

MABS National Development CLG and Citizens Information Board April
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A submission to the Insolvency Service of Ireland on amendments to the Personal Insolvency Act, 2012

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Introduction

The Money Advice and Budgeting Service (MABS) has been processing Debt Relief Notices in accordance with the procedures set down in the Personal Insolvency Act 2012, for 3 years. In this time, we have assessed the eligibility of a substantial number of debtors only to find that many do not wish to proceed on the basis of the stringency of the eligibility criteria as currently enumerated in section 26 or due to the onerous nature of the process.

MABS National Development Limited (MABS ndl) and the Citizens Information Board (CIB) have supported MABS companies throughout this process and, based on data gathered from these companies, wish to make the following submission to the ISI's Consultative Forum ('the Forum') in their consideration of the Personal Insolvency Act.

In this submission our primary focus is on those elements of the legislation that relate to the DRN process as we believe that others submitting to the Forum's review process will focus on PIA and DSA. Notwithstanding our primary focus on DRN's for the purpose of this submission, we would hope also to actively contribute views on other aspects of the legislation when the ISI has collated the submissions of all parties who are contributing to the review.

Our primary concern is that the legislation begins to work more effectively for, and in a way that affords greater equity to, low income borrowers and to this end we have three primary concerns that relate to the legislation in an overarching way:

- 1) No one should be deemed too poor to avail of insolvency i.e. people who live below the RLE should not be excluded from insolvency.
- 2) Insolvency must facilitate write-off of mortgage debt
- 3) The concept of excludable debt means that some low income borrowers are not in fact returned to solvency by virtue of an insolvency arrangement and the relevant provisions need to be revisited.

Supervision Period Reduction to 1 year

The Personal Insolvency (Amendment) Act, 2015 reduced the term of Bankruptcy, from three years to one year. As the rationale for including a three year supervision period for Debt Relief Notices was to tie in with the bankruptcy period, it should now be possible to propose a similar reduction to the Debt Relief Notice supervision period to one year. This would align both bankruptcy and Debt Relief Notices with similar schemes in other jurisdictions such as the UK and Northern Ireland.

The reduction in the three year supervision period would have the same beneficial impacts for eligible debtors for a DRN as for those eligible for bankruptcy. Such a reduction would also obviously reduce the cost to the State (primarily the ISI) of work associated with the 3 year supervision period.

Submission: To reduce the Supervision Period for a Debt Relief Notice from three years to one year.

Eligibility

Excludable Debts

Our view is that the concept of excludable debt as it relates to debts to the State is inconsistent with the principal aim of the legislation and should be removed. Where such debts are not included in an arrangement many low income borrowers are not returned to solvency through the DRN process.

Rent arrears, whether owed to a private landlord or local authority / housing agency, are currently a qualifying debt that must be included in the application for a Debt Relief Notice. As a consequence, many debtors who have managed to secure affordable accommodation but who have fallen behind in payments to their landlords are discouraged from applying for a Debt Relief Notice due to fear of eviction or other consequences (e.g. that repairs to the property would not be carried out in a timely manner, that they may be refused access to waiting lists in other local authority areas) that would have a negative impact on their reasonable standard of living.

If rent arrears owing to a debtor's current landlord could be included in the definition of "excludable debt", the debtor would have discretion to include this debt in the Debt Relief Notice application having been advised of the possible consequences of doing so by the Approved Intermediary.

Submission: To remove debts owed or payable to the State from the definition of excludable debt' and to include rent arrears to a debtor's current landlord in the definition of "excludable debt".

Assets

Vehicle – Value Threshold

The majority of Debt Relief Notices have been granted to debtors living in Dublin, Leinster and the South-East of the country, areas with well-established transport links. There is, however, a cohort of low income, low asset debtors in other counties who are currently ineligible due to the need to have a reliable vehicle. This need is particularly prevalent where public transport and road networks are not reliable. The threshold of €2,000 for a vehicle in these areas is too low for sustained use and the cost of repair to such a vehicle would be prohibitive. Research by the website motorcheck.ie, conducted in 2014¹, estimated that the value of used cars has increased by as much as 32% in the previous four years, reporting that the buyer of a three year old car in 2013 would pay an average of €2,135 more than the buyer of a three year old car in 2010. Accordingly, we submit that an increase in the value threshold for an exempted vehicle be increased from €2,000 to €6,000 to allow those debtors in remote areas to avail of the Debt Relief Notice process.

