, given that legal costs recoverable in that Court are set by reference to a scale related to the value of the claim, it would likely not be remunerative for most legal practitioners to undertake such representation. The Commission, having explored the issue with the Working Group members, considers that it may be appropriate to make provision in respect of consumer debt proceedings in the District Court, for the Money Advice and Budgeting Service or another debt advisor to be permitted, at the court's discretion, to appear and be heard on behalf of an unrepresented defendant in consumer debt proceedings.

2.73 The Commission envisages that any such measure would be used exceptionally, with the assistance of debt advisors in court proceedings likely to be of most benefit to the most vulnerable of consumer debtors. The Commission emphasises that any such provision would be enabling in nature, merely permitting a debt advisor to participate in court proceedings, and would

⁷⁵ See section 43 of the *Debt Arrangement and Attachment (Scotland) Act 2002* and section 3 of the *Act of Sederunt (Debt Arrangement and Attachment (Scotland) Act 2002) 2002*.

⁷⁶ The "McKenzie Friend" facility: see *McKenzie v McKenzie* [1970] 3 All ER 1034, CA.

⁷⁷ Section 40(5) of the *Civil Liability and Courts Act 2004*.

not impose any obligation on a debtor to be represented by a debt advisor nor any obligation on a money advisor to attend in court. It would not create a right for debtors to the assistance of a money advisor, but merely would empower money advisors to participate in court proceedings to a limited degree. Adequate consideration should be given to the resources of MABS when examining this proposal. In this regard the Commission notes that its other proposals, such as the extension of the *IBF-MABS Operational Protocol*, the development of a Common Financial Statement and the introduction of a Pre-Action Protocol in consumer debt claims, aim consistently to reduce the need for recourse to court proceedings to resolve debt disputes and so reduce the number of debtors requiring such assistance from money advisors.

2.74 When viewed in the context of other proposals such as the review and development of the MABS Standard Financial Statement, this measure would form part of an overall policy of encouraging greater debtor participation in court proceedings, and of allowing accurate and reliable information concerning a debtor's means and ability to pay to be made more readily available to the court and to creditors. The role of the debt advisor would be to assist the court in obtaining an accurate representation of the debtor's circumstances, so that suitable orders may be made by the court based on accurate information. In this regard it is hoped that this proposal would make court proceedings more efficient, thus providing a benefit to the State and taxpayers as well as to debtors and creditors.

2.75 The Commission acknowledges that this proposal may raise certain issues of policy for bodies such as the Courts Service and the MABS, and may more appropriately constitute a medium term reform measure. The Commission therefore will return to this issue in its final Report, following further consultation, as part of its consideration of the role of legal advice and legal aid for debtors in consumer debt proceedings.

(4) *Legal Advice and Legal Aid for Defendants in Consumer Debt Proceedings*

2.76 The issue of the provision of legal advice and legal aid to defendants in personal debt cases has also been considered by the Commission. Legal advice and legal aid in civil proceedings are provided by the Legal Aid Board. The Commission understands that the Legal Aid Board accepts that there is no reason why legal advice should not be available in consumer debt cases, provided that the applicant for legal advice meets the

means test applied by the Board.⁷⁸ This legal advice can extend to oral or written advice on the application of the law and the steps that a person might take during the course of the legal process. A more stringent test is applied by the Board when deciding whether an applicant qualifies for legal aid (legal representation in court proceedings) however. The provision of such legal aid is conditional on the putative client satisfying both a means test *and* a merits test. The merits test requires that the applicant have as a matter of law reasonable grounds for instituting or defending the proceedings and that the applicant is reasonably likely to be successful in the proceedings.⁷⁹ A debtor will most often fail this test as he or she will have no legal defence to the claim being brought against him or her for the payment of the debt owed.⁸⁰ As debtors who are unable to meet their existing commitments will most likely not be in a position to hire and pay solicitors or counsel, in the majority of cases such debtors will be without legal representation when appearing in proceedings for the recovery of a debt.

2.77 The Commission has considered the possibility of providing wider access to legal advice and legal aid services for consumer debtors. The Commission concluded that it would be difficult to achieve results on this issue in the short term however and therefore the issue will not be substantively addressed in the Interim Report. Representatives of the Commission will meet with representatives of the Legal Aid Board to discuss the matter however. The Commission will revisit this question of legal advice for debtors and legal aid in debt proceedings in its final Report.

(5) Reform of the Bankruptcy Act 1988

2.78 A key conclusion of the Commission's Consultation Paper was that Irish personal insolvency law is in need of comprehensive reform and that the *Bankruptcy Act 1988* is inappropriate to meet the needs of modern social and economic conditions in a "credit society".⁸¹ The Consultation Paper noted that the ineffective nature of the 1988 Act was shown in the extraordinarily low numbers of bankruptcies in Ireland each year when compared with countries

⁷⁸ See 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 124.

⁷⁹ See section 28 of the *Civil Legal Aid Act 1995*.

⁸⁰ See Free Legal Advice Centres (FLAC) *To No One's Credit op cit.* at 95, 147.

⁸¹ *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 3.159 to 3.177.

demonstrating similar social and economic conditions.⁸² Bankruptcy in Ireland was shown to be so expensive as to be beyond the reach of all but the smallest minority of over-indebted individuals. The philosophy of punishment lying behind the 1988 Act was criticised as being out-dated and wholly inappropriate under social and economic conditions that depend upon the use of credit for economic growth and prosperity. The Commission criticised the view lying behind the 1988 Act of bankruptcy as a creditor's enforcement mechanism of last resort, rather than the view prevailing in other legal systems of personal insolvency law as a tool for the social rehabilitation and economic recovery of debtors.⁸³ The Commission also noted that the *Bankruptcy Act 1988* is wholly inconsistent with international best practices and fails to match Ireland's commitments under the Council of Europe's *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems*.⁸⁴

2.79 The Commission therefore recommended a comprehensive reform of Irish personal insolvency law, composed of an overhaul of judicial bankruptcy law and the introduction of a new parallel non-judicial debt settlement system.⁸⁵ The Commission advanced several justifications for the introduction of a modern system of personal insolvency law:

- Under the functional economic theory of discharge, liberal personal insolvency laws providing for debt discharge are necessary to restore debtors to participation in the open credit economy as functional and productive economic actors.⁸⁶

⁸² According to statistics provided to the Commission by the Courts Service, in 2009 only 17 people were adjudicated bankrupt. This contrasts with 1,237 bankruptcies and 722 Individual Voluntary Arrangements in Northern Ireland during 2009: see *Statistics Release: Insolvencies in the Fourth Quarter 2009* (Insolvency Service 2010), available at: <http://www.insolvency.gov.uk/otherinformation/statistics/201002/#tables> (accessed 6 May 2010).

⁸³ *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 3.172 to 3.173, 5.04 to 5.05.

⁸⁴ *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* (Council of Europe CM/Rec(2007)8, 2007).

⁸⁵ See *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 5.66 to 5.179.

⁸⁶ *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraph 5.06.

- Under the theory of economically efficient allocation of risk, the law should place the risk of financial distress and the responsibility for the losses incurred on the party best placed to bear the risk and best placed to insure against it: this suggests that creditors, rather than debtors, should bear the cost of debt default caused by factors external to the debtor.⁸⁷
- Where over-indebtedness leads to home repossessions, unemployment or ill health, the State provides assistance to the debtor and so it is the State, rather than the debtor or creditor, who bears the cost of debt default. Under the social welfare rationale for personal insolvency law, the discharge of the debtor reduces the debtor's reliance on public support and so reduces the extent to which the taxpayer must bear the cost of default and over-indebtedness.⁸⁸
- A further major justification for discharge of debts is the rehabilitation of the debtor and the humanitarian theory, which focuses on society's duty to end the negative consequences of over-indebtedness on the lives of those affected, such as physical and mental health problems, deprivation for the debtor's dependents.⁸⁹
- A final justification for the discharge of debts is that it provides a form of consumer protection. This theory acknowledges that over-indebtedness is a natural consequence of expanding consumer credit markets and that relief must thus be made available to those individuals who inevitably fall victim to the dangers of over-indebtedness. This is particularly the case as research indicates that over-indebtedness is largely caused by external factors which the over-indebted individual could neither control nor predict.⁹⁰
- A final justificatory rationale for insolvency discharge, albeit in the context of small business debtors rather than consumer debtors, is the entrepreneurship theory.⁹¹ Under this theory, personal insolvency laws act as a form of limited liability whereby individuals who are aware that business failure will not result in a life of over-indebtedness will be

⁸⁷ (LRC CP 56-2009) at paragraph 5.08.

⁸⁸ (LRC CP 56-2009) at paragraph 5.09.

⁸⁹ (LRC CP 56-2009) at paragraphs 5.10 to 5.13.

⁹⁰ (LRC CP 56-2009) at paragraphs 5.14 to 5.15.

⁹¹ King "Moving Beyond the 'Hard'-'Easy' Tug of War: A Historical, Empirical and Theoretical Assessment of Bankruptcy Discharge" [2004] *MULR* 22; Armour "Bankruptcy Law and Entrepreneurship" *Am Law Econ Rev* 2008 10 (303).

more likely to take the risks necessary to start new business ventures which are essential for the growth of the economy and the generation of employment.⁹² The safety net of insolvency procedures thus encourages entrepreneurial activity. Empirical research supports this theory, demonstrating that bankruptcy laws are in fact the most important contributor to high levels of self-employment, more so than other factors such as real GDP growth.⁹³ Therefore the outdated nature of Ireland's bankruptcy law may be inimical to entrepreneurship and economic growth. Since the publication of the Commission's Consultation Paper, the Innovation Taskforce has supported this argument in favour of the reform of Irish personal insolvency law. The taskforce has argued that Ireland's bankruptcy legislation should be reformed following the Commission's recommendations in order to produce a shift in societal attitudes towards the recognition of risk of failure as an essential aspect of entrepreneurship and to remove any sense of stigma from business failure.⁹⁴ The taskforce therefore recommended that Ireland's bankruptcy legislation should be modernised following the conclusion of the Commission's project on *Personal Debt Management and Debt Enforcement*.

