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promoting access to justice

Submission on

Personal Insolvency Bill 2012

FLAC

November 2012

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Please note: This submission is made for the purposes of introducing the Personal Insolvency Bill to the Seanad. This submission repeats much of what FLAC has already submitted. Please see our submission on the original heads of the Bill when the scheme was published at the end of January 2012 and also submissions produced at Committee Stage at www.flac.ie.

1. Introduction & overview

In FLAC's view, there have been no significant adjustments to the draft legislation since its introduction and its passage through the Dail.

Despite some obvious substantive flaws and a considerable lack of detail in terms of proposed structures and operating systems, FLAC is relieved that after a decade of campaigning, a piece of legislation on personal insolvency has finally been published and we recognise the considerable time and effort that has been put into its preparation. We are hopeful but not necessarily optimistic that it will lead to practical settlements being reached between over-indebted people and their creditors through the medium of personal insolvency practitioners (PIPs) that will help to rehabilitate those debtors from both a social and an economic perspective. We are hopeful too that such settlements will avoid wherever possible the loss of the family home and it is useful that the ethos of the legislation reflects this aspiration. In the case of what might be termed 'no income, no assets' debtors, we believe that with some refinement, the proposed system of Debt Relief Notices (DRN) may help to relieve the chronic indebtedness of many whose financial situation has been irreparably damaged arising out of the financial boom and bust.

However, FLAC is concerned to note that even at this late stage, on the introduction of the Bill to the Seanad, no Regulatory Impact Assessment of the consequences of this entirely new insolvency machinery has been published. Given that such an assessment is required where there is a significant new piece of legislation with a substantial impact on the legislative framework, it would be of great assistance to have the information arising from that assessment available to legislators. **FLAC calls on the Minister for Justice Equality and Defence to publish the RIA on this Bill while the Seanad debate is on- going to allow Senators to input**.

As an initial observation, we feel that the proposed system for resolving cases of personal insolvency out of court, whether by way of Debt Relief Notices, Debt Settlement Arrangements (DSAs) or Personal Insolvency Arrangements (PIAs), is overly complex, with a plethora of state-funded actors essentially replicating each other's functions. Ironically, this may lead to an increase in voluntary settlements with creditors as they too seek to avoid the detailed infrastructure, time constraints and administration of the legislation. In this respect, we expect the Money Advice and Budgeting Service (MABS) to continue to be very busy in terms of the core work it carries out being the first point of repair for indebted people and it must be properly resourced to carry out this work. The extent to which MABS will be involved in proposing plans under the legislation remains to be seen but regardless, MABS and other groups working for and on behalf of indebted people will play a critical role in helping people to understand and

evaluate their options and directing them to the appropriate service to realise them. Given the complexity of the legislation, it is also evident that comprehensive legal advice will be necessary before debtors commit themselves to availing of their potential options.

Having overcome what we believe are significant hurdles in getting a proposal to the table, the major 'elephant in the room' for the debtor and the practitioner formulating his or her repayment plan remains the significant creditor voting thresholds that must be reached at creditor's meetings before repayment proposals are accepted. It is obvious that the protection of endangered financial institutions and the fear of moral hazard have been very influential factors in the framing of this legislation and this has contributed to a major imbalance of power between creditor and debtor. This manifests itself particularly in the lack of any oversight or review by a third party such as the Insolvency Service or right of appeal into the courts for debtors where proposals are refused and in the wide range of potential criminal liability for debtors who are not perceived to be honest in their conduct and dealings under the legislation.

The Bill takes a traditional approach to debt resolution by leaving the ultimate decision-making power in the hands of creditors, rather than imposing settlements where it may be in the interests of our society generally. As such, it is out-of-step with more recent progressive developments in European insolvency law summarised by Professor Jason Kilborn in his 2010 paper , 'Expert recommendations and the Evolution of European Best Practices for the Treatment of Overindebtedness, 1984 – 2010'. For example, in the case of Sweden, Kilborn explains that in January 2007, Sweden moved from a three-step insolvency process to one straightforward step. Previously, Step One involved mandatory private negotiation for a debtor with creditors that would invariably be time consuming and would fail. Step Two saw an application for debt relief then being made to the state Enforcement Agency to be presented for voting to creditors, if (or when) this application was rejected, Step Three would see a court review the proposal and usually impose a settlement. In effect, the Swedish authorities decided to scrap steps one and three and trust the state Enforcement Agency to make the correct call on the appropriate repayment plan, in light of the fact that courts had up to then upheld such proposed plans in 90-95% of cases. Creditors unhappy with the outcome may appeal into the Court against the Enforcement Agency's decisions.

In France, on the other hand, the debt adjustment process generally begins with the filing of a petition to a regionally based commission on individual overindebtedness, administered by the Banque de France (the equivalent of the Central Bank in France - a fact in itself considered to be a powerful incentive for creditors to co-operate with the procedure). The commission acts, in Kilborn's words, as a 'sort of hybrid between debt counsellor and administrative tribunal', drawing up a repayment plan for presentation to creditors. Formerly, where the commission's plan involved a proposal for part payment and the proposal was rejected by a creditor/s, it would have to have been subsequently examined by a court which could impose a settlement. However, with the rate of success for the acceptance of such voluntary plans falling from 70% in 2000 to 55% in 2008 and 2009, from November 2010, the

commission is entitled to impose its own plan, again subject to a creditor's right of appeal into the courts.[1]

We believe that the current approach of the Bill risks over reliance upon the credit industry generally to take a rational approach to debt settlement. FLAC's view is that there is little evidence at present that would support their capacity to act pragmatically and in the interests of the taxpayer, the economy and even their shareholders and stakeholders in acknowledging that in many instances much personal debt is now substantially irrecoverable. For this reason alone, a rolling review of the effectiveness of the legislation when enacted will be essential. We will need to know quickly if it is working and remedy deficiencies if it is not.

An optimist might suggest that as the credibility of banks, both domestically and internationally, continues to be undermined by further revelations, this legislation presents them with an opportunity to demonstrate good faith and the capacity to understand and reconcile the fundamental indebtedness being suffered by so many households in Ireland. But where is the incentive to do so? Creditors generally but the banks in particular may consider that in agreeing settlements that involve write-down or write –off, they are pushing themselves further down the road to their own insolvency. With no compulsion in the legislation, why would they do so?

A further major area of concern is the lack of detail in the Bill on the infrastructure that will be put in place to facilitate the new system. For example, it is not apparent what kind of criteria will be used to determine the grant or otherwise of such a license, despite the proposal to set up a new Insolvency Service. We reiterate **that despite the perception that debtors and moral hazard is a major problem in this country, the significant majority of over-indebted people in Ireland are very vulnerable**. That vulnerability is heightened by the expectation that has built up that this legislation may finally provide solutions to the enduring nightmare that many households are suffering. The quality and conduct of practitioners is therefore a key issue and any licensing system must ensure that debtors are not exploited and impoverished.

