Submission on analysing current developments in the resolution of mortgage arrears & related issues and the review of the Personal Insolvency Act 2012 (as amended)

FLAC

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In our work, we identify and make policy proposals on how the law excludes marginalised and disadvantaged people, principally around social welfare law, personal debt & credit law and civil legal aid. We advance the use of law in the public interest and we co-ordinate and support the delivery of basic legal information and advice to the public for free and in confidence.

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Executive Summary

FLAC welcomes the opportunity to make a submission on the review of the personal insolvency legislation at a very difficult time for many over-indebted households in Ireland. Over-indebtedness and debt and credit law generally has been an area of particular focus and concern for FLAC for over two decades. A number of detailed recommendations for law reform over this period have been made by FLAC in a series of reports and submissions.[1] Throughout this time FLAC has also provided specialist legal advice and training to staff of the Money Advice and Budgeting Service.

Almost ten years on from the beginning of the recession, we have yet to resolve our personal debt and insolvency crisis in a fundamental manner. The most critical aspect of that problem is the depth of mortgage arrears on family homes, with almost 33,000 accounts still in arrears for over two years and an average figure of well over €70,000 in arrears per account. Whilst rates of repossession have been low in comparison to the scale of the arrears problem, there is a large number of cases in the system, and many of those have been adjourned several times. To our knowledge there is no publicly accessible running total of repossession cases currently before the Circuit Court available. However, in a 2016 report from the Central Bank to then Minister for Finance, Michael Noonan TD, it was suggested that some 14,000 repossession cases were in the system at the end of Q.2 2016, now one year ago.[2] As an indicative figure, this is very worrying.

There also remains a significant unsecured debt problem that has received far less attention.

It is also widely acknowledged that we are in the grip of a severe housing and homelessness crisis. The prospect of several thousand households having their family home repossessed and flooding into the already crowded accommodation market is alarming. Vulture funds now own a significant number of impaired mortgages and it is feared that domestic lenders will continue to offload their more problematic accounts to them. There is a concern that these funds will not be slow to seek repossessions not just of family homes but also of buy-to-lets, many occupied by tenants caught in the crossfire between landlord and lender.

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[1] These include 'An End based on Means' (2003) report on consumer debt available at https://www.flac.ie/publications/an-end-based-on-means/, 'To No One's Credit' (2009) report on debtor's experience of instalment and committal order system, available at https://www.flac.ie/publications/to-no-ones-credit/, Nine key principles to overcome debt (Oct 2011) available at https://www.flac.ie/publications/nine-key-principles-to-overcome-debt/, Essential principles of debt settlement schemes across Europe (Jan 2012) available at https://www.flac.ie/publications/principles-of-debt-settlement-schemes-in-europe/, Submission on Personal Insolvency Bill (Nov 2012) available at https://www.flac.ie/publications/submission-personal-insolvency-bill-2012/, Submission on review of CCMA (April 2013) available at https://www.flac.ie/publications/submission-review-of-code-of-conduct-on-mortgage-a/, FLAC proposal for a Mortgage Arrears Advice Scheme (June 2013) available at https://www.flac.ie/publications/proposal-mortgage-arrears-advice-scheme/, Submission on Personal Insolvency Bill 2015, (July 2015) available at https://www.flac.ie/publications/submission-personal-insolvency-bill-2015/

[2] *Report On Mortgage Arrears*, Central Bank 2016.

Meanwhile the Personal Insolvency Act 2012,[3] only introduced some five years after the recession began to take hold, has failed to deliver anything like the number of resolutions required. Its early years saw a slow trickle of approved arrangements that were dwarfed by the extent of the problem it was designed to remedy. It is only following significant amendments made to both the insolvency and bankruptcy regimes at the beginning of 2016 that some progress is now starting to be made in terms of the numbers of resolutions, particularly in mortgage arrears cases.[4]

A further key feature of the government's plan to alleviate the arrears and accommodation crisis - the mortgage-to-rent scheme - has thus far failed to achieve its intended aim, with only a very small number of borrowers making the transition to become tenants in their own homes.[5] All this comes at a time of immense pressure on over-indebted households and it is too late for many.

This review of the Personal Insolvency Act 2012 comes then at a particularly critical time in the evolution of the personal debt problem in this country. Although this submission is intended to serve as FLAC's response to the planned review, it is also our belief that a much wider review is required. In that context, this submission also considers the broader question of the overall policy response to the personal debt problem, with a particular emphasis on mortgage arrears.

Explanation of contents

Section 1 suggests that the review of the legislation should look at best practice in other jurisdictions, not just in the UK but also across Europe and that a wider assessment of the other elements that make up the personal insolvency, mortgage arrears and wider debt enforcement infrastructure in Ireland should also be undertaken. It echoes the recent view articulated by the High Court that orderly, managed and timely write-down of debt with inevitable loss to creditors, both secured and unsecured, is inevitable if debt is to be rationally resolved. It points out that the legislation has so far failed to deliver on this basic remit but that recent changes have started to improve numbers of resolutions. It concludes that a comprehensive scheme of advice and assistance for over-indebted borrowers is essential to resolving cases and that Abhaile has begun an improvement here.

Section 2 examines what the limited the statistical evidence tells us about attempts to resolve the mortgage arrears problem, noting that there is little available data on the levels of unsustainable unsecured debt. The Central Bank's mortgage arrears figures over a roughly four-year period are outlined and analysed. While progress has been made, many of the deeper arrears cases remain largely unresolved. Data from the Central Bank on the outcomes of the Mortgage Arrears Resolution Process (MARP) of the Code of Conduct on Mortgage Arrears (CCMA) in 2014 and 2015 show that a substantial number of borrowers were not offered a resolution or were offered a resolution they considered unsuitable during this period. It is also clear that a significant number of borrowers were declared to be 'not co-operating' during this time, and we offer an assessment of some reasons for

[3] Which commenced in practice in Autumn 2013.

[4] See Page 32 below - 1,291 applications for Protective Certificates with a view to proposing a Personal Insolvency Arrangement were made over the whole of 2015. By contrast 1,144 new applications for PIAs made during Quarter 1 of 2017 alone, following on from 935 PIA applications in the last quarter of 2016, both far surpassing any previous figures.

[5] The '*Review of the Mortgage to Rent Scheme for borrowers of commercial private lending institutions*' published by the Department of Housing in February 2017 states that there has only been 217 completions out of a total of 3,575 applications in the six years since the scheme was introduced.

this. Recent trends from repossession figures provided by the Central Bank are also reviewed. We conclude that there is an absence of proper data tracking the profile of borrowers from the beginning of their MARP engagement through to repossession action and beyond for the 29,000 borrowers who have been issued with proceedings over the past four years.

Section 3 looks at each of the elements of the State's 'Abhaile' scheme of advice and assistance for borrowers in mortgage arrears. The scheme is welcome but it is unclear what results it is delivering. We suggest that there is a lack of comprehensive data on outcomes beyond the number of vouchers issued and that this needs to be improved. The legal advice services offered by Consultation and Duty solicitors are limited in their scope and full civil legal aid to defend a repossession case is still subject to a strict merits test which is very difficult for a person facing repossession to satisfy. Unsecured debtors, including those who have already lost or surrendered their family home but may still have residual mortgage debt, are excluded from the scheme. They are therefore disadvantaged in terms of access to a free insolvency practitioner assessment and, potentially, to an insolvency solution or to bankruptcy.

Section 4 explains that FLAC is a member of the Insolvency Service of Ireland's Consultative Forum on the legislation and participated in the discussions designed to propose agreed amendments on behalf of that forum. That submission has been sent separately to the Department of Justice and here we provide our specific view on two important elements of that submission. First we support the raft of proposed changes that would reduce the administrative role of the Circuit Court, leaving administrative matters to be dealt with by the Insolvency Service and we believe that this will lead to the quicker processing of arrangements. Second are the changes proposed by the Money Advice and Budgeting Service (MABS) to the system of Debt Relief Notices intended to lead to a quicker and fairer resolution for those with comparatively low levels of unsecured debt.

In **Section 5** we examine and propose wider changes to the insolvency system. We recommend that the narrowly time-bound appeal mechanism in the Circuit Court for those whose application for a Personal Insolvency Arrangement (PIA) has been rejected, should be extended to those with a more recent arrears problem. We highlight the particular difficulties that those in positive equity may face trying to get a resolution. We recommend that those debtors seeking to resolve their unsecured debt but whose proposal for a Debt Settlement Arrangement has been rejected should also have access to an appeal mechanism in the Circuit Court. Where an insolvent debtor has no disposable income above reasonable living expenses, we propose that a system of monitored 'no payments' arrangements be put in place, as is the case in some other jurisdictions in Europe.

We also look at Personal Insolvency Practitioner costs and fees as a barrier to accessing the legislation. It is recommended that access to the services of a publicly subsidised PIP should be available for debtors on low incomes through the MABS network, as piloted recently in Waterford.

Finally, a series of sundry proposals that will improve debtor outcomes are examined. These include reviewing the provisions that automatically bring arrangements to an end in the event of certain defaults; removing the cap of €3 million on Personal Insolvency Arrangements; tightening up the supervision of the reasonable living expenses guidelines in arrangements and reviewing the operation of the 'excludable' and 'excluded' debt categories.

Section 6 looks at proposals in the debt area that were contained in the Programme for a Partnership Government in May 2016, with particular attention to the proposal that the Code of Conduct on Mortgage Arrears might be put on a statutory basis and assess its feasibility in light of

the Supreme Court finding in the *Dunne and Dunphy* case. We further note that there has been no progress on the commitment in the programme for government that a new court might be set up to 'sensitively and expeditiously' handle mortgage arrears cases. The three current Private Members Bills (PMB) of relevance in this area – the 'Keeping People in Their Homes' Bill (February 2017), the 'National Housing Co-operative' Bill (June 2017) and the Mortgage Arrears Resolution (Family Home) Bill 2017 - are explained and assessed briefly and we examine the government's position in respect of the constitutional difficulties it suggests are inherent in imposing mortgage solutions upon lenders. We suggest that it may be possible to enhance the powers of the Circuit Court in this regard and commit to further work in this area in the coming months.

Section 7 looks at a number of miscellaneous issues. Here we suggest that a properly functioning Mortgage-to-Rent scheme has to be one of the range of solutions made available to over-indebted borrowers in mortgage arrears, particularly for manifestly unsustainable cases. However, the failure of the scheme to date to make any effective impact is very concerning. We review some recent developments in the area that it is hoped will lead to an improved success rate.

In this section we also note that updating the system of the enforcement of judgments debts In Ireland has still not been progressed, despite the detailed recommendations made by the Law Reform Commission (LRC) in its 2010 Report; 'Personal Debt and Debt Enforcement'.

We also argue for the restoration of Mortgage Interest Supplement (MIS) to be used in a targeted way to support borrowers in short term mortgage arrears difficulty so that their situation does not further deteriorate.

Summary of Recommendations (in order):

Data Collection

1. FLAC recommends that a methodology be established by the Central Bank to monitor and regularly report on the levels of unsustainable unsecured personal debt in Ireland.

2. FLAC recommends that as a matter of urgency that the Central Bank of Ireland and the Courts Service co-ordinate the gathering of statistics on repossession activity in the courts to enable the provision of detailed information on current trends.

3. FLAC recommends that the State provide at a minimum the following information in relation to the 28,917 new repossession cases have been brought in the past four years:
   - The MARP outcomes in each of these cases broken down by lender prior to the proceedings being initiated;
   - The number of the current cases against borrowers who form part of the 32,953 accounts in arrears for over two years;
   - The number of these cases concerned properties in negative equity;[6]
   - The number of defendant borrowers have not responded to the proceedings;

[6] Where it might be argued that the prospect of crystallising (and generally writing off) a mortgage shortfall was a significant disincentive to following through on repossession

- The number of defendant borrowers who entered an appearance in response to the proceedings;
- The number that followed the appearance with a defence in the form of the required replying affidavit;
- The number of cases have been struck out or withdrawn and on what basis;
- The number of Possession Orders have been granted but have not yet been executed.
- The number of cases currently before Circuit Courts across the country.