2.80 As noted elsewhere in this Interim Report, the Commission considers that the reform of Irish personal insolvency law requires detailed consideration and complex legislation, and so falls outside the scope of this *Interim Report*.⁹⁵ The Commission will, therefore, revisit the subject of personal insolvency law reform in its final Report. Nonetheless the Commission considers that a relatively modest adjustment could be made to the *Bankruptcy Act 1988* in the more immediate future. Under section 85(4) of the *Bankruptcy Act 1988*, a 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 the preferential payments, and all other creditors have received at least 50% of the debts or the bankruptcy has lasted for 12 years. In such an application for discharge, the court must be satisfied that all after-acquired property has been

⁹² See e.g. Insolvency Service (UK) *Bankruptcy: A Fresh Start* (Insolvency Service 2003).

⁹³ Armour "Bankruptcy Law and Entrepreneurship" *Am Law Econ Rev* 2008 10 (303).

⁹⁴ *Innovation Ireland* (Report of the Innovation Taskforce 2010) at 78. Available at: http://www.taoiseach.gov.ie/eng/Innovation_Taskforce/Report_of_the_Innovation_Taskforce.pdf (accessed 6 May 2010).

⁹⁵ See paragraphs 3.07 to 3.12 below.

disclosed and that it is reasonable and proper to grant the application. The Commission considers that a relatively straightforward amendment to the 1988 Act could be introduced to reduce the 12-year period before which a bankrupt may apply for a discharge under section 85(4)(c) of the 1988 Act to a period of, say, six years or less.

2.81 The Commission's Consultation Paper noted that a fundamental principle of modern personal insolvency laws is that a debtor should be released from all or part of his or her obligations within a reasonable period of time.⁹⁶ This has also been recognised in a Recommendation of the Council of Europe, which Ireland is obliged to follow under international law.⁹⁷ The Consultation Paper argued that the 12-year period before which a debtor may apply for discharge under Irish law fails to meet this standard of discharge within a reasonable timeframe,⁹⁸ and provisionally recommended that under the proposed debt settlement system a discharge should be obtained after a period of three to five years.⁹⁹ In preparing this Interim Report the Commission has reached the conclusion that the 12-year discharge period should be reduced as an initial first step in the process of the modernisation and liberalisation of Irish bankruptcy law, pending the long-term reforms to be proposed by the Commission in its final Report. The Commission proposes this measure as it views this reform as one which can be achieved immediately without complex legislative change. This initial change is however without prejudice to any further recommendations which the Commission may make for the reform of the *Bankruptcy Act 1988* and the establishment of a non-judicial debt settlement system in its final Report.

2.82 The Commission acknowledges that this reform of the reduction of the waiting period for an application for discharge will have limited effect. This is because even after 12 years, or any shorter period of time that might be introduced, have expired, further obstacles exist to the debtor's discharge: the debtor must pay in full all expenses, fees and costs of the bankruptcy, as well as all preferential payments (debts owed to the Revenue Commissioners) before a discharge may be obtained.¹⁰⁰ As these costs and preferential debts

⁹⁶ See (LRC CP 56-2009) at paragraphs 5.171 to 5.177.

⁹⁷ *Recommendation of the Committee of Ministers to member states on legal solutions to debt problems* (Council of Europe CM/Rec(2007)8, 2007) at paragraph 4(b).

⁹⁸ (LRC CP 56-2009) at paragraphs 5.1221 to 5.126; 5.171.

⁹⁹ (LRC CP 56-2009) at paragraph 5.177.

¹⁰⁰ See section 85(4) of the *Bankruptcy Act 1988* and (LRC CP 56-2009) at paragraphs 3.166 to 3.167.

will most often amount to very large sums, in the majority of cases a debtor will be unable to meet these amounts at any stage, and so may remain bankrupt indefinitely. Anecdotal evidence exists of bankruptcies lasting from 25 years to a lifetime as a result of this provision. As noted by Laffoy J in *Grace v Ireland and the Attorney General*,¹⁰¹ 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 [debtor] has no prospect of being discharged and will remain a bankrupt for the remainder of [his or her] life unless... [the debtor] wins the lottery.”

2.83 This aspect of Irish bankruptcy law is at odds with all of the justifications for modern personal insolvency law as outlined above, and effectively defeats the purpose of bankruptcy law in rehabilitating the debtor socially and economically.

2.84 The Commission has provisionally recommended in the Consultation Paper that the *Bankruptcy Act 1988* should be comprehensively reformed so that the discharge conditions reflect modern international standards and the demands of contemporary economic and social conditions in Ireland. The Commission recognises however that reforms of this nature would require detailed consideration and complex legislative measures, and so lie outside the scope of this Interim Report. The Commission will therefore consider the reform of personal insolvency law in detail in its final Report, while confining its proposal in this Interim Report to the reduction in the waiting period for a discharge application under section 85(4)(b) of the *Bankruptcy Act 1988* from 12 years to a shorter period of, say, six years or less.

E Distribution of information to borrowers in difficulty

2.85 The fourth major subject area considered by the Commission has been the distribution of information to borrowers in difficulty.

2.86 In this regard, the primary initiative proposed by the Commission is the compilation of information on personal debt and the publication of this information in a centralised, coherent, comprehensive and consistent manner. Given its role of providing advice and information for people who are in debt or at risk of getting into debt, the Commission considers that MABS is best placed to deliver information to those in need in this manner. Members of the Working Group, notably the IBF and the Courts Service, have agreed to cooperate on this initiative and also to distribute information through their individual

¹⁰¹ [2007] IEHC 90.

information channels, where appropriate, while taking care to ensure that the information being provided by all members is consistent.

2.87 Members of the Group have already taken measures with the aim of providing assistance and advice to debtors during the current economic conditions. This Interim Report therefore contains a compilation of such activities undertaken in this area, and these measures, along with those undertaken by other stakeholders not forming part of this Working Group, are set out in Appendix B. The Interim Report in this way provides an up-to-date account of all activity being undertaken in Ireland to deal with the problem of personal over-indebtedness in order to ensure that a holistic and consistent approach to this pressing social problem is adopted.

CHAPTER 3 ISSUES REMAINING FOR DISCUSSION IN THE COMMISSION'S FINAL REPORT

A Introduction

3.01 Chapter 1 of this Interim Report included a brief outline of the content of the Commission's *Consultation Paper on Personal Debt Management and Debt Enforcement*.¹ It also provided a summary of the allocation of the treatment of the issues raised in the Consultation Paper between this *Interim Report* and the Commission's final *Report on Personal Debt Management and Debt Enforcement*.² While Chapter 2 has presented the interim reform measures achieved and proposed by the Commission in response to the current urgent need for measures to deal with the problem of personal indebtedness, this Chapter describes the issues remaining to be addressed in the Commission's final Report.

B Debt Management: Regulation of Debt Collection Undertakings

3.02 As noted in Chapter 1 above, Chapter 4 of the Commission's Consultation Paper concerned the subject of debt management, including the issues of responsible borrowing, responsible lending, responsible arrears management and debt counselling.³ As noted in the Consultation Paper and in Chapter 1 above, the Commission's approach to several of these issues was to highlight them for consideration by other more appropriate bodies. The Commission however made provisional recommendations in relation to some of the issues raised, such as proposals for the regulation of the money advice and debt collection industries. Some of the issues raised in the Consultation Paper have been addressed by the interim measures achieved and proposed by the Commission, as described in Chapter 2 above.

3.03 One issue discussed in Chapter 2 but not directly addressed through interim measures is the subject of the proposed regulation of the debt collection industry. Having outlined the current legal position in this area, the

¹ See paragraphs 1.02 to 1.13 above.

² See paragraphs 1.47 to 1.48 above.

³ See paragraphs 1.05 to 1.09 above.

Consultation Paper presented a brief comparative overview of the systems for the regulation of debt collection undertakings operating in a selection of countries.⁴

3.04 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 undertakings, 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 undertakings should be obliged to hold a licence before operating a debt collection business.⁵ The Commission provisionally recommended that creditors collecting debts on their own behalf should be exempt from the licensing requirements,⁶ while inviting submissions as to whether there should be any other appropriate exemptions from the regulatory regime.⁷ 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.⁸

3.05 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 practices⁹ and its experience in

⁴ (LRC CP 56-2009) at paragraphs 4.204 to 4.221.

⁵ *Ibid* at paragraph 4.225.

⁶ Consideration of how the practice of assigning consumer debts to collection agencies could be best accommodated within the regulatory regime would be necessary however: see (LRC CP 56-2009) at paragraph 4.229.

⁷ (LRC CP 56-2009) at paragraphs 4.229 to 4.231.

⁸ (LRC CP 56-2009) at paragraphs 4.231 to 4.232.

⁹ Under the Financial Regulator's Codes, entities regulated by the Regulator are required to ensure that any outsourced activity, including the appointment of debt collection agencies, complies with the requirements of the Code. 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”.

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

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.¹⁰ 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.¹¹

3.06 Following deliberations with members of the Working Group, the Commission has decided that its provisional recommendations (as contained in its Consultation Paper) for the introduction of a comprehensive statutory system for the regulation of this sector would require primary legislation. The Commission therefore will return to the issue of the proposed regulation of the debt collection sector in its final Report.

C Personal Insolvency Law

3.07 As noted above,¹² Chapter 5 of the Commission's *Consultation Paper on Personal Debt Management and Debt Enforcement* contained provisional recommendations for the reform of personal insolvency law in

as the agent of a regulated entity acts contrary to the provisions of the Code, the Regulator may take appropriate action against the regulated entity. Relevant provisions of the Code for present purposes include the following obligations:

- 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 (Chapter 1, paragraphs 1 and 2 of the Financial Regulator's *Consumer Protection Code*);
- Not to exclude or restrict, in any communication or agreement with a consumer (except where permitted by applicable legislation), liability or duty of care or any other duty in any agreement with a consumer (Chapter 2, paragraph 23 of the Code); and
- To avoid personal visits or oral communications except in specified circumstances (Chapter 2, paragraph 32 of the Code).