The question of the minimum income a household is entitled to retain <u>before</u> payments are made to creditors, therefore, is not a matter that can be left to negotiation. Practitioners will need detailed guidelines on these and related issues in order to properly formulate proposals but there appears to be an ominous silence on any plans in this regard at present. Similarly, the issue of costs and fees has not been addressed. Whilst it is the norm across Europe that practitioners are paid from monies available for distribution to creditors once repayment proposals are accepted, we are particularly concerned that up-front fees may be charged to debtors for the work that will need to be done to get approval in principle for a proposal to be made, with no guarantee that it will be accepted.

[1] For more detail see www.flac.ie – Resources - Essential principles of debt adjustment/settlement schemes across Europe - A summary of the Kilborn paper with an emphasis on how those principles can be incorporated into the forthcoming Irish Personal Insolvency Bill. January 2012.

Finally, FLAC wishes to emphasise that notwithstanding its reservations concerning the Bill, it intends to work assiduously to ensure that it is improved after it has come into force.

2. Debt Relief Notices (DRNs)

2.1 - Introduction

As already stated, FLAC sees potential in the Debt Relief Notice to resolve cases of comparatively small but ultimately hopeless debt. There has been much said about the danger for society in the effective shutting out of people in debt on low incomes from participation in the economy and the need from an economic perspective to address this problem.. The Debt Relief Notice may present this opportunity. However, the very tight financial criteria outlined in the Bill are likely to exclude a significant number of debtors for whom this type of relief might otherwise be suitable.. It is broadly estimated, for example, that only 15% of clients of MABS would qualify for a Debt Relief Notice, principally because of the maximum limit of €20,000 of 'qualifying debts' before this option would be available. For the sake of clarity, it should be pointed out that the €20,000 limit does not refer to the amount of arrears a debtor has accumulated, but to the amounts currently owed in total in terms of qualifying debts.

2.2 – Specific areas of concern

2.2.1 Definitions

The definition of excluded debt for the purposes of a Debt Relief Notice does not expressly include judgments for liquidated sums. In turn, the definition of qualifying debt means a debt other than an excluded debt and includes (but presumably is not limited to) credit cards, overdrafts, unsecured loans, utility arrears and guarantees and may include a secured debt.

- **FLAC comments**

Are we to take from this that a qualifying debt in respect of which a judgment has been obtained may be included in a Debt Relief Notice application? The answer to this should be yes, not just in respect of a Debt Relief Notice but equally in relation to the Debt Settlement Arrangement or Personal Insolvency Arrangement applications. **For the avoidance of doubt, judgments granted in respect of liquidated sums should be expressly excluded from the definition of secured debt.**

Equally, will a secured debt, in other words a debt where the payment is secured in or over any asset or property of any kind, be included in practice in an application for a Debt Relief Notice? There is no clear answer to this question in the Bill. Section 23 allows for a qualifying debt to include a secured debt but this is expressly made subject to Section 43. Sections 32(9) and 43 provide in principle for write-off of qualifying debts at the conclusion of the Debt Relief Notice but subsection (5) provides that this shall not

affect the right of a secured creditor to enforce his or her security. **FLAC would submit that this is ambiguous and must be clarified.**

2.2.2 Qualifying criteria

These include:

- Qualifying debts of €20,000 or less;
- Net disposable income of €60 or less per month (after payment of reasonable household expenses and excluded debts, if any). Child Benefit is not counted, but wages, welfare benefits, income from a pension and contributions from other household members are to be included;
- Assets worth €400 or less – This does not include an (essential for everyday activities) motor vehicle worth €1,200 or less, household equipment and appliances that are reasonably necessary to maintain a reasonable standard of living, books, tools and other items of equipment up to a value of €6,000 reasonably necessary for employment of business but does seem to otherwise include any asset (asset is not defined) irrespective of any mortgage or charge to which it is subject;
- Debtor must be domiciled in the State;
- Debtor must be insolvent (unable to pay his or her debts in full as they fall due) based on current, contingent and prospective liabilities and current and prospective assets and income;
- Debtor must not have entered into a transaction at an undervalue or given a preference in the preceding two years;
- Debtor must not have incurred 25% or more of the qualifying debts during the six months ending on the application date;
- Debtor will not be eligible on a number of grounds connected with previous or existing applications of a similar nature under the legislation, for example, a rejected DRN application in the previous 12 months;
- Finally, FLAC's reading of S.24 (6) (a) is that any person with a mortgage on a family home will be excluded from applying for a Debt Relief Notice as the value of that home in its entirety seems to be considered an asset.

- **FLAC comments**

We believe that these criteria are far too narrow. The 'qualifying debts' threshold of €20,000 will exclude many suitable applicants who are fundamentally insolvent. These debtors will thus be forced to apply for a Debt Settlement Arrangement (DSA) which is likely to be rejected by creditor veto, particularly as the debtor in question will likely have little to offer to influence a positive vote. **It is suggested that an increase in threshold to at least €30,000 would expand the numbers to whom this potential remedy might apply significantly.**

The asset limit of €400 will exclude many more people, especially as items of personal property must currently be taken into account. Household equipment and appliances, that are reasonably necessary to maintain a reasonable standard of living, together with books, tools and other items of equipment reasonably necessary for employment or business up to a limit of €6,000 are excluded from the calculation. However, no list of such items is as yet provided and the question of what are reasonably necessary goods in 2012 is likely to provoke very wide differences of opinion. The Minister has indicated that in addition to the exceptions now allowed, reasonable education equipment can also be excluded. For example, are laptop computers, flat screen TVs, microwaves and mobile phones, to take a few examples, to considered as pieces of essential household equipment or as items of personal property? **The asset limitation of €400 should be substantially increased and detailed guidelines should be developed as part of the primary legislation with a view to differentiating between essential household equipment and appliances and items of personal property.**

The arbitrary selection of €1200 as the maximum value of the debtor's vehicle in order to qualify is unnecessary and greater flexibility on this issue is desirable. **The setting of a limit of €1200 for a vehicle is unfair and potentially unworkable and should be substituted with a general requirement that the vehicle must be appropriate for the applicant debtor's needs.**

Only 'reasonable' household expenses and payments in respect of excluded debts (if any) are subtracted from the gross income of the household (excluding Child Benefit) to arrive at the net disposable income which must then not exceed €60 per month. This leaves very little margin for other non-household expenses and emergencies. According to Section 24 (5), 'net disposable income' means the income available after payment of reasonable household expenses and payments in respect of excluded debts (if any)'. The number of excluded debts makes it conceivable that in some cases the applicant may have no 'net disposable income' at all. However, the question of what 'reasonable' household expenses will be included is far more likely to be a vexed question. The more generous this calculation, the greater the amount of the applicant's income that will be subtracted from gross income and so the lesser the net income, if indeed any. Conversely, the less generous, the greater the likelihood that the applicant debtor will be excluded from a Debt Relief Notice on the basis that his or her net disposable income exceeds the €60 per month maximum.