The 'Abhaile' scheme and civil legal aid

4. FLAC recommends that each PIP providing services under the Abhaile scheme be obliged to report back to MABS and the Insolvency Service on:
   - the outcome of every voucher that he or she processes;
   - the progress of cases that move to protective certificate and on to PIA proposal stage;
   - the outcome of the creditor meeting and any subsequent appeals to and outcomes in the Circuit Court and High Court.

5. FLAC recommends that a longer initial adjournment period might be put in place to allow for the time that it takes a PIP to assess the defendant borrower's situation and obtain a Protective Certificate through the Insolvency Service of Ireland and (currently) the Circuit Court.

6. FLAC recommends that Section 2 of the Land & Conveyancing Law Reform Act 2013 be amended to also allow for the suspension of the Possession Order or the execution of the Possession Order, so that the defendant borrower can consult a PIP with a view to proposing a Personal Insolvency Arrangement.

7. FLAC supports both the amendment allowing for an appeal to the Circuit Court and the provision of state-funded civil legal aid to fund such appeals. However, we recommend that full details of the outcome of such appeals be published on a rolling basis.

8. FLAC recommends that as soon as possible, the Legal Aid Board gather and publish more detailed data to effectively evaluate the impact of the Consultation & Duty Solicitor section of the Abhaile scheme as follows:
   - How many borrowers have received legal advice vouchers so far?
   - How many borrowers who have received legal advice vouchers had previously availed of a PIP voucher?
   - How many of these borrowers had previously failed to engage or had ceased to engage with their lender?
   - How many borrowers have actually used their vouchers to consult with a Consultation Solicitor?
   - How many have not yet been served with repossession proceedings?
   - How many have been served with repossession proceedings?
   - How many borrowers have consulted with a Duty Solicitor in advance of appearing before the County Registrar in a repossession case?

- In how many cases might it be suggested that the engagement with either Duty or Consultation Solicitor led to a case being settled or struck out?
- In how many such cases did the total amount owed to the lender exceed the value of the relevant property?
- How many full applications for civil legal aid have followed on from the interaction with the Duty or Consultation Solicitor?
- How many of these has resulted in a defence being entered to the proceedings in the form of a replying affidavit?
- How much money has been paid out and how much money is owed to practitioners under the scheme so far?

9. FLAC recommends that, outside of the terms of the Abhaile scheme, the Department of Justice review the provision of civil legal aid in repossession cases involving family homes and, as a minimum, proposes that a less strict merits test for civil legal aid should be applied in repossession cases.

10. FLAC recommends that access to the Abhaile scheme be widened to include insolvent debtors with unsecured debt.

The Personal Insolvency Act 2012

11. FLAC recommends that the requirement that a court must approve the grant of a Protective Certificate already issued by the Insolvency Service be removed and this function be delegated to the Insolvency Service with a right of appeal to the court.

12. FLAC recommends that the requirement that applications to extend the duration of a Protective Certificate must be made to a Court be similarly removed and that the Insolvency Service of Ireland be responsible for such applications with a right of appeal to the court.

13. FLAC recommends that the requirement for Debt Settlement Arrangements and Personal Insolvency Arrangements proposals or variations of such proposals to be approved by the Insolvency Service and then confirmed by the Court be amended so that the Insolvency Service is responsible for approving such applications or variations with an avenue of appeal to the Court.

14. FLAC recommends that the requirement for DRN proposals to be court-approved be dropped and that MABS and the Insolvency Service be responsible for verifying and approving such applications, with an avenue of appeal to the Court.

15. FLAC proposes amendments to the DRN system as recommended by MABS to the Insolvency Service Consultative Forum.

16. FLAC recommends that the requirement for a borrower to be in arrears with the payments on his/her family home mortgage or in an 'alternative repayment arrangement' on that mortgage as 1 January 2015 in order to qualify to appeal against the rejection of Personal Insolvency Arrangement be dropped entirely or amended to January 2016 or later.

17. FLAC recommends that detailed information on the positive/negative equity position of households in arrears be urgently gathered to formulate an appropriate solution for cases of positive equity with unsustainable arrears. This might include a legislative obligation to consider a debt for equity arrangement in a positive equity case and/or expressly providing in the legislation that the repossession versus arrangement comparison is not a mandatory requirement in framing a proposal for a Personal Insolvency Arrangement.

18. FLAC recommends that borrowers be permitted to appeal rejections of their Debt Settlement Arrangement proposals to the Circuit Court. In addition, FLAC recommends that more detailed information should be obtained and published by the Insolvency Service and be made available on the debt profile in cases where DSA applications are rejected by creditors.

19. FLAC recommends that the legislation be amended to provide for 'no-payment plans' where there is no surplus income available to a borrower, and detailed data be gathered on such cases to appreciate the scale and scope of the issue.

20. FLAC recommends that consideration be given to switching the basis of payment in Debt Settlement Arrangement applications away from pre-set defined payments to payments on an available surplus income basis.

21. FLAC recommends that the legislation be amended to provide for a state-funded, free-to-access Personal Insolvency Practitioner service within the Money Advice and Budgeting Service as suggested by the Waterford MABS pilot project.

22. FLAC recommends that Section 123 of the Act in relation to Personal Insolvency Arrangements (and s.85 in relation to Debt Settlement Arrangements), relating to the automatic termination of arrangements in the event of non-payment, be amended to allow the debtor to seek a review prior to the insolvency arrangement coming to an end and/or by allowing a majority of creditors at a creditor's meeting to vote in favour of the arrangement continuing.

23. FLAC supports the recommendation from a number of insolvency practitioners that the €3 million cap on Personal Insolvency Arrangements be removed.

24. FLAC recommends that the Insolvency Service research the frequency of deviation from the reasonable living expenses guidelines in insolvency arrangements and that the legislation be amended where necessary to provide for a stricter adherence to RLE guidelines in arrangements.

25. FLAC recommends that the Insolvency Service carry out research into the effect of excludable and excluded debt provisions on access to solutions under the legislation for insolvent debtors.

Repossession proceedings

26. FLAC recommends that legislation be introduced to allow defendant borrowers to rely on a lender's failure to comply with the terms of the Central Bank's Code of Conduct on Mortgage Arrears as a potential defence in repossession proceedings.

Specialist Court/Tribunal

27. FLAC recommends that a dedicated court/ tribunal which can deal with problem mortgage arrears on a case-by-case basis with a view to proposing resolutions is required as a matter of urgency and given the complexity involved and the urgency, work needs to begin on this as a priority.

Mortgage to rent scheme

28. FLAC recommends that the state put in place as a matter of urgency a fully-functioning and effective mortgage-to-rent scheme that incorporates write-off of any residual debt by the lender following sale and which guarantees sustainable rent, a properly maintained property and security of tenure in return for honouring the terms of the tenancy as well as an option to potentially buy back.

Debt enforcement

29. FLAC recommends that the detailed recommendations made by the Law Reform Commission in 2010 to reform the system of individual debt enforcement mechanisms in Ireland be implemented as a matter of urgency. These include the setting up of a specific Debt Enforcement Office, a complete revision of the system of assembling information on the means of debtors and reform of the Instalment Order including compulsory attendance by the debtor, Garnishee Order and Execution against goods mechanisms.[7]

30. FLAC recommends that the provisions of the Civil Debt (Procedures) Act 2015, which purported to finally bring to an end any imprisonment related to non-payment of debt, be immediately commenced.

Mortgage Interest Supplement.

31. FLAC recommends that the government consider restoring a targeted use of the Mortgage Interest Supplement payment to assist people with a short-term mortgage arrears problem through their financial difficulties. This might help to prevent temporary financial problems multiplying into insolvency, with the attendant social and economic consequences that may follow for the households involved and for society generally.

[7] Pages 321-330.

1. Introduction

FLAC welcomes the opportunity to contribute to this review of the Personal Insolvency Act 2012, which is urgently required. A critical focus of this review should be the complex mechanics of the existing legislation and a critical assessment of the extent to which this has contributed to the modest number of solutions reached so far. It should also examine what additions might be made to the legislation to make it more effective, and for this purpose a review of best practice in other jurisdictions, not just in the UK but also across Europe, would be advisable.

It is also important that a comprehensive assessment of the other elements that make up the personal insolvency, mortgage arrears and wider debt enforcement infrastructure in Ireland be undertaken as part of a wider review, given that the personal insolvency legislation does not exist in a vacuum. Thus, this submission critically evaluates the available data on mortgage arrears in Ireland and what progress these figures suggest is being made in terms of resolution. It also examines recent developments in terms of allowing debtors access to an increased range of services in the form of the Abhaile scheme. Other potential solutions such as the Mortgage-to-Rent scheme, the proposals in the 'Programme for a Partnership Government' and the array of Private Members Bills currently before the Dáil are also examined.

The core objectives of a personal insolvency arrangement (PIA) and the insolvency legislation generally have been helpfully articulated in a recent High Court judgment:

> *The Act is a considered and nuanced approach to the financial crisis and reflects a legislative choice to offer a less blunt and more flexible approach to the resolution of personal debt than was available heretofore in bankruptcy. Section 115A adds another element to the approach required to be taken by a court and the benefit of a debtor remaining in his or her private residence is a benefit to which regard is expressly to be had. The rational resolution of debt is in the legislative scheme envisaged as permitting the orderly write-down of debt, with the inevitable loss to creditors, both secured and unsecured'.*[8]

Orderly, managed and timely write-down of debt with inevitable loss to creditors, both secured and unsecured, is inevitable if debt is to be rationally resolved**.**

However, the Personal Insolvency Act 2012 was always unlikely to deliver such timely write-down of debt, in particular as it gave debtors no right of appeal where their insolvency proposals were rejected by a majority of their creditors. It is regrettable that an appeal option which had been recommended by FLAC and others with some experience of the functioning of insolvency legislation was not introduced from the outset.[9] It was not until the Personal Insolvency (Amendment) Act 2015

[8] *JD & Personal Insolvency Acts* [2017] IEHC 119.

[9] In its submission on the Personal Insolvency Bill 2012 to the Joint Oireachtas Committee on Justice, Equality and Defence in September 2012, FLAC wrote that '*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'* and that '*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'.*

that a right of appeal was introduced, albeit only in the case of the rejection of personal insolvency arrangements (PIA) proposals. This has already led to some significant progress in terms of the number of such proposals coming through the system, particularly in recent months.

Access to assistance to navigate the insolvency legislation is also essential for those who are indebted. Here FLAC reiterates a point it has been making for over two decades now: not only do we need a sympathetic and efficient system but also a full range of financial, legal and ancillary services for debtors in order to encourage and provide reassurance for that engagement. The Abhaile scheme has started to make some improvements in this respect but how effective it is proving to be in terms of producing results in the form of resolution requires constant monitoring and evaluation.