The 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.

¹⁰ (LRC CP 56-2009) at paragraphs 4.226 to 4.228.

¹¹ *Ibid* at paragraphs 4.233 to 4.234.

¹² See paragraphs 1.10 to 1.11 above.

Ireland.¹³ The key recommendations of the Commission were that the *Bankruptcy Act 1988* should be reviewed and replaced by a new court-based bankruptcy system;¹⁴ and that a non-judicial debt settlement system should also be introduced.¹⁵ The Commission recommended that a non-judicial format was to be preferred for the settlement of personal debt issues,¹⁶ but that a two-tiered system should exist, with judicial bankruptcy remaining an option in cases where non-judicial procedures are inappropriate or have failed to reach a resolution of the situation.¹⁷ The Commission did not make any provisional recommendations in relation to the detail of the reform of judicial bankruptcy law and procedures. The Commission provided, however, a series of detailed provisional recommendations as to how the proposed non-judicial debt settlement system could operate, with the content of its provisional recommendations capable of being divided into institutional or structural issues and substantive issues.

3.08 The institutional or structural issues included a consideration of the actors involved in the operation of the debt settlement system, including a mediator, an administrator and a supervisory body. The Commission ultimately invited submissions as to the structure which the debt settlement system should take, and as to how each of these roles of mediator, administrator and supervising authority should be filled.¹⁸

3.09 The substantive issues raised involved a discussion of the detailed rules that should govern individual debt settlement arrangements. These issues included such questions as the appropriate waiting period for discharge under the debt settlement system; the status of priority debts under the scheme, including mortgage loans; and the protection of a reasonable standard of living

¹³ See *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 5.01 to 5.179.

¹⁴ *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraph 5.69.

¹⁵ *Consultation Paper on Personal Debt Management and Debt Enforcement* at paragraph 5.71.

¹⁶ *Ibid* at paragraph 5.78.

¹⁷ *Consultation Paper on Personal Debt Management and Debt Enforcement* at paragraph 5.82. Nonetheless, as the Commission strongly preferred the non-judicial debt settlement, it invited submissions as to how the use of the non-judicial system could be encouraged over judicial procedures: paragraph 5.91.

¹⁸ See *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraph 5.108.

for the debtor during his or her participation in a debt settlement. The mandatory participation of creditors in the debt settlement system and the impact of the completion of a debt settlement on a debtor's credit history were further issues discussed.

3.10 The Commission recognises that these provisional recommendations concern issues of medium and long term reform of a substantial aspect of Irish law. The Commission has recommended a comprehensive reform of the *Bankruptcy Act 1988*, which would be a substantial legislative undertaking. Similarly, the legislation required to introduce a non-judicial debt settlement system, while not necessarily as detailed as that of the *Bankruptcy Act 1988*, would be detailed and complex. Furthermore, as is evident from the Consultation Paper, complicated decisions and legislative choices remain to be made concerning the structure of the non-judicial debt settlement system, as well as concerning the substantive rules governing such debt settlements.

3.11 Therefore the Commission recognises that these issues must be considered in detail in the Commission's final Report, and that the introduction of reforms to personal insolvency law is not a suitable subject for treatment in this Interim Report, which has as its primary focus the introduction of interim measures to bring about urgent reform on a short-term basis.

3.12 The Commission has therefore identified the reform of Irish personal insolvency law as being most appropriately addressed on a long-term basis through substantial legislative measures, and so suitable for consideration by the Commission in its final Report.

D Debt Enforcement Procedures

3.13 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 in this regard.¹⁹ The Commission examined systems of debt enforcement in a number of other countries, and provisionally recommended that the Irish system needs fundamental reform. The proposed new system would be based on the introduction of a central Debt Enforcement Office (which could build on the current arrangements) and the removal of much (but not all) of debt enforcement proceedings from the courts.²⁰ The key

¹⁹ See *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 6.01 to 6.445.

²⁰ *Consultation Paper on Personal Debt Management and Debt Enforcement* at paragraph 6.45.

principles which should underpin this new system were then identified, in particular: proportionate, balanced and appropriate enforcement in each individual case; improved access to information on the means of debtors; clear and simplified enforcement procedures; increased efficiency and accountability in enforcement; a holistic approach to enforcement through interaction with the proposed debt settlement system; and the encouragement of increased participation of debtors in enforcement proceedings.

3.14 The Commission however did not make a definitive decision as to how the proposed Debt Enforcement Office would be structured. The *Consultation Paper* rather provided several options, all of which would involve transferring current enforcement functions held by the courts and County Registrars to the office. The *Consultation Paper* then 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.²¹

3.15 The Consultation Paper also made provisional recommendations and invited submissions on means by which procedures in debt claims and enforcement proceedings could be made more efficient.²² The Commission's Consultation Paper identified the availability of information concerning a debtor's means and assets as essential to ensuring efficient, appropriate and proportionate enforcement.²³ 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, inviting submissions as to the most appropriate method of obtaining information about a debtor's financial circumstances.²⁴

3.16 The Chapter concluded by discussing potential reforms of the individual enforcement methods, and by considering how these individual enforcement methods could operate under the proposed new system. These for example included the view that the use of instalment orders and garnishee orders over other more restrictive mechanisms should be encouraged or even made obligatory.²⁵ Also, the Commission noted that Ireland is one of just a few

²¹ See *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraph 6.70.

²² *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 6.199, 6.126, 6.128.

²³ *Ibid* at paragraphs 2.112 to 2.116; 6.71 to 6.97.

²⁴ *Ibid* at paragraphs 6.95 to 6.97.

²⁵ The Commission provisionally recommended that enforcement through an instalment order must first be attempted, or at least considered, before other

countries in Europe not to possess an attachment of earnings mechanism for the enforcement of (non family maintenance) debts, and outlined the advantages and disadvantages of the introduction of such a mechanism,²⁶ before inviting submissions as to the desirability of its introduction.²⁷ The Commission also made several provisional recommendations in relation to execution against goods.²⁸ Furthermore, the Commission highlighted for further consideration the issue of the appropriate continued role, if any, which should be given to imprisonment under the new enforcement system. Since the decision of the High Court in *McCann v The Judge of Monaghan District Court and Ors*,²⁹ and the consequent *Enforcement of Court Orders (Amendment) Act 2009*, the circumstances under which a debtor may be imprisoned are greatly restricted.³⁰ The Consultation Paper considered this limited continued role for imprisonment and provided arguments for and against it.³¹ The Commission then invited submissions as to whether this role should be retained and particularly whether imprisonment should be available as an enforcement

enforcement mechanisms may be used: *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraph 6.203. The Commission however acknowledged that enforcement by instalment order may not be appropriate in all cases, and so exceptions to this rule should exist. The Commission also recommended that debtors should be facilitated in making offers of instalments to creditors on receiving the first summons in debt proceedings (thereby avoiding court and enforcement office proceedings entirely): paragraph 6.210.

²⁶ *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 6.253 to 6.272.

²⁷ *Ibid* at paragraph 6.272.

²⁸ *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 6.347 to 6.424.

²⁹ [2009] IEHC 276; [2010] 1 ILRM 17.

³⁰ Thus 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 may a court order the arrest and imprisonment of the debtor: 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*.

³¹ *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 6.425 to 6.428.

method of last resort to be used against “won’t pay” debtors where all other enforcement methods have been found to be ineffective.³²

3.17 The Commission recognises that the provisional recommendations contained in its Consultation Paper for the reform of the system of debt enforcement in Ireland are comprehensive in nature and would involve considerable legislative and administrative change. The Consultation Paper proposed the reform of a large majority of existing legislation in this area, and for the creation of an entirely new structure for the enforcement of judgment debts. In this regard the Commission acknowledges that its provisional recommendations would require the introduction of complex and detailed primary legislation, as well as the establishment of new administrative structures. Such reforms could not be achieved on a short-term basis, and so the Commission has concluded that its provisional recommendations for the introduction of a Debt Enforcement Office and the reform of all existing enforcement mechanisms under this new system should not be considered as part of this Interim Report.

3.18 The Commission will, therefore, consider the issue of the reform of debt enforcement procedures in its final Report.

3.19 In addition, the Commission, in its deliberations with the Working Group, has considered the issue of the possible increased provision of legal advice to debtors and legal aid to defendants in consumer debt proceedings.³³ The Commission recognises that this subject is a complex one, involving legal questions but also issues of policy. The Commission concludes therefore that this issue is not appropriate for consideration by this Interim Report, the focus of which is confined to the introduction of interim measures and urgent reforms on a short-term basis.

3.20 The Commission will, therefore, consider the question of the provision of legal advice to consumer debtors and legal aid to defendants in consumer debt proceedings in the discussion of the reform of debt enforcement procedures contained in its final Report.

E Financial Exclusion

3.21 A final issue discussed in the *Consultation Paper on Personal Debt Management and Debt Enforcement* which the Commission has identified for consideration in its final Report is financial exclusion. The *Consultation Paper* discussed research conducted at national and European levels on the subject of financial exclusion, and identified some international best practices for

³² *Ibid* at paragraph 6.428.

³³ See paragraph 2.76 above.

addressing this social problem.³⁴ The Commission also recognised that when proposals for reform to areas such as responsible lending rules, personal insolvency law and debt enforcement procedures are being considered, research must be carried out to assess how such proposals may impact on the issue of financial exclusion.

3.22 Both in its Consultation Paper and its deliberations with the Working Group, the Commission has identified specific proposals for reform which would seek to address the problem of financial exclusion and to promote access to basic financial services for all members of society. Such reforms include legislation concerning the availability of basic bank accounts and concerning restrictions on interest rates which may be charged under consumer credit agreements.³⁵

3.23 The Commission recognises that these issues are most complex, both as a matter of law reform and from the point of view of long-term economic and social policy. Following its discussions of these issues with the Working Group, the Commission has concluded that such issues are not appropriate for consideration in this Interim Report, the focus of which is confined to the introduction of interim measures and urgent reforms on a short-term basis.

3.24 The Commission will, therefore, consider the issue of financial exclusion in its final Report.

³⁴ *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 4.166 to 4.173.