The term 'household' expenses must be clarified and detailed guidelines must be put in place in primary legislation that would include lists of such items. For example, routine medical expenses should be included under this heading as should any emergency expenses that are bound to occur from time to time in all households.

It is not entirely clear why a debtor will automatically not be eligible to apply for a Debt Relief Notice where 25% of the debts were incurred during the six months ending on the application date. The suggestion seems to be here that this would prevent those who deliberately racked up debt from applying but it could also exclude genuine applicants. **Greater discretion should be reserved for an**

approved intermediary and the Insolvency Service to examine such cases on their merits rather automatically exclude them.

Those with mortgages seem to be precluded from applying for a Debt Relief Notice. **Is it necessary or even desirable that this should be the case, regardless of the arrears situation or how much is owed in terms on foot of mortgage, even though that debtor may well fall into the category of no-income, no-assets envisaged to apply to the Debt Relief Notice process?.**

2.2.3 Treatment of Hire Purchase agreements

An applicant debtor must give up possession of goods (by and large motor vehicles) which are the subject of a HP agreement, under the procedure set out in S.63 of the Consumer Credit Act. This will leave the applicant without a vehicle, having paid in many cases substantial instalments over a period of years.

- **FLAC comments**

The approved intermediary, that is, MABS should be allowed to apply to the Insolvency Service to have the Hire Purchase agreement continued notwithstanding the application for a Debt Relief Notice in the very limited number of cases where the agreement has almost been completed.

2.2.4 Excluded debts

A number of debts cannot be included in a Debt Relief Notice application. These include:

- Family law maintenance due to spouse, civil partner, child;
- Taxes and charges of all kinds;
- Household charge;
- Non-principal residence charge;
- Rates;
- HSE money due under Fair Deal (or perhaps generally)
- Property management charges;
- Awards against the debtor arising from a personal injuries/ wrongful death case;
- Any liability or loan obtained by fraud.

- **FLAC comments**

The debtor is entitled to deduct any payments made in respect of the above debts before arriving at his or her net income figure. Therefore the existence of such debts should not affect the debtor’s right to apply for a Debt Relief Notice. However, the existence of this wide range of potential debts parallel to

the Debt Relief Notice process which will not be written off (unless voluntarily) at the end of a three year Supervision period is likely to deter applications. Any approved intermediary (most likely MABS) must also state that the granting of a Debt Relief Notice will offer a reasonable prospect that the applicant will be rendered solvent within five years. This would be difficult to state in any case where there are substantial amounts of excluded debt, especially debts to the Revenue Commissioners.

2.2.5 The complexity of the Debt Relief Notice **process**

Chapter One, Part Three of the Bill which outlines the Debt Relief Notice process is heavy in terms of procedures with a considerable amount of preparatory work required. A significant extra layer has been added by the involvement of the Circuit Court which is charged with both reviewing the debtor's application for a Debt Relief Notice and must also satisfy itself that the eligibility criteria set out in the legislation are met. Thus, we now have a threefold certification of the debts due and the financial affairs of the debtor by three separate State funded agencies; namely the Money Advice and Budgeting Service as the approved intermediary, followed by the Insolvency Service, followed by the civil courts. Similar statutory obligations are placed upon the courts (but in particular the Circuit Court) in connection with both the Debt Settlement Arrangement and Personal insolvency Arrangement options.

- **FLAC comments**

We understand that the complexity as described above has been introduced due to concerns that a lack of court involvement in the settlement of debts might be unconstitutional in terms of the property rights of creditors. However, FLAC submits that many bodies have been established by statute to carry out limited functions and powers of a judicial nature (in terms of Article 37 of the Constitution) that impinge upon property rights, from which there is a right of appeal into the courts. For example, an Employment Appeals Tribunal has the power to award up to two years salary or to even order the reinstatement of an unfairly dismissed employee, a decision which may be appealed to the Circuit Court.

And if the Insolvency Service must have **all** its decisions reviewed and approved by the Circuit Court so that it is not in effect making any decisions, is there any point in having an Insolvency Service at all?

Further as yet unanswered questions also arise in relation to how the court will carry out these functions. How will the review and approval process be handled? Will it be conducted by County Registrars? If so, is there not a danger that any given creditor may argue that the process involves the administration of justice and can only be tackled by a judge? How long will the process of review take? What resources issues will this entail for the Courts Service? Will these processes have to be prioritised? What effect will that have on the existing work of the Courts where delays and backlogs already create injustice and frustration.

In summary, if the Debt Relief Notice**, like its colleague out-of-court options the Debt Settlement Arrangement and Personal insolvency Arrangement, is not to become a bureaucratic nightmare for debtors, practitioners and creditors alike, serious thought must be given to simplifying this and other processes under the legislation. Why not empower the Insolvency Service to approve applications for Debt Relief Notices under the present strict criteria, with a right for creditors to object on appeal to the Circuit Court?**

2.2.6 The role of MABS in the Debt Relief Notice process

It is clear at this point that MABS is intended to be the approved intermediary for processing Debt Relief Notices. However, this comes at a time when MABS is under enormous pressure with an increasing and diverse range of referrals and when it is also the ongoing primary source of assistance for debtors to voluntarily negotiate debt repayments (a pre-requisite for applying under the legislation for any of out-of-court options, it should be noted). Further, most existing MABS clients go to MABS to try to restructure and pay their existing debt. The 'no income, no assets' client who will go to seek a Debt Relief Notice is likely to be a new category of client, increasing its client base.

- **FLAC comments**

There are considerable training and resource implications for MABS as a result of this role. A money advisor (and indeed other frontline actors acting as sources of assistance to debtors) will have to be extremely *au fait* with the options under the legislation in order to provide proper advice and information. Aside from preparing and verifying a wide variety of financial information, an approved intermediary will be obliged to properly assess each of the remedies potentially open to debtors under the legislation. He or she will, effectively, have to assess which is the most appropriate in the debtor's circumstances, even if he or she is not to be involved as Personal Insolvency Practitioners in processing applications for DSAs or PIAs.

These are not simple assessments and they will bring money advice staff into new territory in some cases. MABS staff will have an important role in referral of clients to Personal Insolvency Practitioners and in liaising in relation to those clients. It is imperative that these functions are carried out without a consequent reduction in existing MABS services. The work of assisting people who are over-indebted and need to renegotiate payments but who are not fundamentally insolvent must continue. It is therefore only logical that MABS will require additional resources to meet these challenges. Sufficient additional resources must be available to MABS to ensure that existing crucial money advice and budgeting services continue and that MABS staff can also take on this additional role.