There has been much speculation in recent years that many borrowers in mortgage arrears are 'strategic defaulters'. However, in our view, the question of the extent of meaningful engagement by creditors with debtors has been under-researched and largely ignored. For example, a recent research report conducted by South Mayo Money Advice and Budgeting Service (MABS), published in August 2016, examined a random sample of 50 (out of a total of its 119 mortgage clients presenting between April 2015 and March 2016). It made some telling findings including the following:[10]

- Some 80% of these clients took out mortgages during 2004-2008, with a number of subsequent top-up loans following quickly;
- Arrears generally began 2009-2011 post-Crash, 50% were in arrears within five years of drawdown;
- Economic and life events outside borrower's control generally caused the arrears;
- The average length of time of the clients in arrears was five years;
- Average amount of arrears was lower than national average - €22,000 as opposed to €61,000;
- The age of borrowers was significantly above the MABS national client average;
- The income earning capacity of clients was limited;
- The level of decline in property values was marked with widespread negative equity;
- Two in three clients were now declared to be outside the Mortgage Arrears Resolution Process (MARP) under the Central Bank's Code of Conduct on Mortgage Arrears (CCMA), one in three was in repossession proceedings;
- Only one in five clients was in a long-term alternative payment arrangement and these were predominantly capitalisation of arrears and split mortgages, with little evidence of write-down.[11]

Quite apart from clearly suggesting that there is a strong spatial (or regional) element to the ongoing problem of mortgage arrears, this study poses a fundamentally important question in our opinion. All of these households involve clients working with the state-funded service set up to help to

[10] *An Analysis of Mortgage Arrears Among South Mayo MABS Clients – A spatial dimension to a national problem*, 2016, South Mayo MABS, assisted by Dr Stuart Stamp, Independent Social Researcher and Research Associate at Maynooth University. We would also like to clarify that FLAC helped to finalise the recommendations on this piece of work.

[11] At the end of Q.1 2017, of the 38,807 arrears capitalisations, 77.8% were sticking to the terms of the arrangement, meaning that 8,615 or almost 23% were failing. 93.7% of the 27,304 split mortgages were meeting the terms of the arrangement – that means that 1,720 are not sticking to the agreed terms.

resolve their financial problems. They appear to have received little reward from those credit institutions for their engagement.

2. Analysis and review of the limited available statistical data

Headline figures on mortgage arrears, restructuring and repossession concerning principal dwelling houses (PDH) have been issued on a quarterly basis by the Central Bank for a number of years now. In this section we offer an assessment of what they indicate is happening in terms of attempts at resolution.

2.1 - A review of principal dwelling house (PDH) mortgage arrears figures

Table One – Quarterly statistics for accounts in arrears over 90 days, 2013-2017

Period	91 – 180	181 – 360	361 – 720	Over 720 days	Total over 90 days
Sept 2013	16,680	22,665	28,010	31,834	99,189
Dec 2013	15,273	20,779	26,833	33,589	96,474
Mar 2014	13,604	18,953	25,235	35,314	93,106
June 2014	12,447	16,901	23,929	37,066	90,343
Sept 2014	10,763	14,827	21,881	37,484	84,955
Dec 2014	9,039	12,565	19,317	37,778 (48.0%)	78,699
Mar 2015	8,229	10,696	17,537	37,933 (51.0%)	74,395
June 2015	7,472	9,504	15,282	38,041 (54.1%)	70,299
Sept 2015	6,771	8,409	13,135	37,269 (56.8%)	65,584
Dec 2015	6,354	7,481	11,745	36,351 (58.7%)	61,931

Mar 2016	6,213	6,993	10,698	35,792 (60.0%)	59,696
June 2016	6,014	6,680	9,897	34,980 (60.8%)	57,571
Sept 2016	6,202	6,505	9,092	34,551 (61.3%)	56,350
Dec 2016	5,990	6,248	8,584	33,447 (61.6%)	54,269
Mar 2017	5,964	6,066	8,117	32,953 (62.0 %)	53,100

Source: Central Bank of Ireland

This table clearly shows a decline in the overall '90 days plus' arrears cases over the past three and three-quarter year period, almost halving from 99,189 to 53,100 accounts. It would be churlish to maintain that this is not substantial progress; but in a time of supposed economic recovery and improved prosperity, with a strong State and industry focus on restructuring, it does not perhaps amount to as much progress as a critical situation demands.

Two important points may give further context to these figures:

- First, a number of the accounts no longer classified as being in arrears have been restructured. However, a number of these mortgages are recorded as not meeting the terms of the restructure arrangement - at the end of Q.1 2017, some 13.2% (or more than one in eight), equating to almost 16,000 mortgages, were in this position. Thus an account that appears rehabilitated is not always so.
- Second, the 'in arrears for over two years' category has grown exponentially as a percentage of the overall accounts in arrears over 90 days. Thus, although the number of such accounts has fallen from 37,778 accounts at the end of December 2014 to 32,953 at the end of March 2017, this category actually grew as a percentage of overall arrears from 48% of the total at the end of 2014 to 62% at the end of March 2017. The average amount of arrears on these accounts also continues to inexorably grow. At the end of December 2014, this was €51,414; by the end of March 2017 it had reached €73,710. This is by any standard a staggering level of arrears.

At least it can be said that the problem is becoming more clearly defined. However whilst the rate of repossession and voluntary surrender in Ireland is low in comparison to the scale of the problem, almost all households in arrears of two years or more are now likely to be in imminent danger of repossession and/or eviction. Attempting to resolve these increasingly intractable cases in deep arrears of over two years and preventing other existing arrears cases from moving into this category is a matter of grave seriousness and urgency.

Finally it should be noted that there is very little periodically published information available on levels of unsustainable unsecured debt in Ireland. While the Central Bank may be able to tell us how much money has been borrowed, it does not appear to know how much of this unsecured debt is problematical. This is a major deficit in our understanding of the personal debt problem.

- ★ **Recommendation 1: FLAC recommends that a methodology be established by the Central Bank to monitor and regularly report on the levels of unsustainable unsecured personal debt in Ireland.**

2.2 - A review of MARP outcomes

Before bringing repossession proceedings, mortgage lenders are obliged under the terms of the Central Bank's Code of Conduct on Mortgage Arrears 2013 (CCMA) to process cases of arrears on family homes by having a Mortgage Arrears Resolution Process (MARP) (the 2010 Code, applicable from January 2011, provided for a similar regime). The CCMA prescribes the essential features that every lender's MARP must contain. The necessity to implement a MARP was introduced with the express intention of resolving arrears and preventing repossession. Essentially, there are four possible outcomes in a MARP case:

1. The borrower is declared to be 'not co-operating' with the process;
2. The borrower is not offered (or is no longer offered) an alternative repayment arrangement, in effect a declaration that the mortgage is unsustainable;
3. The borrower is offered an alternative repayment arrangement which s/he rejects;
4. The borrower is offered an alternative repayment arrangement which is accepted.

Those in the fourth category go into the group classified as restructured and hopefully their arrears problem is cured in the long run, though as noted above many are not currently 'meeting the terms of the arrangement'. In principle, none of the 32,953 accounts currently in arrears for over two years should be in this category, so all 32,953 should have had a MARP decision involving one of the first three outcomes.[12] Each of these outcomes will either immediately (in the case of non-co-operation) or within three months (in the cases of unsustainability or a rejected arrangement) leave the borrower open to repossession action in the Circuit Court.[13]

A breakdown of MARP outcomes in arrears cases, by lender, especially in the critical two-years-plus arrears category is not publicly available. It is also unknown, at least publicly, how many in each category are currently the subject of repossession action in the courts and by whom it is being taken. It is also not known how many of these borrowers have had their loans sold on by their lender to a vulture fund. [14] The apparent absence of such data has perhaps helped to facilitate assumptions being made that those in deep mortgage arrears on family homes are primarily strategic defaulters.

[12] This is subject to the reservation that many borrowers will have more than one account, having topped up their mortgage at some point. Thus, exactly how many households are in the 32,953 accounts is not known, but estimates vary between 25,000 and 30,000.
[13] As variously provided by Rules 28, 45 and 47 of the Code of Conduct on Mortgage Arrears 2013.
[14] Some limited and apparently once-off information in relation to the number of repossession cases brought against those in the 'not co-operating' category is contained in a report provided by the Central Bank to the Minister for Finance in October 2016. This is examined on page 10 of this submission.

For example, on March 3 2015, Frances Fitzgerald TD, then Minister for Justice, offered the view that:

> *It is a fact that the majority of those in long term mortgage arrears – i.e. arrears subsisting over 720 days – are considered by the Central Bank as "non-cooperating" borrowers in that they have not engaged with their lender in any meaningful way under the Code of Conduct on Mortgage Arrears (CCMA).*[15]

The Bank subsequently published, in May 2016, a Consumer Protection Bulletin which gave specific details of MARP outcomes in the two years from 2014-2015 as follows:

Table Two – MARP outcomes – 2014-2015

MARP outcomes	1st half 2014	2nd half 2014	1st half 2015	2nd half 2015	Total
MARP completed	57,005	44,716	39,166	23,075	163,962
ARA[16] offered	50,598	39,007	34,860	19,978	144,443
ARA not offered	6,407	5,709	4,306	3,097	19,519
ARA accepted	40,070	33,403	30,569	16,342	120,384
ARA rejected	3,548	2,952	1,832	1,587	9,919[17]
Appeals[18]	3,570	2,347	1,302	829	8,048
Upheld/partly upheld	1,315	820	410	193	2,738
Rejected	2,704	1,784	1,051	658	6,197
Warned on co-operation	21,124	10,642	10,605	5,17	47,544
Declared not co-operating	14,768	6,879	7,531	3,127	32,305
Appeals	1,010	384	176	115	1,685
Upheld/partly upheld	298	141	62	48	549
Rejected	675	372	128	74	1,249

Source: Central Bank of Ireland 'Consumer Protection Bulletin', Code of Conduct on Mortgage Arrears, Edition 3 May 2016

An initial caveat when considering these figures is that we do not know the extent to which the information provided in the *Bulletin* was subject to any verification process by the Central Bank. The Central Bank does not normally engage with individual borrowers about their MARP experience, preferring to get its information from the mortgage lenders it regulates.[19] It is possible that the

[15] In the course of the debate on the Family Home Settlement Arrangement Bill, Dáil Éireann Debate Vol. 870 No. 1, Page 51.
[16] Alternative Repayment Arrangement.
[17] When ARAs accepted and rejected are added together, the total is 130,303. This is some 14,000 short of the number given for those offered an ARA of 144,443. There is no explanation provided for this disparity.
[18] These are presumably appeals either rejecting the offer from the lender or appealing against the failure of the lender to make an offer – There is no further breakdown of these two categories.
[19] An exception came by way of a press release issued by the Central Bank of 21 February 2013 titled '*Research highlights positive experience of borrowers engaged in mortgage arrears resolution process'*. No research report or research methodology was ever provided to back up this assertion and the very limited detail that

information was simply provided by the 19 relevant lenders and accepted by the Bank without further verification. In any case, at face value, these figures indicate that:

- In **19,519** cases through 2014-2015, the relevant borrower was not offered an alternative repayment arrangement (ARA) by the lender following the MARP engagement.

- In **9,919** of the cases where an arrangement was offered, the borrower rejected it. There is no breakdown provided of the kinds of alternative repayment arrangements offered by lenders and therefore no breakdown of the kinds of offers rejected by borrowers. It is likely, however, that many borrowers rejected these arrangements as they did not consider them sustainable in their financial circumstances.

- A further **32,305** borrowers were declared as not co-operating under the MARP during 2014-2015. Only a small number appealed this decision (about 5% of the total) and about one-third of these were successful. The reasons for such a low rate of appeal are not explored.

These figures suggest that in the two years from 2014 to 2015, at least **61,743** households had a negative outcome to their MARP engagement (broken down as 19,519 not offered an ARA, 9,919 rejecting the ARA offered - presumably on the basis that they did not consider it suitable - and 32,305 declared as non-cooperating).

These figures warrant further investigation. Under the terms of the CCMA a declaration of unsustainability permits the lender to proceed to repossession after three months has elapsed. How many of the **19,519** not offered an alternative repayment arrangement in 2014-2015 subsequently had a Civil Bill for Possession served upon them? In turn, how many of these form part of the problematic 32,953 accounts currently over two years in arrears? This information should be tracked as a matter of course.