Submission: To increase the vehicle value threshold from €2,000 to €6,000.

Vehicle – Modified to take account of a disability

The Act further provides that a vehicle of any value may be treated as an exempted asset where it has been modified to take account of a disability of the debtor's or of their dependent(s). While this

¹ <http://www.motorcheck.ie/blog/inflation-in-the-used-car-market/>

is a welcome carve-out from the general vehicular threshold referenced above, it only takes account of disabilities requiring physical adaptation of the motor vehicle, and does not provide for other types of disability. This issue arose in a specific case in November 2014 whereby the debtor had an illness which meant that availing of public transport would result in a serious risk to his health. He purchased a car with the assistance of a specific purpose grant from the HSE and the car he chose was that recommended by the association for the illness concerned. Unfortunately, while there was an established medical need for the vehicle, the vehicle was not modified to take account of the illness concerned (as this was not required) and the Court was unable to grant the Debt Relief Notice due to the prescriptive nature of section 26(6). Accordingly, we submit that the subsection concerned be amended to include vehicles that are either modified to take account of a disability of the debtor's or of their dependent(s) or are required on the basis of a medical need.

Submission: To amend section 26(6) to include vehicles required on the basis of a medical need of the debtor or his/her dependents in the list of exempted vehicles with no upper value threshold.

Insolvency

MABS has almost 25 years' experience of making formal and informal restructuring arrangements with creditors on behalf of low income clients. In many cases, these restructures involve nominal repayment amounts that reflect the client's repayment capacity. While such nominal restructures enable the client to repay the debt according to their means without fear of further action being initiated by the creditor.

The definition of insolvent² does not accurately capture these types of arrangements as, while the debtor is *technically* repaying the debt as it now falls due, the nominal nature of the repayment requires an extension to the term of the agreement far in excess of what was originally envisaged when the parties first contracted.

Submission: To amend the definition of insolvent to exclude payments to which nominal restructures apply.

Removal of Preference as an Eligibility Criterion for DRN

The Debt Relief Notice is the only remedy available pursuant to the Act for which preference is an eligibility criterion. In both the Debt Settlement Arrangement and Personal Insolvency Arrangement processes it is a ground for a creditor objection if made within 3 years of the application. Considering that the demographic of debtors applying for a Debt Relief Notice is likely to be at a greater risk of poverty, eviction and loss of basic utilities than that availing of the other insolvency options, with any preferential payments likely to be considerably lower, it is anomalous that such preferences have far greater consequences in terms of access to insolvency.

Furthermore, where a preference is given to a creditor for the prevention of homelessness, essential utilities or loss of liberty, these payments should be exempted on the grounds that they were made

² "in relation to a debtor, shall be construed as meaning that the debtor is unable to pay his or her debts as they fall due"

in protection of the debtors reasonable standard of living as provided for in section 23 of the Act, and section 23 would take precedence over section 26 in this regard.

- Submission:**
- 1. To remove preference as an eligibility criterion and place it instead as a ground for a creditor objection; and**
 - 2. To exclude payments made in protection of the debtor’s reasonable standard of living from the definition of preference.**

Debtor’s Obligations – Increase in Income

Section 36(3) provides for an obligation on the debtor whose income increases during the supervision period by €400 or more per month to surrender 50% of such increase to the Insolvency Service for distribution to the specified creditors in accordance with section 38. Section 36(4) defines “income” as:

“...his or her income as stated in the documents provided, or documents submitted by him or her, or on his or her behalf, under section 29, less the following deductions:

- (a) Income tax;*
- (b) Social insurance contributions;*
- (c) Payments made by him or her in respect of excluded debts;*
- (d) Payments made by him or her in respect of excludable debts that are not permitted debts;*
- (e) Such other levies and charges on the specified debtor’s income as may be prescribed.”*

In a recent case, a debtor applied for and was awarded Family Income Supplement (FIS) during the supervision period. As FIS is an income under the Act and the increase caused by the FIS award was in excess of €400 per month, the debtor advised the Insolvency Service of the increase and surrendered 50% of same for distribution to his creditors. This is completely at odds with the spirit of the Act and the rationale for awarding FIS which, pursuant to section 228 of the Social Welfare Consolidation Act, 2005 is granted to families whose income falls below a certain monetary threshold deemed suitable for families of that composition.