Time limits for creditor objection

If the debtor's application for a Debt Relief Notice proves ultimately successful, a supervision period begins from the date the Insolvency Service records the Debt Relief Notice on the Register of Debt Relief Notices. In principle, this supervision period will last for three years with the possibility of an extension. We understand that this is to coincide with the discharge period from bankruptcy as a kind of 'no income, no assets' bankruptcy. However, FLAC believes that this period (extended from one year in the draft scheme) will prove unnecessarily lengthy for the relief that it is intended to provide. The effects of this extension are, in fairness, mitigated to some extent by some new provisions that allow a debtor to retain some of any improvement in income whilst remaining in the Debt Relief Notice process, as well as the right to buy out of the Debt Relief Notice and still obtain a 50% write-off.

Of more concern is the right of a creditor who receives notice of a Debt Relief Notice to object to the inclusion of his or her qualifying debt in the Notice at any time during the supervision period. . The grounds include that the Debt Relief Notice 0eligibility criteria were not satisfied, that the creditor suffered a material detriment because of an error or an omission in the debtor's prescribed financial statement, or that the debtor did not notify a change of circumstance. If a creditor makes such an application, the Circuit Court must hear the objection as quickly as possible.

- **FLAC comments**

A debtor who successfully applies for a Debt Relief Notice has a legitimate expectation that, subject to complying with his or her obligations and the criteria set out under the legislation, qualifying debts will be written off at the end of the three year period. However, this expectation is potentially compromised by the right of the creditor to object at any time. If the objection concerns the debtor's failure to disclose a change in financial circumstances, one can readily understand a right of objection whenever such an alleged breach comes to the creditor's attention. **However, there should be a time limit set for an objection that the eligibility criteria for a Debt Relief Notice were not satisfied or that the creditor suffered a material detriment because of an error or an omission in the debtor's prescribed financial statement. Three months from the date of the notification of the approval of the Debt Relief Notice is more than sufficient.**

3. Debt Settlement Arrangements

3.1 Where a Debt Relief Notice is not available

- **FLAC comments**

As noted in the Debt Relief Notice section, FLAC believes that the current limit of €20,000 in terms of qualifying debts and other limitations around qualifying for a Debt Relief Notice will prevent a number of insolvent debtors (including many MABS clients) from qualifying for this option. Many such clients will

therefore have to seek to propose a Debt Settlement Arrangement (DSA) to deal with their unsecured debts. In FLAC's view, there is a serious risk that many of these may find it difficult to enlist the services of Personal Insolvency Practitioners, who are likely to have sought and obtained a license from a commercial perspective.

It is likely that the range of potential applicants for the reliefs under this legislation will vary hugely, from those with very little repayment capacity in terms of both asset realisation and income generation to those who have substantial debts, more than sufficient to render them insolvent, but who may hold assets of value – personal and real property, shares, life assurance policies and so on– and a capacity to generate income into the future.

This latter category of debtor will be of more interest to commercial practitioners. Tangible offers can be made that stand a good prospect of being delivered upon. The debtor will be able to bear the initial costs or fees (if any are charged of course) of having his or her situation assessed and the practitioner will in all probability be paid out of funds made available to creditors through asset disposal and future income generation, where a proposal is made and proves sufficiently attractive to creditors to be accepted.

However, the evidence from MABS and our own advice centres and our information and referral phone line is that there are substantial numbers of people (and not just those with comparatively low levels of debt) who will have very little to offer over the repayment period envisaged. A quick assessment of the debtor's finances in this scenario will suffice to tell a practitioner this.

What will he or she then suggest, given the quite onerous duties that Sections 45, 46, 47, 48 and 49 taken together impose on a practitioner appointed by a debtor to take him or her through the preparatory steps prior to applying for either of the two arrangements available, including carefully considering which avenue may be appropriate? Knowing in turn the amount of work that must be done to assess a case, to seek and obtain a protective certificate and to negotiate with and make a proposal to creditors; and knowing that a percentage of creditors can veto a proposal they do not like and that there is no right of appeal to or oversight by a third party; is it not likely that the practitioner might politely decline the appointment, unless the debtor can deposit sufficient funds to meet the practitioner's costs up front?

In short, we believe that a system which makes the proposing of arrangements entirely dependent upon the judgment calls of private practitioners (who after all have to earn a living), and which requires substantial levels of creditor approval, cannot work without access for the debtor to the equivalent of legal aid. I**n this regard, FLAC reiterates the suggestion made in our submission on the scheme published in January that a register of state-funded public insolvency practitioners be put in place, in addition to the system of private practitioners proposed. As already outlined, such a service could include provision for a service provided by seconded MABS money advisors, for example, and a clear**

line of referral could be established between MABS and any such unit although such public insolvency practitioners might also be approached directly.

3.2 General Conditions (S.50)

A proposal for a Debt Settlement Arrangement must be made by a Personal Insolvency Practitioner to one or more creditors on behalf of a debtor. Where two debtors are jointly party to all debts to be covered by a Debt Settlement Arrangement and both are eligible (i.e. insolvent etc), a joint Arrangement may be proposed.

- **FLAC comments**

If two debtors, for example, two people in a relationship and co-habiting together, are not jointly party to all debts, it would seem that they cannot propose a Debt Settlement Arrangement. Effectively, this will prevent a household/couple making a proposal based on the household's overall financial situation, where some of their debts are joint and some are individual. **In such cases, it is the household's collective financial situation that needs to be resolved. If therefore, a couple is prepared to jointly accept liability for their financial situation, FLAC suggests that it would be more practical and less time consuming to permit such a couple to present their application together rather than separately. This option might also be particularly relevant to maintaining the couple's interest in the family home.**

3.3 Eligibility criteria (S.53)

- The debtor must be domiciled in State at the time of the application for a protective certificate or within one year prior to application or had a business in the State one year prior to the application.
- The debtor must be insolvent. This is defined as meaning that the debtor is unable to pay his or her debts in full as they fall due.
- The completion of a financial statement and making of statutory declaration of its accuracy by debtor.
- A certificate must be provided from a Personal Insolvency Practitioner that given his or her current liabilities, contingent and prospective liabilities and current and prospective assets 'there is no likelihood of the debtor becoming solvent (i.e. able to pay his or her debts in full as they fall due) within 5 years of the debtor's declaration (corresponds to the length of the repayment plan).
- A further statutory declaration by the debtor that s/he has not been able to agree an alternative repayment arrangement with creditors or creditors are unwilling to enter into such (this criterion will not apply where the practitioner confirms in writing that entering into such arrangements would still not have rendered the debtor solvent within a period of 5 years).
- Debtor must not be an undischarged bankrupt, a discharged bankrupt subject to a Bankruptcy Payments Order, someone with a current Debt Relief Notice or Personal Insolvency

Arrangement, or a person with a deed of arrangement under the Bankruptcy Act 1988, a person who has had a protective cert with a view to proposing a Debt Settlement Arrangement in the past 12 months,**),** a person who has had discharge under a Debt Relief Notice in the past three years or a Personal Insolvency Arrangement or Bankruptcy in the past 5 years. (These criteria will not apply where the debtor, on notice to the Insolvency Service, has applied to the relevant court who has ordered that the current insolvency, i.e. the second one, arises by reason of exceptional circumstances outside the control of the debtor).