What meaningful options were then available to these borrowers other than repossessions of family homes? They had engaged in the MARP to no avail. Until recently there was no 'Abhaile' scheme available to them, where legal advice – however limited - or personal insolvency advice might be obtained; very few would have had access to a solicitor privately. Even if they turned up in what might be perceived as the intimidating environment of a court for proceedings to repossess their home, the capacity of the courts to provide a sympathetic resolution is limited. Were they to be expected to hand over their properties in the middle of the greatest housing crisis in the history of the State and join the queue for scarce public and private housing?

The same questions apply to the **9,919** households who rejected the alternative repayment arrangement on offer, presumably asking their lender to reconsider it. They had also engaged in the MARP. And if we do not know what they were offered, how can we say it was unreasonable of them to reject it? For example, fast forward to the end of 2016 and the failure rate of restructured PDH mortgages is 13% and rising, particularly capitalisation of arrears arrangements that are often not financially viable for the borrower. In turn, how many of these borrowers subsequently had a Civil Bill for Possession served upon them, and what were they to do in response?

followed in the press release merely specified that '*consumer research was independently conducted on behalf of the Central Bank'* (no research company was identified) and '*the research on MARP involved face-to-face interviews with **209** individuals who engaged with MARP'.*

Lastly, what of the much maligned 'not co-operating', the largest category of all? The Bank's figures on the 'not cooperating' category suggest that 47,544 were warned on co-operation over the two years, with **32,305** declared as not co-operating.[20] This is an awful lot of borrowers not co-operating when they were not even at immediate threat of repossession, being only at a preliminary stage of the process. Undoubtedly, there will be many who did not co-operate. However, the definition of 'not co-operating' in the CCMA is very wide, complex and multi-stranded and allows any one of a number of acts or omissions to be classified as not co-operating, and is certainly open to manipulation by lenders. In addition, the 20-business day warning letter that the lender is required to send to the borrower prior to such classification is not specifically required to be copied to the person nominated by the borrower as his/her designated representative. This letter is also not required to be sent by registered post and in the welter of correspondence that a person with financial difficulties will receive, it is possible that the long-term significance of this warning letter will not be appreciated.

Further it should be noted that the Central Bank has itself expressed reservations about the approach of some lenders to MARP compliance. In its information release detailing some of its findings arising out of its themed inspection of lenders compliance with the CCMA,[21] it identified, for instance, practices where the lender '*had an internal policy that permitted the lender to remove borrowers from the MARP solely because the borrower had not agreed to an ARA over the telephone*' (when ARAs are required under the Code to be proposed in writing) and it found '*issues regarding adherence to some of the specific timeframes set out in the CCMA, in particular timelines between warning and classifying borrowers as not co-operating and timelines to notify borrowers in advance of carrying out unsolicited personal visits'.*

However, to our knowledge not a single mortgage lender has been sanctioned for failure to comply with these rules.

On the other hand, if a borrower is declared to be not co-operating, s/he is out of the MARP process immediately and a Civil Bill for Possession may be served. How many of those declared as not co-operating through 2014-2015 have had Civil Bills issued against them since then and how many of these feature in the 33,474 accounts currently in arrears for over two years? Again, what meaningful options are available to a borrower served with proceedings?

There are no cogent rolling figures provided by the Central Bank on this. However, the Central Bank's 2016 *Report on Mortgage Arrears* furnished to the Minister for Finance in October 2016 suggests that the retail banks report the following snapshot:[22]

[20] Rule 28 of the CCMA provides that prior to classifying a borrower as not co-operating, a lender must write to the borrower and inform the borrower that he/she will be classified as not co-operating if specific actions are not undertaken within 20 business days.
[21] 24 June 2015 – see also footnote two above.
[22] Page 31, *Report On Mortgage Arrears*, Central Bank 2016 - This report followed from a request by the Minister in June 2016 for information from the Bank detailing current progress on addressing the mortgage arrears problem.

- Approximately 12,000 repossession cases were in progress (by the retail banks) as of the end of Quarter 2, 2016;[23]
- 70 per cent of these proceedings (8,400 or so) were said to be initiated as the borrower was deemed not co-operating. Thus, by extension, though 3,600 were deemed to be co-operating, it did not prevent legal proceedings being brought against them;
- 87 per cent (10,440 or so) of these were said to be in arrears over 720 days, with an average arrears balance of over €53,000.

It would seem from these once-off figures (which have never been published in the Central Bank's quarterly statistics) that the Bank does have at least some access to more detailed information that would enable a more comprehensive picture of the mortgage arrears profile of borrowers in the repossession process, and which does suggest a strong correlation between not cooperating and repossession proceedings.[24] Again, however, it should be noted that this information appears to be provided by the main banks and accepted without independent verification by the Regulator.

It is also notable that this report to the Minister also describes the CCMA/MARP as providing '*a strong consumer protection framework to ensure that borrowers in financial difficulty are treated in a timely, transparent, and fair manner'.*[25] However, there is no reference made in this report to the breakdown of MARP outcomes for borrowers between 2014 and 2015 as outlined by the Bank in its *Consumer Protection Bulletin* of May 2016 a few months previously (and set out in detail in Table 2 above). This breakdown demonstrated that (at least) **61,743** households had a negative outcome to their MARP engagement in 2014-2015 (broken down as 19,519 not offered an alternative repayment arrangement, 9,919 rejecting the arrangement offered and 32,305 declared as non-co-operating). The questionable implementation of elements of the MARP by a cross-section of lenders identified by the Central Bank in its *Themed Inspection of lender compliance* in June 2015 does not merit a mention either.

2.3 Repossession activity on family homes

Some commentators have questioned the accuracy of the Central Bank's figures and their compatibility with comparable figures from the Courts Service. For example, Karl Deeter of Irish Mortgage Brokers recently suggested [26] that the Courts Service '*keep records of every Civil Bill for possession issued*' whereas '*the Central Bank gather their data from the banks who say we have issued legal proceedings'.* He argues that the Central Bank figures are miscounted and overstated and that '*the miscounting is even worse because the Central Bank figures are for PDH's only and the Courts Service sums are for all (includes Buy-to-Let properties).*[27] The clear implication is that the Courts Service figures are more accurate and that mortgage lenders are exaggerating the number of cases where repossession proceedings have actually been issued.

[23] A further 2,100 cases or so were said to be in the course of being pursued by 'non-bank entities'.
[24] Which it describes on page 31 as 'loan level data submissions'
[25] *Report On Mortgage Arrears*, Central Bank of Ireland, October 2016, page 5. Available at http://www.finance.gov.ie/sites/default/files/Mortgage%20Arrears%20Report%20-%20FINAL.pdf.
[26] Speaking at a Housing Agency event - "*Engaging with Mortgage Arrears"* - 9 May 2017.
[27] See www.housingagency.ie.

★ **Recommendation 2: FLAC recommends as a matter of urgency that the Central Bank of Ireland and the Courts Service co-ordinate the gathering of statistics on repossession activity in the courts to enable the provision of detailed information on current trends.**

The following table presents detail of repossession activity over the last four years provide by the Central Bank

Table Three – Repossession Activity Quarter on Quarter, 2013-2016

Period	New cases	Orders granted	Orders executed	Voluntary surrenders
Jan – Mar 2013	**255**	105	49	117
Apr – Jun 2013	**270**	350	63	160
Jul – Sep 2013	**1,830**	89	76	133
Oct – Dec 2013	**1,491**	82	63	105
Jan – Mar 2014	**3,093**	69	54	227
Mar – Jun 2014	**3,274**	296	89	210
July – Sept 2014	**2,514**	289	47	255
Oct – Dec 2014	**2,543**	314	123	306
Jan – Mar 2015	**2,788**	468	156	195
Apr – June 2015	**2,533**	517	201	221
July – Sept 2015	**1,687**	329	207	215
Oct – Dec 2015	**894**	203	162	178
Jan - Mar 2016	**1,895**	277	139	282
Apr – June 2016	**1,243**	372	101	296
July – Sept 2016	**1,210**	300	141	280
Oct – Dec 2016	**1,397**	273	112	343
Total	**28,917**	**4,333**	**1,783**	**3,523**

Source: Central Bank of Ireland

Broken down year on year, these figures look as follows:

Table Four - Repossession Activity by Year, 2013-2016

Period	New cases	Orders granted	Orders executed	Voluntary surrenders
2013	**3,846**	**626**	**251**	**515**
2014	**11,424**	**968**	**313**	**998**

2015	**7,902**	**1,517**	**726**	**809**
2016	**5,745**	**1,222**	**493**	**1,201**

It is clear that there was a substantial spike of new repossession cases in 2014. This is likely to be mainly related to the passing of the Land and Conveyancing Law Reform Act 2013[28] (which reversed the effects of the so called 'Dunne ruling'[29]). This act provided that mortgages drawn down on principal dwelling houses before 1 December 2009, but where repossession action was commenced after 31 July 2013, would be brought exclusively in the Circuit Court[30]. The figures for 2015 show the numbers slowing down and a further slowdown is evident in 2016. Nonetheless it might be noted that the figures for 2015 and 2016 are still considerably above the comparable figure for 2013. It might also be noted that the Q.1 figures for 2017 show a 15% increase over the final quarter of 2016.[31]

On 9 March 2015, Minister for Finance Michael Noonan TD suggested: *"I don't think that the figures show a lot of houses being repossessed by the banks. I think what the figures show is the banks using the courts to get people to engage with them who haven't engaged".*[32]

The figures show that 5,306 family homes were repossessed or voluntarily surrendered between 2013 and 2016 and it is also the case that a number of Possession Orders have been granted in that time that have not yet been executed. Whether that is considered to be a lot is likely to depend on your perspective. It is also certainly true that some cases brought by lenders are intended to spark an engagement rather than to repossess but whether the courts are an appropriate forum to negotiate with often stressed-out debtors is open to question.

However, the Central Bank's figures on MARP outcomes examined above also show that over the two years 2014-2015 almost 30,000 borrowers in the MARP were either not offered an alternative repayment arrangement or were offered an arrangement that they rejected. All had engaged but either did not get any restructure or did not get the restructure they believed they could afford. There are no publicly available figures that track what happened to them after that, but it is a fair assumption that many were served with repossession proceedings.

Served with legal proceedings, were they supposed to engage again and hope for a better outcome this time? It would appear that the Central Bank believes they should. In its 'Report on Mortgage Arrears' (see pages 16 above for more detail), it suggests that '*during the legal process, borrowers have opportunities to re-engage with lenders to find a solution and* ***Central Bank aggregate data***

[28] Commenced on 31 July 2013.
[29] *Start Mortgages and others v Gunn and others* [2011] IEHC 275. This ruling found that the repeal of certain provisions of the Registration of Title Act 1964 by the Land and Conveyancing Law Reform 2009 Act had the unintended effect of restricting lenders from exercising their right to repossession on a summary basis.
[30] The Land & Conveyancing Law Reform Act 2009 had already provided that repossession proceedings on housing loan mortgages drawn down after 1 December 2009 would be brought exclusively in the Circuit Court.
[31] 1,645 new repossession cases on family homes were brought in the first quarter of 2017, 1,397 in the final quarter of 2016.
[32] As reported by the *Irish Times* speaking to reporters in Brussels prior to a meeting of EU Finance Ministers.

show that, on average, 19 percent of legal cases that have concluded are due to terms and conditions being renegotiated' (our emphasis added).[33] There is no indication of where to find the Central Bank aggregate data referred to.

There is a lack of depth and detail in the data provided publicly by lenders and the Central Bank and this should be remedied as soon as possible.