The definition of income detailed in section 36(4) of the Act, as stated above, further obliges debtors who are currently repaying excluded or excludable (non-permitted) debts at a rate of €400 or more per month to surrender a sum on the discharge of that excluded or excludable (non-permitted) debt.

For example – Debtor on basic social welfare payment with maintenance arrears payable at €400 per month:

	Income as per DRN application	Income post-payment of Excluded Debt
Income	814.67	814.67
Less income tax	0	0
Less Social Insurance Contribution	0	0
Less payments to Excluded Debts	400.00	0
Less payments to Excludable, non-permitted, debts	0	0

Less levies	0	0
Income as per section 37(4)	414.67	814.67

Accordingly, while the debtor's actual income source has not increased, his income as calculated in accordance with section 37(4) has increased by €400 and, accordingly, he will be obliged to surrender €200 to the ISI for distribution to his creditors.

Furthermore, the above calculation takes no account of the Reasonable Living Expenses (RLE) provided by section 23 and published by the Insolvency Service. In the above example, where the debtor is a single person living alone with no car, his RLE set costs (excluding accommodation or special circumstances) are €938.14 – over €500 more than the income set out above. In no other arrangement provided by the Act is a debtor required to live on less than the Reasonable Living Expenses provided by the ISI and, accordingly, we submit that section 36 be amended to provide that where the debtor's income as calculated pursuant to section 36(4) is less than the debtor's Reasonable Living Expenses at the time of that calculation, the requirement to surrender 50% of any increase shall not apply, and that exemptions be made for those in receipt of Supplementary Welfare Allowances.

Under a voluntary arrangement the same debtor would advise their creditors of their change in circumstances – however if they remained so significantly under the relevant RLE - their money advisor in general, while always encouraging clients to pay what they can afford, would not advise that the available money be allocated to their unsecured creditors, nor in the main, would their unsecured creditors seek additional payments on this basis. In this regard a voluntary arrangement will remain more attractive to many debtors.

Submission:

- 1. The calculation of income for the purpose of section 36 to include Reasonable Living Expenses;**
- 2. The obligation to surrender 50% of the increase in income only apply where the debtor's income is above the amount of Reasonable Living Expenses for his / her circumstances;**
- 3. Supplementary Welfare Allowances not be considered reckonable income for the purpose of the calculation.**

Debt Relief Notice Process

The experience of MABS' Approved Intermediaries indicates that much of the time is spent by the debtor gathering verifying documentation for debts and expenditure items and the AI verifying the legal title to the creditor, where necessary. The requirement for the Prescribed Financial Statement to be true and accurate necessitates the collation of up to date verifying documentation in the absence of a comprehensive credit register, such as is used in the UK.

Apart from the requirement to have recourse to the courts in every Debt Relief Notice application (a constitutional requirement for the protection of the property rights of the creditor), the main differences in how a DRN and DRO application is processed are:

- a) the ability of an approved intermediary in the UK to verify the information provided to them in a debtor's statement with reference to a comprehensive online credit database. The ICB

is not fit for this purpose as it is incomplete and discretionary for those members who are signed up to it; and

- b) the information verification and application are completed in one sitting with the DRO process. Again, this is not available to the Irish process, not only due to the legislation, but also due to the need to properly verify the debts being put forward.

The unforeseen consequences of the current drafting of the legislation mean that where the verification process has not yielded a response from the specified creditors, if the debtor presents a lower amount in the Prescribed Financial Statement than is actually outstanding in respect of a specified debt, the creditor can continue to enforce the balance of that debt notwithstanding the issue of a Debt Relief Notice. This is clearly contrary to the spirit and intention of the legislation.

At the request of the ISI, MABS has previously submitted suggested amendments to section 27 and section 29 which would streamline the process and we attach same as an appendix hereto by way of formal submission.