- **FLAC comments**

***3.4* Insolvency test**

Insolvency means that the debtor is unable to pay his or her debts in full as they fall due. In turn the practitioner making the proposal must certify that 'there is no likelihood of the debtor becoming solvent (that is, able to pay his or her debts in full as they fall due) within 5 years of the debtor's declaration (which corresponds to the length of the repayment plan).

- **FLAC comments**

We are concerned that these conditions around insolvency (which is also used for the purposes of for a Debt Relief Notice or a Personal Insolvency Arrangement application) are not sufficiently tight and may give rise to objections from creditors that might undermine the operation of the legislation. Are people really insolvent if they need more time to pay their debts, though they cannot pay them in full as they fall due? FLAC would suggest that inability to pay in full is over-indebtedness, which with rescheduling of payments (or forbearance) may work itself out over time but which may fall short of insolvency. For a practitioner to have to certify that there is no likelihood of the debtor becoming solvent within 5 years of the debtor's declaration also seems to involve a forecast of certainty which is neither necessary not desirable. A revised definition of insolvency might be amended to say that '**the debtor is clearly unable to pay his or her debts as they fall due and it is unlikely that he or she will do so for the duration of the repayment plan, as certified by a Personal Insolvency Practitioner'.**

3.5 A second Debt Settlement Arrangement application

A person who has had a protective certificate issued and approved in the past 12 months by the Insolvency Service and the Circuit Court under S.55 is precluded from making another application. Why is this exclusion here? Presumably this prohibition would extend to cover a situation where the creditors at a creditor's meeting subsequently refuse to approve the proposal made by the practitioner on the debtor's behalf. Why should the debtor and practitioner not be allowed to make a second application for a period of 12 months, particularly where financial circumstances may have changed and the proposal now stand a better chance of being accepted?

3.6 Complexity of the process and implications for costs

- **FLAC comments**

Our comments above in relation to the complexity of the Debt Relief Notice process apply equally to the Debt Settlement Arrangement (and indeed the Personal Insolvency Arrangement), although in this case it is a (private commercial) Personal Insolvency Practitioner rather than the (publicly funded) MABS approved intermediary who must carry out the spadework with the debtor in order to prepare an application. There is one very significant difference however. The same two layers apply thereafter, these being approval by the Insolvency Service in principle, and review and final approval by the Circuit Court in practice. However, with the Debt Settlement Arrangement and Personal Insolvency Arrangement, the issuing of a protective certificate only allows an application to be made.

According to the sequence laid out in the legislation, discussions with creditors may take place at that point with a view to framing a proposal for a Debt Settlement Arrangement to a creditor's meeting, where a sufficient threshold of voting creditors must agree to it. In this regard, it is curious that S.59 (2)(g) of the Bill provides that a Debt Settlement Arrangement shall make provision for the practitioner's costs and outlays which relate to work carried out under S.44- 48 (as well as the ongoing administration of the arrangement when it is up and running), i.e. all the preparatory work prior to initiating an application. It is as if it is assumed that the application and proposal will be accepted and then the practitioner can be paid retrospectively for it. What if the application is rejected? A practitioner is unlikely to take this risk and may therefore seek up-front fees.

From a practical perspective, therefore, where a debtor cannot afford to pay costs up front (if any), it would be very surprising if the views of creditors were not canvassed at an early stage by the practitioner, for example, following or even before his/her appointment by the debtor but before any application for a protective certificate is made. At that stage, it may become clear whether there is any significant hope of a proposal being accepted. If not, why go to all the bother of what still appears to us to be a substantial amount of preparation to make a proposal that may ultimately be rejected, with no possibility of appealing to or seeking a review by an independent third party.

3.7 Implications for bankruptcy

A potential problem though may lie ahead for the debtor where a practitioner declines to take on his or her case because of such negative soundings from creditors. She or he will still want find a resolution to his or her debt problems, rather than remain in limbo with all the stresses involved, and if this involves applying for bankruptcy with its reduced discharge period of three years, then many may conclude that this is a necessary evil . However, further on in the Bill, in the chapter on reform to the Bankruptcy Act 1988, at S.133 (4), it is provided that a debtor's petition for bankruptcy must be accompanied by an affidavit (or sworn statement) that *'he or she has, prior to presenting the petition, made reasonable*

efforts to reach an appropriate arrangement with his creditors relating to his debts by making a proposal for a DSA or a PIA to the extent that the circumstances of the debtor would permit him to enter into such an arrangement'.

The salient question here appears to FLAC to be: **Will it be sufficient for the purposes of the above that, having been appointed by the debtor, the practitioner has informally sounded out creditors but ultimately did not initiate an application for a protective certificate? It should be pointed out that the reason for this and other related questions ultimately comes back to the existence of an unchallengeable creditor veto.**

3.8 Secured debts and Debt Settlement Arrangements

S.63 of the Bill very clearly states that **'a secured creditor may not participate in a Debt Settlement Arrangement with respect to a secured debt'**.[2] Section 64 however then goes on to say that in formulating a proposal for a Debt Settlement Arrangement, a practitioner shall generally formulate the proposal **on terms that will not require the debtor to dispose of his or her interest in the family home**. The family home is in turn likely to be the subject of a mortgage, itself a secured debt . There are exceptions to this : a debtor may confirm in writing that she or he does not wish to remain in the family home or the practitioner may determine that the costs of doing so are disproportionately large. The debtor must obtain or be advised to obtain legal advice in this eventuality – **where is he or she to obtain such advice?**

The State should ensure that the Legal Aid Board is adequately resourced to deal with the additional requirement for legal advice and occasional representation that will arise as a result of this new machinery. The Board's resources are severely overstretched right now but applicants for legal advice in this area will require priority given the timeframes on applications.

Section 48 (3) (d) provides that a practitioner, in advising a debtor as to the appropriateness of applying for a Debt Settlement Arrangement or Personal Insolvency Arrangement shall have regard to whether any of the debtor's secured creditors have indicated a willingness to vary the terms of the secured debt to facilitate the operation of Debt Settlement Arrangement.

[2] [2] Curiously, the schedule of the debtor's debts assembled for the purposes of applying for a Protective Certificate in advance of proposing a Debt Settlement Arrangement must state the amounts due to each creditor and whether creditors are secured are not.

- **FLAC comments**

Taken together, these provisions clearly flag for any Insolvency Practitioner that a way to avoid the intricacies and voting complications of the Personal Insolvency Arrangement (see below) is to try to arrange a separate deal with secured creditors outside the terms of the Debt Settlement Arrangement. This is fine in principle, but the more secured debts the debtor has, the less likely such an accommodation might be reached. However, if the debtor for example has only one secured debt such as a mortgage in arrears, it should be possible for the practitioner to seek a substantial rescheduling of the mortgage payment for the duration of the Debt Settlement Arrangement, to free up some income for distribution to unsecured creditors. At the conclusion of the Debt Settlement Arrangement, with remaining unsecured debt written off, the debtor may be in a position to commit to resuming payment of the mortgage in full or some further rescheduled version of mortgage.