- ★ **Recommendation 3: FLAC recommends that the State provide at a minimum the following information in relation to the 28,917 new repossession cases have been brought in the past four years:**
  - **The MARP outcomes in each of these cases broken down by lender prior to the proceedings being initiated;**
  - **The number of the current cases against borrowers who form part of the 32,953 accounts in arrears for over two years;**
  - **The number of these cases concerned properties in negative equity;[34]**
  - **The number of defendant borrowers have not responded to the proceedings;**
  - **The number of defendant borrowers who entered an appearance in response to the proceedings;**
  - **The number that followed the appearance with a defence in the form of the required replying affidavit;**
  - **The number of cases have been struck out or withdrawn and on what basis;**
  - **The number of Possession Orders have been granted but have not yet been executed.**
  - **The number of cases currently before Circuit Courts across the country.**

3. Analysis and review of the Abhaile scheme

The initiation of the Abhaile scheme in June 2016 has been a welcome though overdue development. It has come at a critical time for many households in Ireland where a number of legacy debt cases involving persistent arrears and functional insolvency are coming to a head in the legal process.

Figures provided by the Department of Justice in early June 2017 showed that 7,246 vouchers have been issued to some 4,000 homeowners in arrears since the scheme's inception.[35] In a recent contribution to the debate on Fianna Fail's Private Members Bill, the Mortgage Arrears Resolution (Family Home) Bill 2017, Minister for Justice, Charlie Flanagan, TD, said that, as of 7 July 2017, 8,034 vouchers had been issued, a sizeable increase over a short period of time.[36] It would appear that this is the total number of vouchers under the three elements of the scheme covering legal advice, PIP advice and financial advice. However, there does not appear to be as of yet any systematic tracking of the outcomes for debtors of these consultations. In addition, in our view, the scheme comes with

[33] *Report On Mortgage Arrears*, Central Bank of Ireland, October 2016, page 6. Available at http://www.finance.gov.ie/sites/default/files/Mortgage%20Arrears%20Report%20-%20FINAL.pdf.
[34] Where it might be argued that the prospect of crystallising (and generally writing off) a mortgage shortfall was a significant disincentive to following through on repossession
[35] As reported on www.journal.ie by Michelle Hennessy, 8 June 2017.
[36] Reported on 12 July 2017.

a number of inbuilt limitations that might be improved upon and it could also do with being subject to a rolling review that would monitor its effectiveness.

3.1 - Review of Personal Insolvency Practitioner (PIP) vouchers

The most immediately tangible benefit of the scheme for those in mortgage arrears is access to a Personal Insolvency Practitioner who can assess available options and potentially help to avoid repossession proceedings. A borrower may only enter the scheme if he or she is insolvent, in mortgage arrears on his or her principal private residence and at risk of losing that home. Following the assessment, the PIP may apply to the Insolvency Service of Ireland (ISI) for a Protective Certificate with a view to proposing a Personal Insolvency Arrangement (PIA) to both secured and unsecured creditors. A PIA may also be proposed where there are only secured creditors or indeed only one secured creditor.

This initial service is free to the debtor, with the PIP being paid by the State, removing a potentially significant barrier to access. The PIP's initial charges to assess the debtor's situation are intended to be covered by his or her Abhaile voucher payment and the cost of preparing and servicing a PIA will in principle come out of any surplus income of the debtor remaining after reasonable living expenses have been deducted.

It is also now apparent that a significant number of appeals have been brought to the Circuit Court under s.115A of the Act (inserted by the 2015 amendment Act) challenging creditor rejection of an insolvent borrower's proposal for a Personal Insolvency Arrangement and a number of these have been further appealed to the High Court. In his speech on 12 July in the debate on Fianna Fail's Private Members Bill, the Minister Flanagan said that '*some 447 applications have been made under the new Personal Insolvency court review'* Figures provided by the Insolvency Service of Ireland to 3 March 2017 suggest in turn that 11 appeals to the High Court had been heard. The PIP element of the Abhaile scheme provides a vital gateway to this appeal process.

A significant investment of state resources is being committed to ensure that those in mortgage arrears have access to an assessment that considers the question of proposing a PIA to avoid the potential repossession of family homes. It is vital therefore that we know on a rolling basis to what extent this working for debtors. On this question, Minister Flanagan recently said in his Dáil speech that '*data collected on the 1,565 borrowers who consulted with a PIP under Abhaile in 2016 would indicate that the service is reaching its main target group, of those in the deepest arrears. Insolvency Service statistics indicate that 2/3 of these borrowers were in the deepest category, of arrears exceeding 720 days payments. A quarter were already before the court on repossession proceedings. 60% were recommended to avail of a Protective Certificate under the Personal Insolvency Acts'.*[37]

This is the kind of information that must be immediately captured, analysed and then constantly tracked to assess the effectiveness of the scheme. For example, these figures would suggest that over 1,000 borrowers that had been in arrears for over two years availed of the Abhaile PIP review in 2016, some 400 were already before the court in repossession proceedings and some 940 were

[37] Press release from Minister Flanagan's office re Dail Debate on Mortgage Arrears Resolution (Family Home) Bill 2017, 12 July 2017.

recommended to avail of a Protective Certificate. What we now need to know is what has happened to these borrowers in 2017 and what are the initial figures for borrowers who first availed of Abhaile in 2017.

- ★ **Recommendation 4: FLAC recommends that each PIP providing services under the Abhaile scheme be obliged to report back to MABS and the Insolvency Service on:**
  - **the outcome of every voucher that he or she processes;**
  - **the progress of cases that move to protective certificate and on to PIA proposal stage;**
  - **the outcome of the creditor meeting and any subsequent appeals to and outcomes in the Circuit Court and High Court.**

3.2 - Adjournment to consult a PIP where Possession Order already granted

Where repossession proceedings have already been brought against a debtor, Section 2 (2) of the Land and Conveyancing Law Reform Act 2013 allows a court, of its own motion or on application on behalf of the debtor, to adjourn a repossession case for the defendant borrower to consult a PIP with a view to proposing a Personal Insolvency Arrangement. The legislation sets out a number of criteria to which the Court shall have regard, including the borrower's engagement with the Mortgage Arrears Resolution Process and payment record in the preceding 12-month period. A two-month adjournment may be granted and a further adjournment where the court considers that '*significant progress has been made in the preparation of a proposal for a PIA*'. In our view this adjournment period is far too short to enable a PIP to carry out the work that is required.

- ★ **Recommendation 5: FLAC recommends that a longer initial adjournment period might be put in place to allow for the time that it takes a PIP to assess the defendant borrower's situation and obtain a Protective Certificate through the Insolvency Service of Ireland and (currently) the Circuit Court.**

We have seen above that an adjournment may be sought in repossession proceedings to consult with a PIP and propose a Personal Insolvency Arrangement.

In one of the recent High Court appeals,[38] the secured creditor (mortgage lender) objected to the debtor's proposed PIA on the basis that it unfairly prejudiced that creditor on two grounds:

1. that there was no reasonable prospect that the applicant debtor would be likely to be able to comply with the terms of the proposed PIA and
2. that it already had a Possession Order which it was in the course of executing.

The Court ultimately ruled in its favour on the first ground, forming the view that the debtor had not adduced sufficient evidence that his proposals were sustainable and had not engaged *bona fide* with the process. Critically, the second ground was not addressed by the Court. The evidence disclosed '*that proceedings seeking possession were commenced in the Circuit Court, which granted an order for possession on 26th January, 2015, with a stay of six months (to July 26th 2015). At the time the*

[38] '*In the matter of Part 3, Chapter 4 of the Personal Insolvency Acts 2012- 2015 and Ennis and Section 115A (9) of the Personal Insolvency Acts 2012-2015'* [2017] IEHC 120, 27 February 2017.

Protective Certificate was issued to the debtor pursuant to s.95 (2) (a) of the Acts, on 23rd March, 2016, the secured creditor was awaiting execution by the Sheriff of the order of possession'.

This suggests that the secured creditor had not just obtained a Possession Order, but had also applied for and obtained an Execution Order by the time the Protective Certificate was granted, which had not yet been executed.

In FLAC's view, an adjournment should be granted to allow the borrower to consult with a PIP and prevent the Possession Order being executed, if it could prevent the loss of the borrower's interest in or occupation of the family home. If this was allowed the execution of the Possession Order would merely be suspended. A PIP would still have to propose a Personal Insolvency Arrangement and have it accepted or, if rejected, validly appealed to the Circuit Court and affirmed for the Possession Order to be annulled. For this to occur, the Court would generally have had to conclude that, in all the circumstances, the PIA would amount to a better return for the secured creditor than repossession and sale of the family home and that the PIA did not otherwise unfairly prejudice the secured lender. If the Court did conclude this, it would, arguably, not be in the public interest and the interests of justice to allow a repossession to go ahead.

However, the wording of s.2 (2) of the Land & Conveyancing Law Reform Act 2013 does not appear to allow for an adjournment where a possession order has already been granted. It provides that '*in any proceedings brought by a mortgagee seeking an order for possession of land*' the court may adjourn so that the defendant borrower may consult a PIP.

Figures on repossession outlined above show that a total of 4,333 Possession Orders have granted on family homes from 2013 -2016[39]. Over the same period, 1,783 Possession Orders have been executed. Although there will not be an exact correlation between these two figures because of time lags between the obtaining and executing of an order, this still means that there could be in the order of some 2,500 Possession Orders granted but not yet executed. Some of these family homes might still be rescued by a successful PIA proposal or the imposition by a Court of a PIA on appeal.

- ★ **Recommendation 6: FLAC recommends that Section 2 of the Land & Conveyancing Law Reform Act 2013 be amended to also allow for the suspension of the Possession Order or the execution of the Possession Order, so that the defendant borrower can consult a PIP with a view to proposing a Personal Insolvency Arrangement.**

3.3 - Review of Abhaile scheme's 'PIA Review Legal Aid Service'

There has been a significant number of appeals to the Circuit Court under the terms of Section 115A of the Personal Insolvency (Amendment) Act 2015 over a relatively short space of time, with Minister Flanagan recently suggesting that some 447 appeals had been lodged so far. It is not immediately clear how many of these have been legally aided under the heading of 'The PIA Review Legal Aid Service' part of the Abhaile scheme, but given the financial circumstances of insolvent debtors, it might be considered doubtful that many could mount the costs of such an appeal from

[39] See Table Three above, Pages 17-18.

their own resources. Nonetheless, a recent newspaper report suggests that only 157 of these appeals have been legally aided.[40]

The jurisprudence developing from the High Court in further considering appeals from the Circuit Court in this area is providing some welcome clarification of the boundaries and the limitations of the legislation. Although a number of these decisions have not necessarily resulted in favourable outcomes for insolvent debtors, it is useful to see the legislation being interpreted and applied for the future guidance of all interested parties. This is particularly the case given that the mechanism is currently the only legally binding as opposed to voluntary method of writing down a family home mortgage in an arrears situation, thereby helping to avoid the repossession of family homes.

- ★ **Recommendation 7: FLAC supports both the amendment allowing for an appeal to the Circuit Court and the provision of state-funded civil legal aid to fund such appeals. However, we recommend that full details of the outcome of such appeals be published on a rolling basis.**

3.4 - Review of Abhaile's Consultation and Duty Solicitor Service

The final critical part of the Abhaile scheme is the Consultation and Duty Solicitor service. FLAC's principal concern here is whether the legal services currently being provided are sufficiently broad to comprehensively assist borrowers in arrears, particularly those who have already been served with legal proceedings.