³⁵ It should be noted that any consideration of the issue of potential interest rate restrictions would necessarily be conducted in the context of the maximum harmonising effect of the 2008 EU *Directive on Credit Agreements for Consumers*. Article 22(1) of the 2008 Directive states:

“Insofar as this Directive contains harmonised provisions, Member States may not maintain or introduce in their national law provisions diverging from those laid down in this Directive.”

APPENDIX A WORKING GROUP ACTION PLAN

Specific Action	Act	SI	Administrative/ Voluntary Action	WG Members Responsible	Status	Report Para.
Financial Regulation						
Reform of financial services regulation legislation	Yes	Yes	Yes	DF; CBI	Central Bank Reform Bill 2010 published; Central Bank (No. 2) Bill and Central Bank (Consolidation) Bill to be published in 2010.	[2.04] – [2.11]
Regulation of money advice undertakings	Yes		Yes	DF	Matter to be examined by DF; legislation, if any, to be considered by DF.	[2.12] - [2.20]
Regulation of debt collection undertakings	Yes		Yes	Commission	To be considered in Commission's final Report.	[2.21]- [2.25]; [3.02]- [3.06].
Reform of credit union regulatory structure	Yes	Yes	Yes	DF; CBI	Credit Union Act 1997 (Section 85) Rules 2009; Central Bank Reform Bill 2010 published; strategic review in train.	[2.26]- [2.30]
Regulation of credit reporting	Yes		Yes	DF	DF examining issue.	[2.31]- [2.34]
Codes of Conduct						
Extension of IBF-MABS Protocol	No	No	Yes	MABS; IBF	Activity in train: MABS negotiating with relevant organisations.	[2.38]- [2.40]
Review of IBF-MABS Protocol	No	No	Yes	MABS; IBF	Activity in train: IBF and MABS conducting review.	[2.41]- [2.44]

Development of Standard Financial Statement	No	No	Yes	IBF; MABS	Activity in train: IBF and MABS conducting review.	[2.45]- [2.47].
Status of codes of practice in court proceedings	Yes				Commission suggests consideration by relevant stakeholders.	[2.48]- [2.57].
Legal Processes						
Pre-Action Protocol in Consumer Debt Proceedings		Yes		Courts Service	Model Rules of Court prepared: Appendix C.	[2.59]- [2.65]
Participation of money advisors in court proceedings		Yes		Commission; Courts Service; MABS	To be considered in Commission's final Report.	[2.66]- [2.75]
Legal advice and legal aid for debtors	Possibly	Possibly	Yes	Commission; DJLR; Courts Service	To be considered in Commission's final Report.	[2.76]- [2.77]
Reduction in waiting period for discharge application under <i>Bankruptcy Act 1988</i>	Yes			DJLR	Commission suggests reduction.	[2.78]- [2.84]
Distribution of Information to Borrowers in Difficulty						
Compilation and distribution of information in targeted manner	No	No	Yes	Courts Service; MABS; IBF	Activity in train: IBF and MABS are continuing their roles of providing information.	[2.85]- [2.87].

Key:

CBI = Central Bank of Ireland (Financial Regulator)

DF = Department of Finance

DJLR = Department of Justice and Law Reform

DSP = Department of Social Protection

IBF= Irish Banking Federation

MABS = Money Advice and Budgeting Service

WG = Working Group

This Appendix outlines a compilation of measures currently being undertaken by stakeholders or which have recently been achieved by stakeholders in response to the problem of personal over-indebtedness and repayment difficulties. The Commission presents this account in order to provide a complete picture of all action being taken in response to this social problem and in order to provide a holistic and “joined-up” approach on a national basis.

(a) *Irish Banking Federation (IBF): Recent Activities and Initiatives*

(i) *The IBF Pledge to Homeowners*

The *IBF Pledge to Homeowners* (issued by IBF on 10th November 2009) provides additional reassurance to customers who are facing genuine difficulty with their mortgage repayments on their principal private residence – this is on top of the existing protection provided in the Financial Regulator’s *Code of Conduct on Mortgage Arrears*.

The Pledge makes clear that legal action will not be commenced provided the customer talks with the lender at the earliest opportunity so that a mutually-acceptable arrangement can be agreed, maintained and reviewed thereafter on a six-monthly basis. The pledge is supported by all of the mainstream banks and building societies.

An Oversight Committee has been established to monitor the operation of this Pledge – it comprises two representatives from the Money Advice and Budgeting Service (MABS) and two IBF representatives operating under the chairmanship of Prof. Martin O’Donoghue.

(ii) *IBF/MABS consumer guide and website*

To supplement the various information which individual lenders make available to their customers, IBF has developed, in consultation with MABS, a simple consumer guide entitled *Your Guide to Dealing with Mortgage Repayment Difficulties*. Together with other helpful information for customers who may be experiencing financial difficulties, this is available on a new website – www.helpinghomeowners.ie – which has been developed by the IBF in

partnership with the country's twelve mainstream mortgage lenders. The website emphasises the importance for the borrower in getting in touch with his/her lender in order to work together to find a mutually-acceptable, sustainable solution. The importance of that early engagement is reflected in the four key action steps as follows that a borrower is advised to take:

- i) Contact your mortgage lender as soon as possible if you're having trouble with your mortgage repayments or you are concerned that this might be likely to happen.
- ii) Look at your financial situation to make sure that you're maximising your income and draw up a budget based on your most important spending commitments.
- iii) Respond to letters or phone calls from your mortgage lender or their legal representative.
- iv) If you are genuinely unable to make your mortgage repayments, ask your mortgage lender to explore with you one or more of the options available under the statutory Code of Conduct on Mortgage Arrears (which are listed on the website).

(b) *Social Inclusion Division/Economic and Social Research Institute Joint Study of Financial Exclusion and Over-Indebtedness*

The Social Inclusion Division coordinates the implementation of government strategies for social inclusion.¹ Part of its brief is to monitor poverty trends and issues drawing on the *Survey on Income and Living Conditions* (an annual representative survey of 5,000 Irish households carried out by the Central Statistics Office, and also administered across all EU member states). In 2010, the Division is undertaking a study of financial exclusion and over-indebtedness in conjunction with the Economic and Social Research Institute. The study will analyse a special module on over-indebtedness and financial exclusion which was included in SILC 2008. It will examine levels of both financial exclusion and over-indebtedness and will highlight the most vulnerable members of the population. The study will also compare Irish levels of financial exclusion and over-indebtedness in a European context. The study will be completed in quarter four of 2010. Extensive consultation with key stakeholders on the design and implementation of the study has been carried out with government departments, the Money Advice and Budgeting Service (MABS), the Law Reform Commission, National Consumer Agency, Free Legal Advice Centres (FLAC), Irish Payments Services Organisation (IPSO), Irish Banking Federation

¹ See <http://www.socialinclusion.ie/about.html> (accessed 6 May 2010).

(IBF), Financial Regulator and the Expert Committee on Debt and Mortgage Arrears.

(c) ESRI: Research on Negative Equity

As discussed in paragraph 1.25 in 2009 the ESRI produced a Working Paper entitled *Negative Equity in the Irish Housing Market*.² This Working Paper discusses the problem of negative equity, an issue which has caused considerable public concern in recent times, and provides an overview of why negative equity matters. It outlines some of the features of the rises in property prices in Ireland in the years before the economic recession, and proposes to estimate the number of households finding themselves in a situation of negative equity in Ireland, based on published data from the Department of the Environment. The Paper also seeks to provide some indication of the employment sectors where individuals are vulnerable to the impact of negative equity, and concludes by examining some policies to overcome the problem. While the Commission has acknowledged above that the issue of negative equity may be only peripherally relevant to a discussion of legal policies for addressing over-indebtedness and repayment difficulties,³ the issue nonetheless is one which must be considered when reviewing the law in this area. Therefore the research of the ESRI may be usefully considered as part of a holistic national response to over-indebtedness.

(d) Financial Regulator: Recent Activities and Initiatives

(i) Review of Consumer Protection Code

The Consumer Protection Code (the Code) was published by the Financial Regulator in July 2006 and came into full effect in July 2007. The Code applies to the majority of lenders, but for legal reasons does not apply to the savings and loan business of credit unions. The purpose of the Code is to ensure the same level of protection for consumers regardless of the type of financial services provider they choose. It seeks to increase standards of service to consumers, to ensure that firms will only sell suitable products to consumers and to ensure greater transparency for the consumer by setting out information requirements.

A review of the Code has now commenced. The Financial Regulator is currently reviewing issues that have arisen since the Code was implemented

² Duffy *Negative Equity in the Irish Housing Market* (ESRI Working Paper No. 319 2009) at 8, available at: <http://www.esri.ie/UserFiles/publications/20091012160331/WP319.pdf> (accessed 6 May 2010).

³ See paragraphs 1.26 and 1.27 above.

and considering the impact of EU legislation and other developments. The Regulator has also sought initial views from the industry representative bodies and the Consultative Panels. The Regulator anticipates entering into a public consultation later in the year, where it will seek the views of other interested parties on the revised Code.

(ii) *Extension of the Moratorium on Possession Order Proceedings in Respect of Mortgage Loans*

In 2009 the Financial Regulator issued a statutory *Code of Conduct on Mortgage Arrears*. This Code applies to the mortgage lending activities of all regulated entities to consumers in respect of their principal private residences in Ireland. The Code is issued under section 117 of the *Central Bank Act 1989* and lenders are “required to comply with this Code as a matter of law.” Lenders must also be able to demonstrate their compliance with the Code. This document sets out a framework within which mortgage lenders must operate, with an emphasis on the adoption of flexible procedures aimed at assisting the borrower in his or her individual circumstances. In this regard, the Code lays down the steps a lender must take in managing mortgage arrears, but does not deprive lenders of the ability to enforce the mortgage where following the Code would be inappropriate, and the borrower is not relieved of his or her contractual duties by these provisions, unless the lender so consents.

A key provision of the Code as originally issued was the requirement for lenders to wait for a period of six months from the time when the arrears first arose before applying to court to commence proceedings to enforce the mortgage loan.⁴ In February 2010, the Financial Regulator increased the time period during which lenders may not bring possession proceedings on a borrower’s primary residence from six months to 12 months, from the time mortgage arrears first arise.