This could work in some situations. However, there are, as ever, some obstacles. First, if other creditors have judgments registered as judgment mortgages against the mortgaged property or other secured debts, it is unlikely to get traction. Second, there is absolutely no obligation on the mortgage lender in the scenario set out to accommodate the debtor and even if it does, there is no obligation on the unsecured creditors to accept the proposal. Thus, although the intention of the drafters in this regard is reasonably clear in terms of protecting family homes, the success of what might be termed 'PIA-lite' stands or falls on the decision of creditors.

3.9 The length of the repayment period and minimum income

The Debt Settlement Arrangement is primarily modelled on a UK procedure first introduced under the Insolvency Act 1986 – the Individual Voluntary Arrangement (IVA). The maximum length of the envisaged repayment period is similar, five years for the Debt Settlement Arrangement with a possible 12 month extension and 5 years for an IVA. Both systems involve a private trustee/practitioner proposing an arrangement between the debtor and his or her creditors for the (partial) repayment of debt over a fixed period, with the prospect of a write-off at the conclusion of that period. Both involve periodic reviews of the applicant's financial circumstances and both are an alternative to bankruptcy with less serious present and long term consequences.

However, it is important to note that the IVA system in the UK has not been an unqualified success. For example, from 1990 to 2007, an approximate average of 30% of IVA's terminated without being completed each year.[3] Detailed research data breaking down the reasons for such failure does not appear to be available but it is speculated that a combination of factors are at play. These include unsustainable repayment proposals, poor regulation of and poor quality of insolvency practitioners (some of whom request up-front payments) and persistent economic distress for applicants. It is also a factor that the length of these arrangements can be very demoralising from the debtor's perspective

[3] Figures from the UK Insolvency Service, May 2010.

and human nature being what it is, there are times when the debtor is tempted to take time out, in addition to those times when additional expenses aggregate for unforeseen reasons and must be met.

- **FLAC comments**

In short, though issues of so called moral hazard are important public policy considerations when designing a personal insolvency scheme, too much rigidity and inflexibility risks compromising the effectiveness of the legislation. Quite apart from the ever present issue of creditor veto, two aspects of the Debt Settlement Arrangement (and indeed Personal Insolvency Arrangement) options under the legislation come under sharp focus – the length of the repayment plan and the income the household is entitled to retain during this period. At 5/6 years, the Debt Settlement Arrangement is too long and 2/3 years longer than the basic automatic discharge period from bankruptcy.

In addition, S.60 (2) (f) provides that a Debt Settlement Arrangement '*shall not contain any terms which would require the debtor to make payments of such an amount that the debtor would not have sufficient income to maintain a reasonable standard of living for the debtor and his or her dependants'.* S.59 (4) in turn allows a practitioner to have regard *'to any guidelines on reasonable expenditure and essential income for debtors published by the Insolvency Service'.*
The establishment of such guidelines must be an absolute priority for the Insolvency Service. Indeed, the primary guidelines should be contained in the legislation now under review.

It is submitted that there is a close correlation between the failure of repayment plans and the length of the repayment period coupled with harsh minimum income guidelines. The longer the period of payment and the harsher the treatment on income, the greater the risk of the plan failing. In this regard, we reiterate that this is no normal time to be introducing personal insolvency legislation. Thus, FLAC believes that it must be clearly understood that many insolvent households have little payment capacity but still need relief; they still have to provide for the basics of life and have some margin of comfort during the debt settlement period. However, it is far from clear that creditors will bear this in mind when considering proposals.

The work of the Vincentian Partnership for Social Justice on Minimum Income Standards in Ireland should act as a benchmark to guide deliberations in this area. European and international experience would suggest that this question is absolutely critical not only to the fairness but also to the effectiveness of personal insolvency legislation, particularly where lengthy periods of repayment are provided for, such as in this Bill.

3.10 Where a Debt Settlement Arrangement fails

- **FLAC comments**

Once a failure occurs, the debtor and his or her dependants - and society in general - risk greater perils and costs as uncertainty replaces a formal system. **It is FLAC's view that the Bill as presently outlined gives little or no thought to what will happen to the debtor whose application is rejected.** It would seem that there are two options at this point for the debtor – first, do nothing and see what happens – an ongoing stressful situation for the debtor and hardly acceptable, second, petition for his or her bankruptcy, a daunting prospect for the debtor likely to face significant costs and without access to ongoing legal advice.

3.11 Preparation for the creditors meeting

Further detailed obligations are imposed on the practitioner in preparation for the creditor's meeting. Some of these involve a degree of assessment that is very onerous. For example, under S.65 (1) (d), a practitioner must prepare a report that must describe:

- the outcome for creditors;
- having regard to the financial circumstances of the debtor, whether the proposed Debt Settlement Arrangement represents a fair outcome for creditors;
- how that outcome may be better than the estimated financial outcome for creditors if the debtor were to be adjudicated a bankrupt;
- whether the debtor is reasonably likely to able to comply with the terms of the Debt Settlement Arrangement; and
- that the proposal is an acceptable alternative to bankruptcy for the debtor.

- **FLAC comments**

Much will depend on how vigorously these criteria are policed, but taken literally, the practitioner will need a crystal ball to properly fulfil these criteria. If they are not to be taken literally, why put them in the Bill at all**? It is arguable that this fussiness is not necessary and the overly bureaucratic approach will likely cloud rather than clarify issues.** Occasionally, some of these requirements seem to lack common sense – for example, the practitioner must describe whether the debtor is reasonably likely to able to comply with the terms of the Debt Settlement Arrangement. Why bother making the proposal at all if compliance is not reasonably likely?

3.12 Creditor appeals

Under S.84 of the Bill, **even where a creditor's meeting has voted in favour of the proposed Arrangement**, a creditor may challenge the grant of a Debt Settlement Arrangement in Court on a wide array of grounds, including that the Arrangement 'unfairly prejudices the interests of a creditor'. **A debtor has no right of appeal of any kind under the Debt Settlement Arrangement chapter.**

3.13 Termination of Debt Settlement Arrangements

A practitioner may call a creditor's meeting under the terms of S.76 at which the Debt Settlement Arrangement may be varied, according to the same 65% voting threshold set out in S.67 that applied to the original proposal. Under the terms of S.77, a creditor's meeting called by the practitioner or any given creditor may vote (again with a 65% threshold) to bring the Debt Settlement Arrangement to an end either because of incapacity to service the agreement or where the debtor participated in the process knowing he or she did not fulfil the eligibility criteria. S.78 in turn allows the Court, on the application of the practitioner or any given creditor, to terminate a Debt Settlement Arrangement on any one of a number of specified grounds.