To begin with, the scheme has inbuilt limitations that curtail its potential impact. MABS provides a legal advice voucher to eligible borrowers, which they use to access the Consultation Solicitor. There is however no solicitor/client relationship in the arrangement. Once-off (in principle) oral and written legal advice must be provided to the person in receipt of the voucher. However, according to the Legal Aid Board's terms and conditions for the scheme, a Consultation Solicitor may, in certain circumstances and with the prior approval of the Board, conduct '*negotiations for the settlement of the repossession proceedings or related legal proceedings and a second consultation with the client, to include the provision of written advice*'. From this it seems that any second consultation is intended to be very much the exception rather than the rule.

The Consultation Solicitor may in turn forward a copy of the file of what is described as a "Scheme-advised defendant" to the Duty Solicitor. A "Scheme-advised defendant" is a person who has received written legal advice from the Consultation Solicitor and has been served with a Civil Bill for Possession listed for hearing before the County Registrar.

However, the Duty Solicitor attending at Circuit Court repossession lists does not have a solicitor-client relationship with the defendant borrower either, and can only make limited representations on his or her behalf concerning those repossession proceedings. Here the Board's terms and conditions document states that '*it is expected that the duty solicitor will attend before the County Registrar and speak on behalf of defendants, without entering a defence or coming on record in the proceedings'*. Equally it is clear that there may be no continuity in terms of liaising with the Duty

[40] 'Abhaile helps just 157 fight for homes in court appeals' Niall Brady, *Sunday Times*, 23 July 2017.

Solicitor into the future, as it is stated that '*the Duty Solicitor must at all times make clear to the person that the service being provided is in relation to the present hearing date only and that if the proceedings are adjourned a different Duty Solicitor (or no duty solicitor**)** may be present on the adjourned date"*

Finally, both the Consultation Solicitor and the Duty Solicitor can advise and facilitate an application for full civil legal aid from one of the Board's full-time law centres if the borrower has a good defence to the repossession case capable of meeting the merits criteria under sections 23 and 28 of the Civil Legal Aid Act 1995. There is no information available that would suggest that this happening on any widespread basis and this issue is further explored in the next section.

In his recent speech referred to above, Minister Flanagan suggested that, '*as of end June 2017, the MABS in-house mortgage debt advisors (now also part of Abhaile) had helped almost 4,000 borrowers. 1,300 borrowers facing repossession have been referred by MABS court mentors for specialist help and advice. Up to end of August (2017), Abhaile duty solicitors will have attended almost 500 repossession lists before the County Registrar, across the country, providing legal assistance to borrowers wishing to engage with Abhaile'.*

While this information is welcome, what is missing is any idea of the progress made for the relevant borrowers as a result of the consultation and the tangible outcome in terms of results that have followed. Thus, much more detailed information is required to make any kind of assessment of impact of this aspect of the scheme. FLAC believes there should have been a rolling review from the outset of the respective numbers under the various strands of the Abhaile scheme, how a borrower transitions from one element to another, and what resolutions result for borrowers and defendant borrowers from the provision of these services.

- ★ **Recommendation 8: FLAC recommends that as soon as possible, the Legal Aid Board gather and publish more detailed data to effectively evaluate the impact of the Consultation & Duty Solicitor section of the Abhaile scheme as follows:**
    - **How many borrowers have received legal advice vouchers so far?**
    - **How many borrowers who have received legal advice vouchers had previously availed of a PIP voucher?**
    - **How many of these borrowers had previously failed to engage or had ceased to engage with their lender?**
    - **How many borrowers have actually used their vouchers to consult with a Consultation Solicitor?**
    - **How many have not yet been served with repossession proceedings?**
    - **How many have been served with repossession proceedings?**
    - **How many borrowers have consulted with a Duty Solicitor in advance of appearing before the County Registrar in a repossession case?**
    - **In how many cases might it be suggested that the engagement with either Duty or Consultation Solicitor led to a case being settled or struck out?**
    - **In how many such cases did the total amount owed to the lender exceed the value of the relevant property?**
    - **How many full applications for civil legal aid have followed on from the interaction with the Duty or Consultation Solicitor?**

- **How many of these has resulted in a defence being entered to the proceedings in the form of a replying affidavit?**
- **How much money has been paid out and how much money is owed to practitioners under the scheme so far?**

3.5 - Legal aid to defend borrowers in repossession cases

The terms of the Abhaile scheme provide that following a consultation with the Consultation (or Duty) Solicitor, a person may apply for full civil legal aid. Specifically, paragraph 32 of the terms of the Consultation Solicitor Service on the Board's website states that:

> *In the event that the person applies to a law centre for civil legal aid and advice to defend repossession proceedings, and the law centre so requests, the solicitor shall be under an obligation to copy and make available to the law centre the entire file including the written note of the legal advice given by the Consultation Solicitor under the Scheme.*[41]

The MABS website, however, makes it clear that such an application is not part of the Abhaile scheme: *If you have a valid legal defence to the repossession and want to apply for legal aid, you should apply for that to the Legal Aid Board, separately from this Scheme*.[42] In practice then, such applications for civil legal aid are subject to the condition that the borrower has a valid defence capable of meeting the merits criteria under sections 23 and 28 of the Civil Legal Aid Act 1995. The significant majority of defendant borrowers in repossession cases do not have a proper legal defence in the eyes of the law and are likely to fail the rigorous merits test generally applied by the Legal Aid Board. Inability to pay following an adverse change in financial circumstances beyond one's control, significant negative equity, alleged reckless lending by the plaintiff, even alleged non-compliance with the terms of the Central Bank's Code of Conduct on Mortgage Arrears – none of these are valid legal defences that will be likely to get the applicant through a strict merits test.

FLAC does not believe that these defendant borrowers should remain unrepresented. The vast majority are financially impoverished, with their occupation of the family home at stake. It may be argued that this aspect of our civil legal aid system does not measure up to international human rights standards.

Article 6 (1) of the European Convention on Human Rights and Fundamental Freedoms 1950 states that '*in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.* Article 6 (3) goes on to provide that everyone charged with a criminal offence has a minimum set of rights including '*to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require'.* Despite the specific reference in Article 6 (3) only to criminal offences, the Court of Human Rights subsequently found In the *Airey* case[43] that there may be circumstances in which, without the assistance of a legally qualified representative, a litigant might be denied her right to be able to present her case properly under Article 6. The Court

[41] See www.legalaidboard.ie.
[42] See www.mabs.ie.
[43] *Airey v Ireland* 32 Eur Ct HR Ser A (1979): [1979] 2 E.H.R.R. 30.

found that Ireland was in breach of Article 6 because it was not realistic to expect that in the family law proceedings concerned, Ms Airey could effectively conduct her own case.

These provisions in the Convention are further developed in the Charter of Fundamental Rights of the European Union.[44] Specifically, Article 47 on the right to an effective remedy and to a fair trial provides that:

> *'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*
> *Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.*
> *Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice'.*

Article 20 states that '*everyone is equal before the law'*; Article 7 that '*everyone has the right to respect for his or her private and family life, home and communications'.* The application of this range of protections is however somewhat reined in by Article 51 which provides that '*the provisions of this Charter are addressed to the institutions and bodies of the European Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law'.* [our emphasis added]

However EU law is engaged in the personal debt arena in a number of areas. The Court of Justice of the European Union (CJEU) has explored in recent years the parameters of its jurisdiction in this respect in a significant number of 'preliminary ruling' decisions which concerned the enforcement of secured loans across Member States, particularly Spain. In the ***Aziz*** case,[45] for example, existing Spanish law did not allow for the adjournment of mortgage enforcement proceedings in train against Mr Aziz so that he might question the fairness of a 'unilateral quantification of debt' term in his mortgage contract. The Court held that the relevant Spanish legislation, by limiting objections to enforcement to specified grounds which did not include the existence of a relevant (potential) unfair term, impaired the protection sought by the Unfair Contract Terms Directive.[46] Following *Aziz*, Spanish procedural law was amended to allow a defendant opposing mortgage enforcement proceedings to object to those proceedings '*on the ground that the contractual clause upon which the enforcement was based was unfair'.*

The *Aziz* decision was recently cited in ***Allied Irish Banks and Counihan and Counihan.***[47] Counsel for the defendants raised the issue of the Unfair Terms in Consumer Contracts Regulations in this case and referred the court to the *Aziz* case where the CJEU court restated that national courts were '*required to assess of their own motion whether a contractual term falling within the scope of the unfair terms directive is unfair, compensating in its own way for the imbalance which exists between the consumer and the seller or supplier'*. The High Court ruled that the CJEU in the *Aziz* case obliged a court, even in an adversarial system such as Ireland's, to act in an inquisitorial manner. Judge Barrett

[44] (2000/C 364/01).
[45] Case C-415/11, 14 March 2013.
[46] Transposed into Irish law by the Unfair Terms in Consumer Contracts Regulations, SI 27/1995.
[47] Judgment of Barrett J, High Court, 21 December, 2016

held that Irish courts facing summary applications should therefore identify whether any of the terms of the loan agreement at issue might be unfair for the purposes of the Directive and regulations. If they were, and were therefore potentially not binding, this could create grounds for the matter having to go to a full hearing.

FLAC is of the view that a defendant borrower should not have to face repossession proceedings without legal representation if he or she has acted in good faith, regardless of the lack of an available defence. However, our civil legal aid system as it currently operates does not appear to vindicate a defendant borrower's right, albeit established by the jurisprudence of the Court of Justice of the European Union, to question the fairness of a contractual term in a mortgage contract before a Possession Order can be granted. Present procedures in the legal system in Ireland do not appear to comply with the requirement for a court to assess of its own motion whether a mortgage contract contains an unfair term or terms.

- ★ **Recommendation 9: FLAC recommends that, outside of the terms of the Abhaile scheme, the Department of Justice review the provision of civil legal aid in repossession cases involving family homes and, as a minimum, proposes that a less strict merits test for civil legal aid should be applied in repossession cases.**

3.6 Lack of access to Abhaile scheme for those with unsecured debt only

A person who is not in mortgage arrears or is no longer in mortgage arrears on a family home is not currently entitled to access financial or legal advice available under the Abhaile scheme. This may impact in the future on the comparatively low number of Debt Settlement Arrangement applications that are made, relative to Personal Insolvency Arrangements.[48] Again, we understand the focus on attempting to protect the debtor's interest or occupation in the family home, but it is manifestly unfair that those who have surrendered their family home or have had it repossessed or who do not own their home are not entitled to access the state advice scheme that would then enable them to resolve these and other unsecured debts.

This lack of access to Abhaile also has a knock-on effect on an unsecured debtor's potential access to petition for bankruptcy. Section 145 of the Personal Insolvency Act 2012 amends Section 11 of the Bankruptcy Act 1988 by providing an additional subsection (4) as follows:

> *A debtor may not present a petition for adjudication unless the petition is accompanied by an affidavit sworn by the debtor that he 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 Debt Settlement Arrangement or a Personal Insolvency Arrangement to the extent that the circumstances of the debtor would permit him to enter into such an arrangement.*

High Court Practice Direction 66 on Bankruptcy (as of 16 August 2016) supplements the requirements of s.11 of the Bankruptcy Act 1988 as follows:

[48] By the end of Q.1 2017, the Insolvency Service report that a total of 1,158 applications for DSA's had been made compared to 5,839 applications for PIAs.