(e) *Department of Finance: Financial Regulation Reform*

As indicated in Chapter 2 above, the Department of Finance has issued several proposals for reform in the area of financial regulation, and is examining further areas for reform also. First, legislation is proposed for the reform of the *Central Bank Acts 1942 to 1998* to ensure that the domestic regulatory framework for financial services meets Government objectives for the maintenance of the stability of the financial system as well as effective and efficient supervision of the financial institutions and markets and to safeguard the interests of consumers and investors.⁵ Secondly, reforms have been introduced regarding

⁴ See paragraph 4(d) of the Code.

⁵ See paragraphs 2.04 to 2.11 above.

the regulation of credit unions, and a Strategic Review of the Credit Union Sector is in the process of being conducted by the Financial Regulator on the request of the Minister for Finance.⁶ Finally, the Department of Finance is currently looking at the credit reporting system in Ireland so as to inform the Minister of any issues that need to be addressed and of what measures are required to be taken.⁷

In addition, the Department of Finance has indicated that the matter of the proposed regulation of money advice undertakings is one, in the first instance, for examination by the Department of Finance. Legislative measures, if any, may be considered as part of this process.

(f) Citizens Information Board: Recent Actions and Initiatives

The Citizens Information Board (CIB) is the statutory body which supports the provision of information, advice and advocacy on a broad range of public and social services. It provides the Citizens Information website, www.citizensinformation.ie and supports the voluntary network of 42 Citizens Information Centres and the Citizens Information Phone Service. It also funds and supports the Money Advice and Budgeting Service (MABS).

The CIB is governed by the *Comhairle Act 2000*, as amended by the *Citizens Information Act 2007* and the *Social Welfare (Miscellaneous Provisions) Act 2008*, and comes under the remit of the Department of Social Protection. The mandate of CIB is:

- To ensure that individuals have access to accurate, comprehensive and clear information relating to social services
- To assist and support individuals, in particular those with disabilities, in identifying and understanding their needs and options
- To promote greater accessibility, coordination and public awareness of social services
- To support, promote and develop the provision of information on the effectiveness of current social policy and services and to highlight issues which are of concern to users of those services
- To support the provision of, or directly provide, advocacy services for people with a disability.
- To support the provision of advice on personal debt and money management through the Money Advice and Budgeting Service.

⁶ See paragraphs 2.26 to 2.30 above.

⁷ See paragraphs 2.31 to 2.34 above.

(i) *Losinyourjob.ie*

In 2009, in response to the deterioration in macroeconomic conditions and rises in unemployment, the CIB launched an information and advice campaign through a website called www.losingyourjob.ie. This microsite provides public service information for those who are currently unemployed or are becoming unemployed in Ireland. [Losingyourjob.ie](http://www.losingyourjob.ie) is based on content from www.citizensinformation.ie. It provides information relating to several subjects of relevance to those who have become unemployed or who have suffered an income shock, including dealing with reduced hours or income, obtaining social welfare benefits; money and tax issues; addressing problems in paying rent or a mortgage; options for education and training; advice on returning to employment; and advice on emigration.

(ii) *CIB and MABS: Keepingyourhome.ie*

In 2009, in response to the increasing number of mortgage loan borrowers who are experiencing difficulties in making repayments, the CIB and Money Advice and Budgeting Service (MABS) created a website for the provision of information and advice to such borrowers. This website, called keepingyourhome.ie, aims to provide comprehensive information on the services and entitlements available if you are having difficulties paying your rent or making your mortgage repayments. [Keepingyourhome.ie](http://keepingyourhome.ie) is based on content from www.citizensinformation.ie and www.mabs.ie. The site provides information on a range of subjects relevant to homeowners in difficulty, such as MABS advice on mortgage arrears; consumer protection codes; the Department of Social Protection Mortgage Interest Supplement; the Mortgage Interest Relief scheme; mortgage protection and repayment insurance policies; and the procedure for the repossession of a home. Similar information is made available in respect of tenants who are experiencing difficulties in meeting rent payments. The site also provides information relating to the options available to an individual who has lost his or her home, such as information about applying for local housing, housing associations and housing options for homeless people.

(g) *MABS: Recent Actions and Initiatives:*

MABS is the only free, independent, and confidential service offering advice and information for people who are in debt or at risk of getting into debt in Ireland. In 2009, information, advice and support were provided to almost 23,000 clients, via the national network of 51 local offices and through outreach clinics locally. In the first quarter of 2010 in excess of 6,000 people were assisted by services. In August 2009, the Department of Social and Family Affairs (now Department of Social Protection) provided an additional 19 posts for MABS on a temporary basis; the number of FTE MABS staff is now 231.

There were almost 25,000 calls to the MABS Helpline during 2009, in the first quarter of 2010 the Helpline dealt with 7,828 calls. In addition to resolving queries at first point of contact, in early 2009, the MABS Helpline started to offer a 'call-back' service to consenting callers, through this service the Helpline provides additional support to those who wish to negotiate with their creditors directly.

MABS has comprehensive materials on all aspects of dealing with debt on its website; materials are also available from its 51 services nationwide and from the MABS Helpline. MABS materials are also distributed via the Citizens Information Service, the Society of Saint Vincent De Paul and the Department of Social Protection and, as relevant, through a network of other key referrers nationwide. In addition, approximately 50,000 copies of the MABS 'Guide to Money Management and Dealing with Debt' which is a detailed self-help guide to dealing with debt problems were distributed in 2009.

In early 2009, MABS prepared a two page guide for people concerned about mortgage arrears; the guide reflects the key tenets of the Statutory Code on Mortgage Arrears and stresses the importance of contacting the lender, or MABS, at the earliest possible point. The guide is available from the MABS Helpline, on www.mabs.ie and is also included in the Citizens Information Board's new website on mortgage debt, www.keepingyourhome.ie

As one of its core objectives, MABS has a remit in relation to the provision of education on money management. The overall goal of this activity is the prevention of over-indebtedness by equipping learners with the key skills to manage their money effectively. MABS' remit in this regard is fulfilled at national level through the development and implementation of educational programmes which reflect the MABS approach to money management and which are delivered in conjunction with relevant third parties. 'Get Smart with Your Money' is a programme for transition year students which was developed in partnership with the Financial Regulator and has been implemented in participating schools since its launch in September 2008. 'Eurowatchers' is a home budgeting programme for adults at basic education level which was launched in 2009 and is being delivered nationally in conjunction with the Vocational Education Committees (VECs). In March 2010, in conjunction with St John of God's Carmona Services, MABS launched an interactive website for people with an intellectual disability www.moneycounts.ie. As well as contributing to the implementation of the programmes listed above, at local level, MABS staff provide educational programmes to relevant target groups within their community, subjects covered include: budgeting, planning for Christmas, redundancy etc.

MABS has worked to strengthen its relationship with other organisations that can provide help to the client group and organised a workshop in April 2009 for all of the relevant national support organisations. MABS also regularly contributes to conferences and seminars hosted by other organisations working with the target group. In addition, MABS has been working with 'Chartered Accountants Voluntary Advice'(CAVA), a limited company set up by the Leinster Society of Chartered Accountants which facilitates the provision of financial advice on certain business matters, voluntarily, by members of the Society to people referred by MABS.

In September 2009, the IBF/MABS Protocol was launched. The implementation of the Protocol is actively supported through a Monitoring Group and via bilateral meetings between MABS and IBF members. MABS and IBF members have also implemented training and awareness programmes for staff and have implemented system and process changes to support the effective implementation of the Protocol. Based on the experience of implementing the IBF/MABS Protocol work is ongoing in negotiating similar Protocols with other major creditor groups.

(h) Free Legal Advice Centres: Recent Activities and Initiatives

FLAC is an independent human rights organisation dedicated to the realisation of equal access to justice for all. To this end it campaigns on a range of legal issues but also offers some basic, free legal services to the public. FLAC currently concentrates its work on four main areas: Legal Aid, Social Welfare, Credit & Debt and Public Interest Law.

As part of its Credit and Debt Campaign,⁸ which aims to ensure that Irish laws relating to consumer credit and debt are reformed in order to provide consumers and their dependants with a dignified and effective way of dealing with debt that will be fair to the consumer, the creditor and the taxpayer alike, the Free Legal Advice Centres have recently launched two measures to provide information and advice to those suffering from over-indebtedness and repayment difficulties.

The first such measure is the publication of the FLAC *Guidelines on Mortgage Arrears*.⁹ This is a booklet containing information and advice on such matters

⁸ Information on this campaign is available at:
<http://www.flac.ie/campaigns/current/credit-and-debt-campaign/> (accessed 4 May 2010).

⁹ Available at:
http://www.flac.ie/download/pdf/10_03_24_guidelines_on_mortgage_arrears_for_website_final.pdf. (accessed 6 May 2010).

as the State-funded assistance available for those experiencing mortgage repayment difficulties; explanations of the consequences of negative equity for those carrying mortgage arrears; advice for debtors on how to deal with harassing debt collection practices; an outline of the rights of mortgage debtors under the Financial Regulator's *Code of Conduct on Mortgage Arrears*; and explanations of the procedures for repossession of a mortgaged property. The booklet also provides information concerning free legal advice options open to mortgage debtors, and notes the proposals for future reform of the law in this area included in the Government's *Renewed Programme for Government*.

Secondly, FLAC has also produced a pamphlet entitled *Checklist for Actions on Losing your Job*.¹⁰ This pamphlet contains advice in plain language about a series of steps that could be taken by those who have become unemployed in order to maximise their income and manage their debt repayments as effectively as possible.