One of these is that the debtor is in arrears with his or her payments for a period of not less than three months. A debtor is considered to be in such arrears where at the beginning of the three-month period before the application to the court is made, any payment became due and was not paid during the three months that followed. This would appear to mean, for example, that where payments are made monthly to the practitioner to distribute to creditors and a payment is missed and not recovered within the three months that follows; a creditor may apply to end the Debt Settlement Arrangement even if subsequent monthly payments are made. Where the Arrangementis terminated, the debtor shall be deemed to have committed an act of bankruptcy.

- **FLAC comments**

The inflexibility of this and other events that might be used to end the Debt Settlement Arrangement betrays a lack of understanding of the difficulties and vagaries of expenditure for households trying to make ends meet on a limited budget whilst simultaneously trying to stick to the repayment plan over a substantial period of time. Of course the ourt does not have to grant the application, but if it is brought, who will defend the debtor's position and ensure that his or her voice is heard, so that the Debt Settlement Arrangement (hard won with a lot of time and effort on the part of many) is not prematurely ended?

4. Personal Insolvency Arrangements

4.1 Introduction

The Personal Insolvency Arrangement has been described as the most innovative part of the Bill, possibly because it purports to deal with both secured as well as unsecured debts. It is now clear that it is not as novel as it initially appeared to be. FLAC had already flagged the Norwegian and Greek examples of incorporating housing debt into personal insolvency arrangements after the scheme was published. The FLAC conference held on 19 April 2012 provided further detail of these examples.[4] Creditor approval is required and again there is no mechanism for appealing or reviewing refusals or any power for a court to impose step in and impose a settlement, in contrast with the Norwegian system (and other Scandinavian models).

In principle, as with the Debt Settlement Arrangement application, the practitioner must prioritise maintaining the debtor's interest in the family home when making a proposal for a Personal Insolvency Arrangement, unless again it is not practicable or sustainable to do so. However, this is dependent on creditors accepting proposals that are hardly likely to be to their taste. Thus, restructuring of secured debt is envisaged, particularly in S.98 (3) which suggests the possibility of a secured creditor voluntarily agreeing to a reduction in the principal sum due in respect of a secured debt. In turn, S.97 (6) suggests that the terms of a secured debt may be varied in a number of different ways, that basically square up with the alternative repayment arrangements set out in the Code of Conduct on Mortgage Arrears and the so called 'advance forbearance' measures that may soon be coming on stream through the Central Bank's Mortgage Arrears Resolution Strategy (MARS) (of which little has been divulged publicly so far).

Indeed, the recent announcement (6[t] September 2012) by Minster for Social Protection, Joan Burton T.D., that independent financial advice (in the shape of limited access to financial advice accountants) will be available to mortgage holders in arrears who are being offered long-term resolution proposals by their lenders may have slightly jumped the gun on what is intended in the Mortgage Arrears Resolution Strategy, as the Code of Conduct on Mortgage Arrears certainly contains no reference to long term forbearance measures. **Either way, whether in the Code of Conduct, the Mortgage Arrears Resolution Strategy or the Personal Insolvency Arrangement, there is no obligation on the lender at present to propose a particular solution to resolve the mortgage arrears problem or to accept a particular proposal from a practitioner on the debtor's' behalf.** It is also apparent that the Mortgage Arrears Resolution Strategy intends to tackle unsustainable mortgages and as a result, it is likely that repossession rates will increase.

4.2 General Conditions

This submission has already highlighted FLAC's concerns about ee limitation on access to Debt Settlement Arrangements for debtors who have debts in common but also individual debts to which both are not party. In FLAC's view, the same arguments apply to a Personal Insolvency Arrangement

[4] See www.flac.ie for further information as well as the dedicated microsite at http://flacdebtconference2012.wordpress.com/.

proposal. At least, S.85 (4) seems to recognise the desirability of a joint proposal mechanism for households. However, it proposes a separate PIA for each party to be administered by the same practitioner and looks cumbersome and unwieldy. **It may be that there is a specific legal obstacle to a joint proposal but every effort should be made to find a way around this so that the finances of an insolvent household can be dealt with in one application**

We have also noted above FLAC's concerns around the insolvency test in relation to Debt Settlement Arrangements. The same arguments are relevant to Personal Insolvency Arrangements in our view.

Uniquely in the case of Personal Insolvency Arrangements, the debtor must make a statutory declaration that he or she has co-operated for at least six months with secured creditors with regards to mortgage arrears on the principal private residence, with any process approved by the Central Bank (such as the Code of Conduct/Mortgage Arrears Resolution Process) but that no alternative repayment arrangement has been agreed.. **Why then must a debtor now show 12 months such co-operation in order to apply for Mortgage Interest Supplement)?**

4.3 Complexity of the process

If anything the procedures envisaged under the Bill for the Personal Insolvency Arrangementare even more labyrinthine than with the Debt Settlement Arrangement. Again, there are a substantial number of hurdles to be cleared by the debtor and the Personal Insolvency Practitioner before a proposal can even be made to the debtor's creditors. Broadly, these include:

- The debtor must locate and instruct a practitioner (to whom upfront fees may have to be paid – see above in this regard);
- The practitioner must take the debtor through the processes of Chapter Two of the Bill relating to the assessment of his or her finances, the completion of a Prescribed Financial Statement and detailed consideration of available and appropriate options;
- The practitioner must state on the basis of this assessment that there is no likelihood of the debtor becoming solvent within five years;
- The practitioner intending to apply for a Personal Insolvency Arrangement must first apply to the Insolvency Service for the grant of an protective certificate and must submit a plethora of documentation;
- If granted, the relevant court (generally Circuit Court) must then review and approve that certificate;
- Any creditor may appeal against the granting of the certificate by the court;
- If the protective certificate is ultimately granted, the Personal Insolvency Practitioner must notify creditors and take their submissions about how they wish their debts to be treated in any proposal;
- Secured creditors must estimate the value of their security.

Only then can the practitioner call a creditor's meeting at which the proposal for a Personal Insolvency Arrangement can be considered and voted upon. At this point there is no certainty whatsoever (apart from the practitioner's experience and whatever soundings are made with what may be a diverse collection of creditors) that the proposal stands a chance of succeeding. The debtor will have incurred costs and will reasonably have built up some expectation that an accommodation will be reached by this stage. Considerable work will have been done to prepare the proposal, which in turn may have been hampered by a number of structural obstacles in this part of the legislation. These include:

- That a large number of potential debts are excluded from a Personal Insolvency Arrangement unless the relevant creditor agrees otherwise, such as Revenue debts, local authority charges, maintenance, fines, service charges;
- That the proposal must make provision for the costs, outlays and outgoing administration costs of the practitioner and this money will presumably have to come from payments otherwise available to creditors.