1. Every Petition submitted by a debtor seeking an order of adjudication in bankruptcy must be accompanied by an affidavit of the debtor exhibiting a letter from a Personal Insolvency Practitioner registered with the Insolvency Service of Ireland certifying that:

a. *The Personal Insolvency Practitioner has met the debtor and interviewed him/her in relation to his/her assets, liabilities and income.*
b. *The debtor has confirmed to the Personal Insolvency Practitioner that the Statement of Affairs (in Form 23 Appendix O of Rules of Superior Courts) is accurate, complete and consistent and nothing in the interview with the debtor would give the Personal Insolvency Practitioner any reason to doubt same. (This confirmation should be given to the Personal Insolvency Practitioner by the debtor, even when the practitioner has prepared the Statement of Affairs on behalf of the debtor, so that the practitioner can certify as required to the court.)*
c. *Having regard to the contents of the debtor's Statement of Affairs and the Personal Insolvency Practitioner's interview with the debtor, the Personal Insolvency Practitioner believes that the debtor is unable to pay his/her debts as they fall due and the debtor's inability to meet his/her engagements cannot be more appropriately dealt with by means of a Debt Relief Notice Process, Debt Settlement Arrangement or a Personal Insolvency Arrangement.*

2. A debtor should not swear his/her Statement of Affairs nor sign his/her Statement of Personal Information, until he /she is fully satisfied that each document is accurate, complete and consistent.

Thus, any person who wishes to petition for his or her own bankruptcy must have the appropriate letter from a Personal Insolvency Practitioner to support his or her application. As we know, a debtor in mortgage arrears and in danger of losing their family home can avail of a free consultation with a PIP. Where such a debtor's mortgage is manifestly unsustainable, the PIP's suggestion may be to surrender the family home. The PIP may then furnish the letter required by High Court Practice Direction 66 to exhibit with the debtor's affidavit as part of the Abhaile service. This may enable the debtor to enter into the bankruptcy process where residual mortgage debt and other unsecured debts will eventually be written off.

On the other hand, a debtor not in or no longer in mortgage arrears, but with levels of unsecured debt that preclude him or her entering into a Debt Relief Notice under the legislation[49], is unable to access a free consultation with a PIP. He or she must bear the cost of any PIP consultation, thus potentially blocking access to bankruptcy even where he or she may be clearly insolvent. This is a matter seriously in need of remedy. FLAC believes it is both unfair and impractical that insolvent debtors whose debts are unsecured only are deprived of access to a PIP assessment and the Abhaile scheme should be expanded to allow for this.

32. **Recommendation 10: FLAC recommends that access to the Abhaile scheme be widened to include insolvent debtors with unsecured debt.**

[49] The current ceiling in terms of unsecured debt to qualify for a Debt Relief Notice (DRN) is €35,000.

4. Amendments to the legislation discussed by the ISI Consultative Forum

FLAC is a member of the Consultative Forum set up by the Insolvency Service and has participated in the meetings held so far in 2017 to examine the effectiveness of solutions offered under the legislation as well as the review of the legislation itself.[50] A number of proposals to amend the Act, many of them quite technical in nature, were examined by the group and we set out a review of what we consider to be the two principal proposals.

The ISI has sent a submission to the Department of Justice on behalf of the Consultative Forum under separate cover.

4.1 - Circuit Court granting and extending of Protective Certificates, approval of arrangements and approval of variations of arrangements

- **Introduction**

Given the diverse composition of the Consultative Forum group, it has not been possible in a number of instances to get unanimous or even broad agreement on a number of relevant proposals. However, it is worth noting that there is some consensus that some tasks under the legislation currently assigned to the Circuit Court as well as the ISI could usefully be left to the ISI alone that might save appreciable amounts of time. It is broadly agreed that these changes would facilitate the smoother and swifter processing of proposed arrangements and would remove at least some of the frustration felt by insolvent debtors, creditors and practitioners alike at the delays in finalising arrangements, at a time where many insolvent debtors' cases are very urgent.

A submission of the Association of Personal Insolvency Practitioners (APIP) suggests, for example, that:

> *there are some steps in the Personal Insolvency process that APIP would argue are superfluous to requirements. Two such processes are:*
>
> - *the requirements for an application for a Protective Certificate to go before the relevant Court, and*
> - *the application for the approval of a creditor approved insolvency arrangement to go before the relevant Court*
>
> *Both these applications go before the relevant Court as ex-parte applications. The legislation as it stands provides for a mechanism for a disgruntled creditor to bring an application before the same Court to object to either of these applications. As APIP sees it, there is no prejudice experienced by any stakeholder in these applications being dealt with by the Insolvency Service of Ireland, with the Courts being troubled only if a creditor objection arises. In dealing with one household insolvency (a pair of interlocking* applications for PIAs), *this one change to the process would eliminate four applications going before the relevant*

[50] The Forum is a diverse group, encompassing many viewpoints, including secured and unsecured creditors, personal insolvency practitioners, debtor advocates, money advisors, the Revenue, the Courts and Insolvency Service officials.

> *Court. This would free up the resources of the insolvency practitioner/PIP and the Court Service.*

Insolvency Practitioners McCambridge Duffy suggested that:

> *there can be substantial delays between creditors approving and the Court approving a proposal, in some instances this can be 5 months'.* They add the important point that '*during this period the creditors may not be receiving mortgage payments and creditors cannot contact the debtor nor are they bound by the terms of the arrangement as it is not* (yet) *effective.*

In a follow-up paper tabled to discuss this issue in more detail, the Insolvency Service stated in relation to the issuing of Protective Certificates that in only one instance since the legislation commenced has a Circuit Court judge refused to grant the certificate approved in principle by the Service. In this case, there was only one debt, which was an excludable debt, and the creditor only opted out after the application for a protective certificate had been made.

- **Issuing and extending Protective Certificates**

Under s.60 (Debt Settlement Arrangements) and s.94 (Personal Insolvency Arrangements) of the Personal Insolvency Act, the Insolvency Service is empowered and obliged to carry out a comprehensive assessment of whether the insolvent debtor meets eligibility criteria for the relevant arrangement and it may make appropriate enquiries in so doing.

Under s.61 (DSA) and s.95 (PIA) where the Insolvency Service has issued a Protective Certificate, it must furnish the Certificate to the relevant court which in turn must carry out its own assessment as to whether the insolvent debtor meets the eligibility criteria and may hold a hearing if it so chooses.

Under s.63 (DSA) and s.97 (PIA), a creditor aggrieved by the issue of the Certificate may appeal within 14 days of notification for an order directing that the protective certificate shall not apply to that creditor. Thus, there is already a check and balance in the system and this could be tweaked, if necessary, to allow an appeal to the Court to object to the granting of the Certificate in itself, rather than just its application to the individual creditor.

In addition, under s.61 (6) (DSA) and s.95 (6) (PIA), an extension of up to 40 days to the duration of a Protective Certificate may be sought on application to the Court rather than the ISI.

Over the four or so years since its establishment the ISI has built up considerable expertise in processing applications, having issued a total of 4,295 Protective Certificates to end of Q.1 2017 and, as noted above, only once has the Circuit Court refused to confirm the granting of a PC. It should also be said that the ISI has also rejected a number of applications, though how many is not clear from its Case Management Quarterly Statistics.

- ★ **Recommendation 11: FLAC recommends that the requirement that a court must approve the grant of a Protective Certificate already issued by the Insolvency Service be removed and this function be delegated to the Insolvency Service with a right of appeal to the court.**

★ **Recommendation 12: FLAC recommends that the requirement that applications to extend the duration of a Protective Certificate must be made to a Court be similarly removed and that the Insolvency Service of Ireland be responsible for such applications with a right of appeal to the court**.

- **Approving Debt Settlement Arrangements and Personal Insolvency Arrangements and approving variations of such arrangements**

Under s.76 (DSA) and s.113 (PIA), Insolvency Service must, following the outcome of the creditor's meeting, record the approval of an arrangement in the Register and furnish the relevant court with a copy of the arrangement.

In turn, s.78 (DSA) and s.115 (PIA) require the court again to consider whether to approve the coming into effect of the arrangement and set out the criteria it must take into account.

However, under s.77 (DSA) and s.114 (PIA), an objection can be lodged before such approval and s.87 (DSA) and s.120 (PIA) set out the grounds that may be used to lodge an objection.

It must be emphasised that before the approval of the proposed arrangement by the Insolvency Service, the appropriate threshold or thresholds of creditors have already approved the relevant proposal, so the Insolvency Service and subsequently the Court is essentially rubber-stamping their decision. Nonetheless, any aggrieved creditor may still pre-empt that approval by appealing, so again there is an in-built check and balance in the legislation. Again, it makes eminent sense in our view to remove the approval role from a court and to delegate this function to the ISI which would only be in essence confirming the will of the creditor's meeting.

The right of appeal to a court for a creditor wishing to challenge the arrangement on any one of a range of grounds set out in s.87 (DSA) and s.120 (PIA) in our view adequately satisfies requirements of procedural fairness.

The comments above apply equally in relation to the requirements for the Court to approve variations of existing DSA or PIA arrangements. As suggested by McCambridge Duffy in its submission on this issue, the variation has already been approved by creditors at their meeting and this is simply an alteration to the existing arrangement. If a given creditor has an issue with the variation, they can raise an objection and the court can review it.

★ **Recommendation 13: FLAC recommends that the requirement for Debt Settlement Arrangements and Personal Insolvency Arrangements proposals or variations of such proposals to be approved by the Insolvency Service and then confirmed by the Court be amended so that the Insolvency Service is responsible for approving such applications or variations with an avenue of appeal to the Court**.

- **Constitutional considerations**

Some concerns have been expressed over whether there are constitutional impediments to such amendments. On this question, Bunreacht na hEireann 1937 makes a clear distinction between the

administration of justice on the one hand and the limited powers and functions of a judicial nature on the other. The former can only be carried out by a judge, the latter may be delegated to statutory bodies. FLAC suggests that the proposed new powers of the Insolvency Service do not exceed (and may not even reach) the threshold of the exercise of limited functions and powers of a judicial nature. Furthermore, allowing a specialist body to assume responsibility for a wider range of quasi-judicial functions has been a trend in the Irish legal system for some time now.[51]

A second constitutional factor undermining what would clearly be time-saving improvements to the insolvency system is the fear that any such amendments to the legislation might be perceived to infringe on the property rights of creditors and might therefore be unconstitutional. In summary, there is copious case law considering the personal rights articles of the Constitution. It is beyond the scope of this submission to consider these, but broadly speaking, it is our view that legislation will not be considered to be attacking property rights if it is put in place to reconcile the exercise of property rights with the exigencies of the common good (or perhaps more pertinent in 2017, the public interest).

Serving the public interest in terms of seeking to resolve legacy over-indebtedness is precisely what the Personal Insolvency Act 2012 is intended to achieve. This is clear from the preamble objectives set out at the beginning of the Act, which include, for example:

> *the need to enable insolvent debtors to resolve their indebtedness (including by determining that debts stand discharged in certain circumstances) in an orderly and rational manner without recourse to bankruptcy, and to thereby facilitate the active participation of such persons in economic activity in the State.*

A final comment here is that proposals to remove some of the powers of the Circuit Court and delegate them to the Insolvency Service do not alter the possibility (or indeed the likelihood) of write-down contemplated by this legislation. In effect, it is the majority of creditors voting at a creditor's meeting that impose write-down (or cram-down) on other creditors, not the Insolvency Service of Ireland. There is still an appeal for any disgruntled creditor to argue unfair prejudice (as opposed to prejudice itself, which is a given, according to the recent jurisprudence of the High Court).

4.2 - Improvements to the system of Debt Relief Notices (DRNs)

As with DSAs and PIAs, the legislation around Debt Relief Notices (DRNs) required the Court to confirm the coming into operation of the notice of a DRN. Given that the vast majority of DRN applications have been processed through an office of the Money Advice and Budgeting Service

[51] For example, up until recently, under the unfair dismissals legislation, there lay a *de novo* appeal to the Circuit Court from a finding of the Employment Appeals Tribunal; now, however, such cases are now dealt with by the Workplace Relations Commission[51] and any appeal is to the Labour Court (itself outside the formal courts system) with an appeal only on a point of law into the High Court and potential enforcement action in the District Court. Similarly, disputes relating to landlord and tenant matters are initially dealt with by the dispute resolution services of the Residential Tenancies Board. Appeals may be brought to the Tenancy Tribunal. Again, an appeal to the High Court may be brought only on a point of law and potential enforcement action is in the Circuit Court.