(i) Department of Justice and Courts Service: Enforcement of Court Orders (Amendment) Act 2009 and Court Rules

In 2009, in response to the decision of the High Court in *McCann v The Judge of Monaghan District Court and Ors*¹¹ that the procedure for the arrest and imprisonment of debtors under section 6 of the *Enforcement of Court Orders 1940* was unconstitutional, the Minister for Justice introduced what became the *Enforcement of Court Orders (Amendment) Act 2009*. As the High Court decision had found the existing legislation to lack the necessary procedural protection to assure observance of the rights of the debtor, the 2009 Act inserted a number of key safeguards to the procedure. As summarised by the Minister for Justice, these safeguards are as follows:

“The Act ensures that a debtor cannot be imprisoned if the debtor is unable to pay the debt. The debtor must be present at proceedings, he or she is entitled to seek legal aid, the court must be satisfied that failure to pay is due to wilful refusal and that there are no goods that could be seized to satisfy the debt.

The court can also request the debtor and creditor to seek resolution by mediation. Imprisonment is to be used as a final resort, only where the debtor can afford to pay the debt but refuses to obey a court

¹⁰ Available at:
http://www.flac.ie/download/pdf/checklist_for_action_on_losing_job_mar2010.pdf
(accessed 6 May 2010).

¹¹ [2009] IEHC 276; [2010] 1 ILRM 17.

order to do so and only where the alternative of seizing goods to meet the debt is not available.”¹²

In addition, Rules of Court were made by the relevant Rules Committee, and approved by the Minister, to facilitate the operation of the 2009 Act: *District Court (Enforcement of Court Orders) Rules 2010* (SI No.129 of 2010). The 2010 Rules, which came into effect in April 2010, simplify the relevant court documents, which now refer debtors to the benefits of assistance from money advisors, including MABS.

(j) Commission for Energy Regulation: Electricity and Gas Codes of Practice Guidance for Suppliers

The Commission for Energy Regulation (CER) is the regulator for the electricity and natural gas sectors in Ireland.

In January 2010, the CER published a Consultation Paper on its proposals to issue guidance for electricity and gas suppliers' Codes of Practice in one reference handbook.¹³ The CER requires that gas and electricity companies draw up Codes of Practice in order to protect the rights of customers in the areas of billing, complaints handling, disconnection, marketing, vulnerable customers and natural gas prepayment metering. These codes were introduced to ensure that customers could be confident of the quality of service being provided by their supplier. The Codes of Practice were originally launched in March 2007. Following on from this the Commission decided that to have the guidelines for the Codes of Practice in one Supplier Handbook would be beneficial and more practical for ease of reference.

While compiling the Supplier Handbook the Commission took the opportunity to review all the Codes and revise them where necessary. A separate reporting section has been added along with a standard complaints template for use with future reports to the Commission.

¹² Speech of the Minister for Justice, Mr. Dermot Ahern TD at “Reforming the Law on Personal Debt”, *Law Reform Commission Annual Conference 2009*, 18th November 2009, Dublin Castle. The Minister’s speech is available at: <http://www.justice.ie/en/JELR/Pages/SP09000172> (accessed 6 May 2010).

¹³ Commission for Energy Regulation *Code of Practice Supplier Handbook Proposed Guidelines* (CER Consultation Paper CER/10/012 2010), available at: http://www.cer.ie/en/gas-retail-market-current-consultations_.aspx?article=3c9445df-6bde-408f-ab3b-a1f162e2b3ce&mode=author (accessed 6 May 2010).

As part of this review, the CER has added a new arrears section to its Code of Practice on Customer Billing guidance.¹⁴ This section provides that suppliers are required to include guidance in their code for customers who may have difficulty in paying their bills. Suppliers' codes should also include procedures for dealing with customers experiencing repayment difficulties and the options available for these customers to allow them to avoid disconnection of supply. The code should encourage customers with repayment difficulties to contact the supplier and confirm that such customers will be made to feel that their case will be heard sympathetically and that offers of repayment will be carefully considered. Copies of suppliers' codes should be provided to customers at an early stage during the follow-up action for non-payments. Suppliers should also be required to describe their procedures for distinguishing customers in difficulty from others in default ("can't pay" debtors v "won't pay debtors").¹⁵ When agreeing any repayment arrangement suppliers should take account of the customer's ability to pay and confirm with the customer that the arrangements are manageable. The draft guidance also suggests that customers should be referred to the help and advice that may be available from advice agencies e.g. MABS, a recognised charity, or Social Welfare Representative. Details of how to contact these agencies should be provided to the customer as appropriate.

In addition, CER's revised Code of Practice on Disconnection guidance has been amended to take account of the need to provide a reasonable holistic approach to those customers experiencing repayment difficulties. The guidance states that should a customer involved in the disconnection process wish to nominate a third party to represent him or her, this should be facilitated,¹⁶ and where appropriate, suppliers will be required to assist customers in genuine financial difficulty in making a payment plan.¹⁷ The payment plan service need not be offered as a standard service to all customers however, but such plans must be facilitated where domestic customers are experiencing genuine financial hardship and, where appropriate, suppliers must engage with a money

¹⁴ See Commission for Energy Regulation *Electricity and Gas Codes of Practice Guidance for Suppliers* (CER/10/012(a) 2010) at 12-13, available at: http://www.cer.ie/en/gas-retail-market-current-consultations_.aspx?article=3c9445df-6bde-408f-ab3b-a1f162e2b3ce&mode=author (accessed 6 May 2010).

¹⁵ See *Consultation Paper on Personal Debt Management and Debt Enforcement* (LRC CP 56-2009) at paragraphs 1.61 to 1.74.

¹⁶ Commission for Energy Regulation *Electricity and Gas Codes of Practice Guidance for Suppliers* (CER/10/012(a) 2010) at 16.

¹⁷ *Ibid* at 17.

advisor such as a representative of MABS, a recognised charity or another third party. This guidance also provides that where a supplier is made aware that a vulnerable domestic customer may be at high risk due to disconnection alternative methods of debt recovery should be used, for example through offering alternative means of payment, pre-payment meters and payment plans.

The consultation period in respect of the CER's proposed guidance began in January 2010, and the CER's conclusions should be published shortly.

**CONSUMER DEBT CLAIMS PRE-ACTION PROTOCOL:
MODEL RULES OF COURT**

S.I. No. of 2010

Rules of the Superior Courts (Consumer Debt Claims) 2010

We, the Superior Courts Rules Committee, constituted pursuant to the provisions of the Courts of Justice Act 1936, section 67, by virtue of the powers conferred upon us by the Courts of Justice Act 1924, section 36, and the Courts of Justice Act 1936, section 68 (as applied by the Courts (Supplemental Provisions) Act, 1961 section 48), and the Courts (Supplemental Provisions) Act 1961, section 14, and of all other powers enabling us in this behalf, do hereby make the following Rules of Court.

Dated this..... day of 2010.

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

I concur in the making of the following Rules of Court.

Dated this day of 2010.

DERMOT AHERN
Minister for Justice and Law Reform

Rules of the Superior Courts (Consumer Debt Claims) 2010

1. These Rules shall be construed together with the Rules of the Superior Courts 1986 to 2009 and may be cited as the Rules of the Superior Courts (Consumer Debt Claims) 2010.

2. These Rules shall come into operation on the day of 2010.

3. The Rules of the Superior Courts are amended:

(i) by the substitution for rules 12 and 13 of Order 4 of the following rules:

“12.(1) In consumer debt proceedings (within the meaning of Order 37A, rule 1(2)), the indorsement on the summons shall state, in addition to any other particulars,

(a) that the agreement pursuant to which the debt or liquidated demand is claimed is, as the case may be,

(i) a credit agreement to which Part III of the Consumer Credit Act 1995 applies, or

(ii) any credit agreement not referred to at paragraph (i), where the plaintiff entered into that agreement in the course of a trade, business or profession and the defendant concerned is a natural person who was acting outside his or her trade, business or profession when he or she incurred the debt, entered the contract or other arrangement or agreement or security to which the liquidated demand relates,

(b) that the plaintiff (as the case may be) -

(i) is a credit institution, within the meaning of section 2 of the Consumer Credit Act 1995,

(ii) is a moneylender, within the meaning of section 2 of the Consumer Credit Act 1995,

(iii) is a person whose business or trade is or includes the sale of goods or supply of services who is a party to a credit agreement to which Part III of the Consumer Credit Act 1995 applies or

(iv) (in an action by an assignee or by a personal representative of a person mentioned in paragraph (i), (ii) or (iii)), that the original assignor, or the testator or intestate, as the case may be, was at the time the credit agreement concerned was entered, a person mentioned in paragraph (i), (ii) or (iii),

(v) where the credit agreement to which the proceedings relate is not one to which Part III of the Consumer Credit Act 1995 applies, entered into that agreement in the course of a trade, business or profession and

the defendant concerned is a natural person who was acting outside his or her trade, business or profession,

- (b) the date on which the credit agreement concerned was entered;
- (c) the amount of credit advanced or the amount actually lent to the defendant;
- (d) the rate or rates per cent. per annum of interest charged and the dates of any changes in those rates;
- (e) where the credit agreement is one to which Part III of the Consumer Credit Act 1995 applies, or a contract of guarantee relating to such an agreement -
 - (i) that the agreement concerned was in writing and signed by the defendant and by or on behalf of all other parties to the agreement, in accordance with section 30 of the Consumer Credit Act 1995;
 - (ii) the date when a copy of the credit agreement was handed, delivered or sent to the defendant in accordance with section 30 of the Consumer Credit Act 1995;
- (f) the date on which any warning letter referred to in Order 37A, rule 1(2) was sent to the defendant.

(2) In the case of a credit agreement for a cash loan, other than an advance on a current account, or a credit card account to which Part III of the Consumer Credit Act 1995 applies,¹ where the action is commenced by summary summons or special summons, the indorsement on the summons shall also state:

- (a) the date or dates on which the credit was advanced;
- (b) the amount of each repayment instalment;
- (c) any charges other than interest charged under the credit agreement, and if so, the dates and amounts of any such charges;
- (d) the number of repayment instalments;
- (e) the date, or the method of determining the date, upon which each repayment instalment is payable;
- (f) the total amount payable in respect of the loan;
- (g) the date of expiry of the loan;
- (h) the amount repaid;
- (i) the amount due but unpaid;
- (j) the date or dates upon which such unpaid sum or sums became due, and
- (k) the amount of interest accrued due and unpaid on every such sum.