Appendix – Proposed Amendments to Section 27 and Section 29 of the Personal Insolvency Act, 2012

Initiation of Debt

Relief Notice process

27. (1) A debtor who wishes to become a specified debtor shall request a meeting with an approved intermediary who shall provide the debtor with the following information and advice—

- (a) the eligibility criteria under *section 26*,
- (b) the general effect of making an application under *section 29*, and the consequences, including any adverse consequences, for the debtor in the event of his or her becoming a specified debtor,
- (b) the other option or options (if any) available to him or her for addressing his or her financial difficulties including, in particular, becoming party to a Debt Settlement Arrangement, Personal Insolvency Arrangement or bankruptcy, and the general effect of choosing one or more than one of those options,
- (c) the fee (if any) that is prescribed for making an application under *section 29*.

(2) Where the debtor, following the meeting referred to in *subsection (1)*, wishes to apply for a Debt Relief Notice, he or she shall confirm that fact in writing to the approved intermediary and submit to an approved intermediary -

- (a) a written statement disclosing all of the debtor's financial affairs, which statement shall include such information as may be prescribed in relation to—
 - (i) his or her creditors,
 - (ii) his or her debts and other liabilities,
 - (iii) his or her assets, and
 - (iv) the efforts made by him or her to reach an alternative repayment arrangement with his or her creditors,
- (b) information that fully discloses his or her financial affairs to the approved intermediary,
- (c) his or her written consent to the—
 - (i) making by the approved intermediary of an enquiry under *subsection (3)*, and
 - (ii) disclosure by the approved intermediary of personal data of the debtor, to the extent necessary for such an enquiry, and
- (d) such other information as may be prescribed.

(3) The approved intermediary, on receipt of the information referred to in *subsection (2)*, shall examine that information and, having regard to the obligation of the debtor under *subsections (7) and (8)*, shall –

- (a) determine whether the debtor, in the opinion of the approved intermediary, satisfies the eligibility criteria specified in *section 26(2)*, and
- (b) if the approved intermediary is of such opinion referred to in *section 27(3)(a)*, for the purposes of *subsections (5) and (6)*, make such enquiries as he or she considers appropriate to verify the value of a debt or other liability disclosed by the debtor under this section.

Any enquiries made by the approved intermediary pursuant to this section shall not be deemed to reactivate any debt for the purpose of the Statute of Limitations 1957.

(4) Where a creditor who receives an enquiry from the approved intermediary pursuant to this section does not furnish the information requested within 21 days of the making of the enquiry, the approved intermediary shall be entitled for the purposes of subsection (5) to presume that the value of the debt or liability concerned is that disclosed by the debtor and the creditor shall not be entitled to pursue any residual balance should the amount used by the approved intermediary in verifying the value of the debt or other liability in accordance with subsection (3) be less than the actual amount outstanding in respect of that debt or other liability provided that any such residual debt does not increase the total amount of debt included in the Debt Relief Notice application beyond the maximum amount provided in section 26(2)(a).

(5) On the expiry of the 21 days referred to in subsection (4), the approved intermediary shall complete an application for a Debt Relief Notice in the prescribed form, such application to include a Prescribed Financial Statement completed by the approved intermediary on behalf of the debtor together with a statement to the effect that, in the opinion of the approved intermediary on the basis of the information provided by the debtor –

- (a) the information contained in the debtor's Prescribed Financial Statement is true and accurate in all material respects, and
- (b) the debtor satisfies the eligibility criteria specified in *section 26(2)*.

(6) On completion by the approved intermediary of the application and Prescribed Financial Statement referred to in subsection (5), the approved intermediary shall furnish to the debtor the completed application form, Prescribed Financial Statement and documentation referred to in *section 29(2)(b) to (h)* for verification and signing by the debtor.

(7) A debtor who participates in the Debt Relief Notice process (including a debtor who becomes a specified debtor), is at all times under an obligation to act in good faith and to co-operate fully in the process.

(8) A person referred to in *subsection (7)*, in his or her dealings with the approved intermediary concerned, shall—

- (a) make full and honest disclosure to that approved intermediary of all of his or her assets, income and liabilities and of all other circumstances that are relevant to that process,
- (b) comply with any reasonable request from the approved intermediary to provide assistance, documents and information, including any debt, tax, employment, business, social welfare or other financial records, necessary for the application of the process to the debtor's case or the performance of the approved intermediary's functions, and
- (c) ensure that, to the best of his or her knowledge, the Prescribed Financial Statement completed under this section is true, accurate and complete.