Three voting thresholds must then be met:

- at least 50% of secured creditors present and voting at the creditor's meeting must accept the proposal,
- at least 50% of unsecured creditors must accept it, and
- a cumulative total of 65% of creditors generally must accept it.

Even where the proposal gets the requisite approval, any individual creditor may still appeal against the coming into force of the Personal Insolvency Arrangement on the grounds that that creditor is unfairly prejudiced by it.

4.4 The practitioner's view

One litmus test for the potential effectiveness of any scheme of this nature is the view of the practitioners likely to operate it. FLAC's initial discussions with some accountants and solicitors well versed in corporate insolvency processes do not bode well. These practitioners have also emphasised that the Revenue Commissioners, amongst others, still have preferential debt status and can therefore be excluded from any arrangements. This may, in their view, make it very difficult for viable arrangements to be put in place. The legislation has been generally described as overly complex and broadly unworkable, in that it lacks the necessary elements of certainty that a practitioner would need to be able to properly advise a client as to the likely outcome. These practitioners highlight by way of contrast the availability of a clean and evidently quick bankruptcy option in Northern Ireland or the UK ,with guidance available to navigate the debtor through the process, accessible by a relatively simple change of residence and 'centre of interest' for a comparatively limited period.

4.5 Judgment Mortgages

As a general observation, it is suggested that the more complex the applicant's financial situation, the more difficult it may be to navigate through the Personal Insolvency Arrangement. The definition of secured debt does not help the situation. For example, subject to a very limited exception, it includes judgment mortgages as secured debts, bringing these debts into the secured creditor side of the Personal Insolvency Arrangement equation. Conceivably, a common application for a Personal Insolvency Arrangement might comprise the following secured debts:

- A mortgage in arrears on a principal private residence;
- A top-up loan on the original mortgage;
- A buy-to-let mortgage in arrears;
- Two judgment mortgages registered against the principal private residence.

The applicant for the Personal Insolvency Arrangement may also have significant personal unsecured debts made up of personal loans, credit card agreements and Hire Purchase finance on a motor vehicle or vehicles. Business-related debts might include monies owed for goods or services and leasing equipment. There may be other debts such as taxes owed to the Revenue Commissioners, rates etc that may not be included in the arrangement unless the relevant creditor agrees.

Where the debtor now has a limited income and/or earning capacity, it may prove very difficult to make a proposal that will even come close to meeting the expectations of secured creditors, let alone the perhaps more limited expectations of unsecured ones.

In the light of these observations, the current proposed structure may fail to attract sufficiently qualified Personal Insolvency Practitioners and may make the cost of arrangements prohibitive. Debtors whose proposals are rejected will either file for bankruptcy or do nothing. This may lead on the one hand to a spike in such applications for bankruptcy. On the other hand, it may lead to stalemate and huge anxiety as households find that the legislation designed to resolve their problems has in fact worsened them and there is now nowhere to turn, having tried all avenues to resolve their situation. Alternatively, debtors may be forced into Arrangements that will break down in time because they are unsustainable and punitive, leading to further suffering for the household concerned. Finally, where mortgage debt is part of the equation, rates of repossession will increase as bankruptcy will automatically lead to the loss of the family home.

5. Reform of the Bankruptcy Act 1988

5.1 Reduction of the discharge period in bankruptcy

There has been concern expressed about an obvious disparity between the duration of the four different options set out on the Bill. As noted above, the 'supervision period' for a Debt Relief Notice will last for three years. It is no coincidence that this accords with the new proposed automatic discharge period from bankruptcy and it would seem that the Debt Relief Notice therefore is intended to be bankruptcy for the poor 'no income, no assets' debtor. After that though, it has been asked why a debtor would choose the 5/6 year duration of a Debt Settlement Arrangement or 6/7 years in PIA when discharge from bankruptcy can be automatic after three years. Potential cost may be one reason, the stigma of bankruptcy another although it is questionable whether there will be much difference between bankruptcy and a Debt Settlement Arrangement / Personal Insolvency Arrangement in this regard. A further reason may be the requirement in the Bill for any debtor petitioning for his or her bankruptcy to swear that he or she has made reasonable efforts to reach an appropriate arrangement such as a Debt Settlement Arrangement or Personal Insolvency Arrangement to the extent that his or her circumstances permit.

5.2 Bankruptcy Payments Orders

A further compelling reason why a debtor might choose a Debt Settlement Arrangement or Personal Insolvency Arrangement is to be found in S.143 of the Bill (amending S.85 of the Bankruptcy Act 1988). Although the so-called automatic discharge period under the bankruptcy legislation is to be reduced to three years, this section provides for the making of a 'Bankruptcy Payments Order' which may last for a period of no more than five years. This order may be applied for at any time during the bankruptcy period and will continue after discharge, so that in effect if applied for towards the end of that period could lead to the debtor making payments for a total of almost eight years. Such an application may be made to the High Court by the Official Assignee in bankruptcy (an officer of the High Court), by a trustee-in-bankruptcy or by a creditor and will involve payments being made to the Official Assignee from the bankrupt's income or other assets. It is the payments from income that are of particular concern to FLAC and a situation may be envisaged where the bankrupt has little of value in terms of assets, so that their income from a PAYE employment is effectively targeted well beyond the 'automatic' discharge period. The section does not set down any parameters that might be used to assess in what circumstances an order should be granted and this should be remedied. We also believe that the length of the order is too long and should be reduced to maximum of three years.

5.3 Minimum Income and regulatory issues

In conclusion, FLAC notes that the question of minimum income has effectively been 'parked' in the Bill with a general commitment given in relation to the Debt Settlement Arrangement / Personal Insolvency Arrangement options that the relevant debtor must be left with sufficient income to maintain a reasonable standard of living for him/her and any dependants, following payments to creditors. The Insolvency Service is empowered to publish guidelines/Codes of Practice in this regard**. Given that this is so important, this is an issue that should be addressed in the primary legislation with the broad**

categories at least fleshed out there. Detailed guidelines should be within this primary legislative framework. As already stated in FLAC's submission on the draft scheme, the work of the Vincentian Partnership for Social Justice on Minimum Income Standards in Ireland should act as a benchmark to guide deliberations in this area. European and international experience would suggest that this question is absolutely critical not only to the fairness but also to the effectiveness of personal insolvency legislation, particularly where lengthy periods of repayment are provided for, such as in this Bill.

In turn, the licensing and regulation of Personal Insolvency Practitioners is also left to one side. It is notable that the Insolvency Service is not yet specifically delegated to carry out this task, with Part 5 of the Bill merely providing that the Minister may delegate a person to regulate Personal Insolvency Practitioners. Again, our view is that this is work which must begin now, as potentially thousands of indebted people in Ireland await personal insolvency options. It goes without saying that the criteria for both the granting and the continuance of such authorisations must set a high standard of probity, conduct and competence, especially given the vulnerability of over-indebted people and their dependants. The State should also use this opportunity to finally regulate both debt management and debt collection companies.

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