(3) In the case of a credit agreement operated by means of a credit card or a running account to which Part III of the Consumer Credit Act 1995 applies,²

¹ Section 31(1), 1995 Act.

² Section 31(2), 1995 Act.

where the action is commenced by summary summons or special summons, the indorsement on the summons shall also state:

- (a) the amount of the credit limit, if any;
- (b) the terms of use and repayment which it is alleged were breached;
- (c) the amount due but unpaid;
- (d) the date or dates upon which such unpaid sum or sums became due, and
- (e) the amount of interest accrued due and unpaid on every such sum.

13. In actions pursuant to an agreement to which Part III of the Consumer Credit Act 1995 applies, or to any contract of guarantee relating to such an agreement, the special indorsement of claim on a summary summons shall state, in addition to any other particulars, that the plaintiff has complied with each requirement of that Act [and of any other enactment] which applies to the agreement in question non-compliance with which would render the agreement unenforceable.”;

(ii) by the substitution for rule 3 of Order 13 of the following rule:

“3.(1) Where an originating summons (whether plenary or summary) is indorsed with a claim for a liquidated demand, and the defendant fails, or all the defendants, if more than one, fail to appear thereto, the plaintiff may enter final judgment in the Central Office for such sum as is mentioned in the affidavit required by rule 18 not exceeding the sum indorsed on the summons, together with interest (if any) to the date of the judgment and costs.

(2) Notwithstanding sub-rule (1), in consumer debt proceedings³ (within the meaning of Order 37A, rule 1(2)) judgment shall not be entered in default of appearance against a defendant unless the leave of the Master or the Court as the case may be, has been obtained in accordance with the provisions of rule 14.”;))

(iii) by the substitution for rule 10 of Order 13 of the following rule:

“10. Subject to rule 3(2) of this Order, where a plenary summons is indorsed with a claim for a liquidated demand together with another claim or other claims and any defendant fails to appear thereto, the plaintiff may enter final

³ It is suggested that the rules dealing with consumer debt would, where relevant and appropriate, replace rules dealing with claims under either the *Moneylenders Acts* (*Money-Lenders Act 1900* and *Moneylenders Act 1933*) or the *Hire Purchase Acts* (*Hire Purchase Act 1946* and *Hire Purchase (Amendment) Act 1960*), all of which are replaced by the *Consumer Credit Act 1995*. This would in effect reinstate the procedure that applied under the *Moneylenders Acts* that judgment in default could not be entered without leave of the Court/Master.

judgment for the liquidated demand, together with interest (if any) and costs as provided in the preceding rules of this Order, against the defendant or defendants failing to appear and may proceed, as to the other claim or claims, subject to and as provided in such of the said rules as may be applicable.”;

(iv) by the substitution for rules 14 and 15 of Order 13 of the following rules:

“14.(1) In consumer debt proceedings (within the meaning of Order 37A, rule 1(1)), an application for leave to enter judgment in default of appearance shall be made by motion on notice returnable before the Master not less than four clear days after service of the notice.

(2) Such notice shall not be issued until the time limited for entering an appearance has expired and a proper affidavit of service of the summons has been filed. The notice of motion and a copy of the affidavit mentioned in sub-rule (3) may be served personally or by registered post, addressed to the defendant at his last known place of address.

(3) The motion shall be grounded on an affidavit sworn by or on behalf of the plaintiff, which shall:

- (a) verify the indorsement of claim in the summons;
- (b) where the plaintiff’s claim is pursuant to an agreement to which Part III of the Consumer Credit Act 1995 applies, set out the facts or circumstances (and exhibit any documents) which demonstrate the plaintiff’s compliance with each requirement of that Act which applies to the agreement in question non-compliance with which would render the agreement unenforceable;⁴
- (c) contain evidence of any offer or invitation by the plaintiff to the debtor to use mediation, conciliation, arbitration [or other dispute resolution process] to settle the claim;
- (d) include particulars (and if in writing, exhibit copies) of any notice or demand relied on;
- (e) contain evidence of the sending to the defendant of any warning letter referred to in Order 37A, rule 1(2); and

⁴ The 1995 Act includes various provisions, especially sections 38, 43(3), 54, 59 and 85, which provide that a particular kind of credit agreement is unenforceable if the credit provider has not complied with certain requirements. An option offering more precision would be to set out each potentially relevant statutory requirement in the alternative. It may also be too onerous to require the plaintiff to prove compliance with these requirements in an affidavit to be served on the defendant – rule 15, which currently only applies to Hire Purchase, credit-sale and related agreements, currently only requires that compliance with relevant sections of the *Hire Purchase Acts* be proved before judgment is entered.

(f) specify the sum actually due at, or as near as may be before, the time of swearing.

15. At the hearing of the application under rule 14, whether the defendant appears or not, the Master [or the Court, as the case may be,] in addition to any other order which may be made —

(a) may make an order enlarging the time for entry of an appearance;

(b) where a warning letter referred to in Order 37A, rule 1(2) has not been sent to the defendant within the time specified in that Order, may adjourn the hearing of the application and direct the plaintiff to deliver to the defendant a letter stating that the defendant should urgently consider seeking the advice of the Money Advice and Budgeting Service or another debt advice service or of a legal adviser, if the defendant has not already done so;

(c) unless satisfied that the plaintiff has already given the defendant sufficient invitation and opportunity to do so, may make an order that the proceedings be adjourned for such time, as the Master [or the Court] considers just and convenient, and require the plaintiff to invite the defendant in writing to use during that period mediation, conciliation, or other dispute resolution process, to settle the claim;

[d) may exercise the powers of the Court under section 38, section 54(4), section 59, section 66(2) or section 85 of the Consumer Credit Act 1995;]⁵

(e) where the defendant appears and is sui juris, may make an order to receive a consent and make the same a rule of court;

(f) if satisfied, by affidavit or otherwise that:

(i) the notice of motion and grounding affidavit have been duly served,
[and

(ii) there do not appear to be reasonable grounds for concluding that there is a prima facie defence to the claim]

may give leave to enter final judgment for the whole or part of the claim, and (g) as regards any part of the claim as to which leave to enter final judgment is refused, may give any such directions or make any such order as might have been given or made upon the hearing of the summons or of a motion for judgment, as the case might be, if the defendant had entered an appearance, upon such terms as to notice to the defendant and otherwise as may be thought just.”

(v) by the substitution for rule 3 of Order 13A of the following rule:

⁵ Apart from section 66(2), these are the sections which permit the Court to authorise enforcement notwithstanding non-compliance with a relevant provision where the consumer has not been prejudiced. To some extent, these correspond with powers in sections 3 and 4 of the *Hire Purchase Act 1946*, dealt with in the former rule 15. Section 66(2) authorises the making of an order for the protection of goods subject to a hire-purchase agreement.

“3. In the case of default of appearance by any defendant to an originating summons or other originating document, the plaintiff shall:

(1) in the case of a plenary summons, (other than a personal injuries summons as defined in Order 1A), deliver a statement of claim by filing the same in the Central Office; or,

(2) in the case of a special summons, file a grounding affidavit in the Central Office; or,

(3) in the case of a summary summons in consumer debt proceedings (within the meaning of Order 37A, rule 1(2)), file in the Central Office an affidavit verifying the contents of the summary summons and satisfying the requirements of Order 13, rule 14(3), or

(4) in the case of a personal injuries summons, a summary summons (other than a summary summons mentioned in paragraph (3)) or other originating document, file an affidavit in the Central Office verifying the contents of such personal injuries summons, summary summons or other originating document;

and in any such case, shall file an affidavit or affidavits of service of the originating document concerned and thereupon may apply to the Court for a judgment in default of appearance.”

(vi) by the substitution for rule 2 of Order 27 of the following rules:

“2. Subject to the provisions of rules 2A, 15 and 16, if the plaintiff's claim be only for a debt or liquidated demand, or for the recovery of land, or for the delivery of specific goods, and the defendant does not within the time allowed for that purpose deliver a defence, the plaintiff may at the expiration of such time enter final judgment in the Central Office for the amount of such debt or liquidated demand, or that the person whose title is asserted in the statement of claim shall recover possession of the land, or for the delivery of the specific goods without giving the defendant the option of retaining such goods upon paying the value thereof, as the case may be, with costs.

2A.(1) In consumer debt proceedings (within the meaning of Order 37A, rule 1(2)) where the defendant does not within the time allowed for that purpose deliver a defence, judgment shall not be entered in default of defence against a defendant (within the meaning of Order 37A, rule 1(2)) unless the leave of the Master or the Court as the case may be, has been obtained.

(2) In such proceedings, an application for leave to enter judgment in default of defence shall be made by motion on notice returnable before the Master not less than four clear days after service of the notice.

(3) The application shall be grounded on an affidavit containing the particulars referred to in Order 13 rule 14(3).

(4) At the hearing of the application, whether the defendant appears or not, the Master [or the Court, as the case may be,] in addition to any other order which may be made —

- (a) may make an order enlarging the time for delivery of a defence;
- (b) where a warning letter referred to in Order 37A, rule 1(2) has not been delivered to the defendant within the time specified in that Order, may adjourn the hearing of the application and direct delivery to the defendant of a letter stating that the defendant should urgently consider seeking the advice of the Money Advice and Budgeting Service or another debt advice service or, if the defendant is not legally represented, a legal adviser;
- (c) unless satisfied that the plaintiff has already given the defendant sufficient invitation and opportunity to do so, may make an order that the proceedings be adjourned for such time as the Master [or the Court] considers just and convenient, and require the plaintiff to invite the defendant in writing to use during that period mediation, conciliation, [or other dispute resolution process], to settle the claim;
- [(d) may exercise the powers of the Court under section 38, section 54(4), section 59, section 66(2) or section 85 of the Consumer Credit Act 1995;]
- (e) where the defendant appears and is sui juris, may make an order to receive a consent and make the same a rule of court;
- (f) if satisfied, by affidavit or otherwise that:
 - (i) the notice of motion and grounding affidavit have been duly served, [and
 - (ii) there do not appear to be reasonable grounds for concluding that there is a prima facie defence to the claim]
 may give leave to enter final judgment for the whole or part of the claim.”