(9) A debtor to whom subsection (6) refers shall return the application documentation to the approved intermediary no later than 14 days after receipt by the debtor of such documentation.

(10) On receipt by the approved intermediary of the signed documentation referred to in subsection (9) from the debtor, the approved intermediary shall submit the application to the Insolvency Service in accordance with *section 29(2)*.

Creditor consent required for issue of Debt Relief Notice in respect of excludable debt.

28.— (1) A Debt Relief Notice shall be issued in respect of an excludable debt only where the creditor concerned has consented, or is deemed to have consented, in accordance with this section, to the issue of such a Debt Relief Notice.

(2) Where a debtor who wishes an application under *section 29* to be made on his or her behalf wishes the Debt Relief Notice concerned to be issued in respect of an excludable debt, the approved intermediary concerned shall, without delay, notify the creditor concerned of that fact, which notification shall be accompanied by—

(a) such information about the debtor's affairs (including his or her creditors, debts, liabilities, income and assets) as may be prescribed, and

(b) a request in writing that the creditor confirm, in writing, whether or not the creditor consents, for the purposes of this section, to the Debt Relief Notice being issued in respect of the debt.

(3) A creditor shall comply with a request under *subsection (2)(b)* within 21 days of receipt of the notification under that subsection.

(4) Where a creditor does not comply with *subsection (3)*, the creditor shall be deemed to have consented to the issue of a Debt Relief Notice in respect of the debt concerned.

(5) In this Chapter, "permitted debt" means an excludable debt to which *subsection (1)* applies.

Application for Debt Relief Notice.

29.— (1) An application for a Debt Relief Notice may only be made—

(a) on behalf of a debtor who has made the confirmation referred to in *section 27(2)*, and

(b) by an approved intermediary who is satisfied, in relation to that debtor, of the matters referred to in *paragraphs (a) and (b) of section 27(5)*.

(2) An application referred to in *subsection (1)* shall be made to the Insolvency Service, shall be in such form as may be prescribed by the Insolvency Service and shall be accompanied by such fee (if any) as may be prescribed and the following documents—

(a) a copy of the statement made by the approved intermediary under *section 27(5)*;

(b) a document signed by the debtor confirming that he or she satisfies the eligibility criteria specified in *section 26(2)*;

(c) the Prescribed Financial Statement completed under *section 27*, in relation to which the statement referred to in *paragraph (a)* was made, and a statutory declaration made by the debtor confirming that the Prescribed Financial Statement is a complete and accurate statement of the debtor's assets, liabilities, income and expenditure;

(d) a schedule of the creditors of the debtor and the debts concerned, as specified in the Prescribed Financial Statement referred to in *paragraph (c)*, stating in relation to each such creditor—

(i) the amount of each debt due to that creditor,

- (ii) whether the creditor concerned is a secured creditor and, if so, the details of any security held in respect of the debt concerned, and
 - (iii) where the debt is an excludable debt, whether that debt is a permitted debt within the meaning of section 28;
- (e) the debtor's written consent to—
 - (i) the disclosure to the Insolvency Service,
 - (ii) the processing by the Insolvency Service, and
 - (iii) the disclosure by the Insolvency Service to creditors of the debtor concerned, of personal data of that debtor, to the extent necessary in respect of the Debt Relief Notice process;
- (f) the debtor's written consent to the making of any enquiry under *section 30* relating to the debtor by the Insolvency Service;
- (g) a document signed by the debtor stating whether, to the best of his or her knowledge, there is any judgment or court order in force against him or her which relates to a debt which is a qualifying debt;
- (h) such other information about the debtor's affairs (including his or her creditors, debts, liabilities, income and assets) as may be prescribed.

(3) A debtor on whose behalf an application under *subsection (1)* has been made shall notify the approved intermediary concerned as soon as practicable if the debtor becomes aware of—

- (a) any error in, or omission from, the information supplied to the Insolvency Service in, or in support of, the application;
- (b) any material change in his or her circumstances between the application date and the date on which the application is reviewed under *section 31(2)* that would affect the debtor's eligibility for the issue of a Debt Relief Notice.

(4) An approved intermediary who receives information under *subsection (3)* shall, without delay, furnish that information to the Insolvency Service.

(5) An application under this section may be withdrawn by the approved intermediary at any time prior to the issue of a Debt Relief Notice under *section 31*.