(vii) by the substitution for rules 15 and 16 of Order 27 of the following rules:

- “15.(1) In consumer debt proceedings (within the meaning of Order 37A, rule 1(2)), judgment in default of defence shall not be entered until after the expiration of twelve months from the date of issue of the summons by which the proceedings were instituted unless the leave of the Court shall have been first obtained.
- (2) An application for such leave may be made by motion on notice served not less than four clear days before the hearing; and the provisions of Order 13, rule 14 (2) and (3) shall apply to such application.
- (3) On the hearing of any application for such leave, the Court may, in addition to any other order which may be made, make any order mentioned in Order 37A, rule 4”;

(viii) by the substitution for rule 1 of Order 37 of the following rule:

- “1.(1) Subject to sub-rule (2), every summary summons indorsed with a claim (other than for an account) under Order 2 to which an appearance has been entered shall be set down before the Master by the plaintiff, on motion for liberty to enter final judgment for the amount claimed, together with interest (if any), or for recovery of land, with or without rent or mesne profits (as the case may be) and costs, and, in the case of an action for the recovery of land for non-payment of rent, to ascertain the amount of rent due. Such motion shall be for the first available day, as the Master may fix, not being less than four clear days from the

service thereof upon the defendant, and shall be supported by an affidavit sworn by the plaintiff or by any other person who can swear positively to the facts showing that the plaintiff is entitled to the relief claimed and stating that in the belief of the deponent there is no defence to the action. A copy of any such affidavit shall be served with the notice of motion.

(2) Notwithstanding sub-rule (1), every summary summons indorsed with a claim under Order 2 in consumer debt proceedings (within the meaning of Order 37A, rule 1(2)) to which an appearance has been entered shall be set down before the Master by the plaintiff, on motion for liberty to enter final judgment and the provisions of Order 37A and of this Order (other than rules 3, 4 and 7) shall apply to every such motion.”;

(ix) by the insertion immediately following Order 37 of the following Order:

“Order 37A
Consumer Debt Proceedings

1.(1) This Order applies to any proceedings in which the plaintiff claims recovery of a debt or liquidated demand against any defendant pursuant to -

(a) an agreement⁶ to which Part III of the Consumer Credit Act 1995 applies,

(b) any agreement not referred to at paragraph (a), where the plaintiff entered into that agreement in the course of a trade, business or profession and the defendant concerned is a natural person who was acting outside his or her trade, business or profession]⁷ when he or she incurred the debt, entered the contract or other arrangement or agreement or security to which the liquidated demand relates,

(2) In this Order:

proceedings mentioned in sub-rule (1) are referred to as “consumer debt proceedings”, and

“warning letter” means a letter referred to in rule 2.

⁶ The term “agreement” rather than “contract” is used in the Consumer Credit Act 1995 (“1995 Act”).

⁷ This is essentially the definition of a “consumer” from the 1995 Act. Option (b) is intended to capture, if necessary, consumer debt other than under a consumer credit agreement to which the 1995 Act applies. The *Consumer Protection Act 2007* uses a similar, but not identical definition: “a natural person (whether in the State or not) who is acting for purposes unrelated to the person’s trade, business or profession...”

2. A person (in this rule referred to as “the intending plaintiff”) wishing to commence consumer debt proceedings shall , not less than four weeks before commencing such proceedings, send by pre-paid ordinary post to the intended defendant a warning letter in which (in addition to any other information which may be given in such a letter), the intending plaintiff, in plain language:

- (a) shall give full particulars of the amount of the debt or liquidated demand claimed;
- (b) shall give a description of the agreement on foot of which it is claimed such as would enable the intended defendant to identify it;
- (c) shall state the circumstances (e.g. the date on which the intended defendant went into arrears) giving rise to the claim for recovery of the amount;
- (d) shall state that he intends to initiate consumer debt proceedings in the Court against the intended defendant;
- (e) shall state whether the intended plaintiff is willing to accept payment of any lesser amount in satisfaction of the amount claimed, and , specifies any such lesser amount;
- (f) shall state that the intended defendant should urgently consider seeking the assistance of the Money Advice and Budgeting Service or another debt advice service or of a legal adviser, if the intended defendant has not already done so;
- (g) may invite the intended defendant before such proceedings are initiated to use mediation, conciliation, arbitration or another dispute resolution process specified by the intending plaintiff, to settle the claim; and
- (h) in the event that an invitation referred to in paragraph (g) is given, shall indicate that, if the intended defendant wishes to accept the invitation, he or she should confirm this to the intending plaintiff in writing within two weeks of receipt of the warning letter.

3. If any conflict arises between the provision of any rule of this Order and any other provision of these Rules, the provision of the rule of this Order shall, in respect of any proceedings to which this Order applies, prevail.

4. The Court may, in any consumer debt proceedings commenced otherwise than by summary summons, on the application of any of the parties or of its own motion when the proceedings are before the Court (including on an application under Order 27, rule 15), and the Court considers it appropriate, having heard the parties and having regard to all the circumstances of the case:

(a) unless satisfied that such an order has previously been made in the proceedings or that the plaintiff has already given the defendant sufficient invitation and opportunity to do so, make an order under section 32(1) of the Arbitration Act 2010 or order that the proceedings be adjourned for such time as the Court considers just and convenient and request the plaintiff to invite the defendant in writing to use during that period mediation, conciliation, or other dispute resolution process, to settle the claim;

(b) make such orders and give such directions as to pleadings, discovery, settlement of issues or otherwise, and generally may for the conduct of the proceedings or for determination of the questions in issue in the proceedings, as appear convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings, or

(c) make an order in exercise of the powers of the Court under section 38, section 54(4), section 59, section 66(2) or section 85 of the Consumer Credit Act 1995.”

(x) by the substitution for rule 16 of Order 41 of the following rule:

“16. At any time within ten years from the execution of any warrant of attorney to enter judgment on a bond, judgment may be marked thereon as of course in the Central Office, but after such period no judgment shall be marked on any warrant of attorney, unless by order of the Court on motion; and the application for every such order shall be grounded on an affidavit, stating the amount remaining due on foot of such bond and warrant, and the character in which the applicant claims to be entitled, and that the obligor is still alive, and, where necessary, such affidavit shall contain matter sufficient to take the case out of the Statute of Limitations, and in case the payment of money shall be relied on for that purpose, shall state by whom and to whom such payment shall have been made. Provided that in consumer debt proceedings (within the meaning of Order 37A, rule 1(2)), judgment shall not be marked on any warrant of attorney until after the expiration of twelve months from the date of such warrant of attorney unless by order of the Court to be obtained on motion.”;

(xi) by the substitution for rule 18 of Order 42 of the following rule:

“18. Upon any judgment or order for the recovery or payment of a sum of money and costs, there may be, at the election of the party entitled

thereto, either one order or separate orders of execution for the recovery of the sum, and for the recovery of the costs, but a second order shall only be for costs, and shall be issued not less than eight days after the first order. Provided that, if, in consumer debt proceedings (within the meaning of Order 37A, rule 1(2)), judgment has been entered for the plaintiff by virtue of a warrant of attorney, and such judgment has been entered after the expiration of twelve months from the date of such warrant of attorney, no execution order shall issue without an order of the Court to be obtained on motion.”

(xii) by the substitution for sub-rule (2) of rule 11 of Order 76 of the following sub-rule:

“(2) Where a debt of any part thereof is for credit advanced pursuant to an agreement referred to in paragraph (a) or (b) of rule 1(1) of Order 37A, the affidavit shall contain such of the particulars referred in Order 4 rule 12 as, under that rule, apply to such agreement and shall exhibit a copy of the credit agreement and shall include or exhibit and verify a statement showing the amount of the balance which remains unpaid, distinguishing the amount of the principal from the amount of interest included therein.”⁸

(xiii) by the substitution for rule 21 of Order 76 of the following rule:

“21. On the presentation of the petition, the petitioning creditor shall file in the proper office an affidavit in the Form No. 12 proving his debt and the act of bankruptcy, provided that when a debt or any part thereof is claimed to be due pursuant to an agreement referred to in paragraph (a) or (b) of rule 1(1) of Order 37A, the affidavit shall also satisfy the requirements of rule 11(2), and provided also that where the act of bankruptcy relied on is non-compliance with a bankruptcy summons, it shall also incorporate a statement that the debt has not been secured or compounded.”

(xiv) by the substitution for rule 129 of Order 76 of the following rule:

“129. Upon the presentation of a petition by a creditor, the creditor shall file an affidavit in the Form No. 12 proving his debt, provided that when the debt of a petitioning creditor or any part thereof is in respect of

⁸ This in effect reinstates the particulars required by section 16(2) of the *Moneylenders Act 1933*, even though the 1933 Act is repealed by the *Consumer Credit Act 1995*.

credit advanced pursuant to a credit agreement (within the meaning of section 2 of the Consumer Credit Act 1995) or interest or charges in connection therewith, the affidavit shall also satisfy the requirements of rule 11(2).”

[(xv) by the insertion immediately following rule 1A of Order 99 of the following rule:

“1B.(1) Notwithstanding sub-rules (3) and (4) of rule 1, no costs shall be recoverable by the plaintiff in consumer debt proceedings (within the meaning of Order 37A, rule 1(2)), where the plaintiff in those proceedings has failed to send a warning letter referred to in Order 37A, rule 1(2) within the time specified in that Order before initiating the proceedings.

(2) Where the Court, or on appeal the Supreme Court, in consumer debt proceedings (within the meaning of Order 37A, rule 1(2)), is satisfied that the plaintiff failed without good reason to give the defendant a reasonable opportunity to attempt to settle the claim by a dispute resolution process referred to in Order 37A, rule 2, it may refuse to award the plaintiff the whole or part of any costs of the action, appeal or application against the defendant [or may award the unsuccessful defendant the whole or part of any costs of the action, appeal or application against the plaintiff .”]



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 of legislative changes.

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The Law Reform Commission is a statutory body established by the Law Reform Commission Act 1975