(MABS) acting as the 'approved intermediary',[52] this has led to the somewhat ludicrous situation where three state-funded entities are involved in processing applications before a DRN may be put in place, as follows:

1. Under s.27 the MABS-approved intermediary meets the potential applicant and carries out the relevant assessments and checks before submitting an application under s.29 to the ISI.
2. The ISI considers the application under the terms of s.30 and 31 and, if satisfied that the application is in order, issues a Certificate and in turn furnishes that certificate to the appropriate court.
3. The court in turn again considers whether the necessary criteria have been satisfied before issuing a Debt Relief Notice. Under s.42 and 43, a specified creditor may apply to the court if aggrieved by any act, omission or decision of the ISI in connection with the DRN concerned. Under s.43, a specified creditor may apply to the court during the (3-year) supervision period if he or she objects to the inclusion of his or her debt in the DRN.

The DRN was introduced to deal with small and manifestly unsustainable levels of 'qualifying' debt, initially of up to €20,000. This was increased to €35,000 in the Personal Insolvency (Amendment) Act 2015, when it was clear (as many had pointed out would be the case from the beginning) that the level of qualifying debt was too low and numbers of approved DRNs were accordingly disappointing.

DRNs are given a unique position under the legislation as the only form of resolution that does not require creditor approval in the form of a voting mechanism at a creditor's meeting and where write-off of all qualifying debt is automatic at the conclusion of the supervision period. It is of course very important then that the necessary due diligence is carried out before a DRN is confirmed.

★ **Recommendation 14: FLAC recommends that the requirement for DRN proposals to be court-approved be dropped and that MABS and the Insolvency Service be responsible for verifying and approving such applications, with an avenue of appeal to the Court.**

In the course of the Consultative Forum's deliberations, the Money Advice and Budgeting Service - as the principal approved intermediary for processing Debt Relief Notices under the Act – made a number of proposals to improve the system of DRNs. The intention of the DRN process was to provide for a quick resolution for debtors with comparatively low levels of debt. In general terms, FLAC would defer to the expertise and experience of MABS as the practitioners in this area. The amendments suggested below are sensible and are, in our view, largely uncontroversial. These include as follows:

- **Supervision period reduction from three years to one year –** To provide for quick resolution for debtors and to tie in with the one year bankruptcy discharge period brought about by the Bankruptcy (Amendment) Act 2015 and to align with the one year supervision period for Debt Relief Orders in the United Kingdom.
- **Removal of preference as an eligibility criterion –** To replace straightforward exclusion for making a preferential payment with a right of objection for creditors and to provide that

[52] The only other registered approved intermediary apart from MABS companies is the Irish Mortgage Holders Organisation (IMHO).

payments made to protect the debtor's reasonable standard of living be excluded from the definition of making a preference.

- **Debtor's obligations where there is an increase in income –** To ensure that the obligations on a debtor to surrender a portion of any increase in his or her income would only apply when the increased income led to the debtor exceeded the relevant ISI reasonable living expenses guidelines for the household type.
- **Increase the permitted motor vehicle value threshold from €2,000 to €5,000 –** To reflect the fact that in many areas of the country there are poor public transport networks and that a reliable vehicle is required that might reduce the regular cost of repairs and thus to ensure that debtors who otherwise fulfil the criteria would not be excluded from a DRN
- **Modified vehicle to take account of a disability –** That the right to retain a vehicle of a value exceeding the relevant threshold where it is specially adapted to meet the needs of a debtor or his/her dependant with a disability be extended to a vehicle required by the debtor or his or her dependent(s) on the basis of a medical need.

★ **Recommendation 15: FLAC proposes amendments to the DRN system as recommended by MABS to the Insolvency Service Consultative Forum.**

5. Other areas of the legislation requiring attention

5.1 – Remedies for those with secured (and unsecured) debt

Access to s.115A appeals

As outlined in detail above, the addition of a right of appeal to the Circuit Court for an insolvent debtor whose proposal for a PIA (incorporating a mortgage on a family home) has been rejected has started to make a difference. This is particularly apparent in terms of the increase in the number of applications for protective certificates to propose a PIA. These are likely to become more pronounced with the most recent decision of the High Court in the *Callaghan* case,[53] where the court essentially favoured the certainty of a PIA with a write-down now against the uncertainty of a split mortgage into the distant future, in rejecting a creditor's appeal against a Circuit Court decision affirming a PIA.

However, measures ostensibly designed to assist debtors may sometimes be drafted in such a way as to undermine their usefulness in counteracting the very problem they are intended to resolve. For example, in another recent High Court appeal from the Circuit Court under s.115A of the Act,[54] the court had to somewhat reluctantly conclude that a debtor's application to overturn a rejection of her PIA proposal by her mortgage lender could not be granted because she did not meet one of the key criteria imposed by the section. This criterion was that she did not have 'a relevant debt', in that she was not in arrears with the payments on her mortgage or was not in an 'alternative repayment

[53] *Re: Callaghan, a debtor*, [2017] IEHC 325.
[54] 'In the matter of Part III, Chapter IV of the Personal Insolvency Acts 2012-2015 and Hill and Section 115A (9) of the Personal Insolvency Acts 2012-2015' (18 January 2017).

arrangement' on 1 January 2015, as the relevant amendment passed in the Personal Insolvency Amendment 2015 continues to require.

Nonetheless, it was clear that she had by that time encountered serious difficulties meeting the payments on her mortgage but arrears did not actually first occur until March 2015. By the time the proposal for the PIA was made to a creditor's meeting in June 2016, the total amount owed on the mortgage amounted to almost €151,000 and the property was estimated to be worth €55,000. The net result of this ruling was that a suggested arrangement to write down the mortgage to the current market value of the property (amongst other features of the proposed PIA) could not be examined by the court to determine if it was a reasonable proposal.

As of June 2017, therefore, an insolvent borrower could be almost two and a half years in arrears on his or her mortgage and still not qualify to appeal the rejection of a PIA proposal due to the qualifying condition outlined above. This needs to be remedied immediately and could be done by amending the relevant date to January 2016 (or later) or removing the date requirement entirely**.**

★ **Recommendation 16: FLAC recommends that the requirement for a borrower to be in arrears with the payments on his/her family home mortgage or in an 'alternative repayment arrangement' on that mortgage as 1 January 2015 in order to qualify to appeal against the rejection of Personal Insolvency Arrangement be dropped entirely or amended to January 2016 or later.**

Positive equity versus negative equity cases

There was a modest improvement in the approval of personal insolvency arrangements under the legislation in 2016 over 2015, with 693 as against 619 PIAs approved. A more telling figure perhaps is the total of 1,144 new applications for PIAs made during Quarter 1 of 2017 following 935 PIA applications in the last quarter of 2016, both far surpassing any previous figures – for example only 1,291 such applications were made in the whole of 2015 - and indicating that there should be a sizeable increase in the number of PIA proposals in 2017. This is almost certainly linked to the availability of the appeal mechanism to the Circuit Court where a PIA proposal is rejected.

However, the recent jurisprudence of the High Court has also enunciated clearly a vital test for the court in determining whether to overturn the secured creditor's objection to a PIA: What is the return for the secured creditor in the proposed arrangement compared with the return were the property to be repossessed and the debtor adjudicated bankrupt?

As long as the total amount owed on the mortgage is greater than the current market value of the property at the time of the proposal, it is more difficult for the secured creditor to argue against the proposed PIA, particularly as the costs of sale for that creditor (10% to 15% of market value) must also be factored into the calculation. However, where does this leave mortgage holders who are in positive equity but also in considerable and unmanageable arrears?

Under the strict application of the repossession-versus-arrangement return, a write-down PIA is likely to be justifiably rejected by the secured creditor in a positive equity scenario, as it will be able to argue that it will recover all or the bulk of the money it is claiming to be owed by repossession and sale now. Any appeal that might follow to the Circuit Court is unlikely to succeed if the

repossession-versus-arrangement comparison is the key matrix guiding the Court's decision. As a number of properties move out of negative into positive equity, especially in urban areas, a window of write-down resolution that had just been opened by the introduction of the Circuit Court appeal is already closing for a number of households.

This matter needs urgent consideration. As ever, a lack of detailed information may inhibit the discussion. For example, it is not publicly known how many accounts in each category of mortgage arrears are in positive as opposed to negative equity in the first place, and what is the degree of positive equity in these cases?

It is also worth noting that in one recent ruling, Ms Justice Baker left a small window of doubt that the repossession-versus-arrangement comparison might always be a mandatory requirement. Specifically, she stated in the *Doyle* case:

> '*I am mindful of the fact that a court may approve a scheme in circumstances even when a creditor is likely to do worse under the scheme than in bankruptcy, and there is no mandatory condition that the court be satisfied that the return on bankruptcy would be less favourable'.*[55]

Ms Justice Baker drew on previous case law in the area of examinership for comparative purposes in suggesting that such circumstances would normally require weighty justification. FLAC's view is that the prevention of the repossession of a number of family homes in positive equity may provide the kind of weighty justification required.

There is also an accommodation provided for in the Act as it stands which might be at least be partially suitable, in tandem with other strategies, for cases of positive equity with unsustainable arrears. Specifically, s.102 (6) (f) suggests that a PIA may include a term that *'the principal sum due on the secured debt be reduced provided that the secured creditor be granted a share in the debtor's equity in the property the subject of the security'.* How feasible this might be in given situations is a matter for insolvency practitioners to frame, but it seems to us that positive equity arrears cases may require a different approach for a resolution to be achieved.

- ★ **Recommendation 17: FLAC recommends that detailed information on the positive/negative equity position of households in arrears be urgently gathered to formulate an appropriate solution for cases of positive equity with unsustainable arrears. This might include a legislative obligation to consider a debt for equity arrangement in a positive equity case and/or expressly providing in the legislation that the repossession versus arrangement comparison is not a mandatory requirement in framing a proposal for a Personal Insolvency Arrangement.**

5.2 – Remedies for those with unsecured debt only

Appeal against the rejection of a Debt Settlement Arrangement (DSA)

[55] 'In the matter of Part 3, Chapter 4 of the Personal Insolvency Acts 2012- 2015 and JD and Section 115A (9) of the Personal Insolvency Acts 2012-2015' Page 19.

The Personal Insolvency (Amendment) Act 2015 only allows for an appeal where a proposal for a Personal Insolvency Arrangement (PIA), incorporating a secured debt in arrears on a family home, is rejected by a majority of relevant creditors. Not everyone who is insolvent has a secured debt however. While it is understandable that the initial focus of the State in introducing this appeal mechanism was on preventing the loss of family homes, FLAC does not see a continuing justification for an insolvent debtor who does not own, or no longer owns, his or her family home being treated less favourably in terms of access to an appeals mechanism.

The latest ISI figures to end Q.1 2017 suggest:

- There has been a total of **1,158** applications for a DSA since the legislation commenced.
- **868** Protective Certificates had been granted on foot of those applications (75% of the total number of DSA applications made).
- This converted into a total of **543** DSA arrangements approved (in turn 63% of the Protective Certificates granted).

In effect this means that more than one in every three DSA applications is being rejected by creditors; further, these are cases where the Insolvency Service saw fit to approve the application for a Protective Certificate and the Circuit Court affirmed this application. It would be useful to have a breakdown of the debt profile in these cases, for example:

- How many feature a now unsecured residual mortgage debt where the family home has already been repossessed or surrendered?
- In how many is an accommodation proposed for ongoing payment of the applicant's mortgage outside the terms of the DSA as suggested in s.68 (4) of the legislation?[56]
- In how many cases is the proposal rejected due to a lack of adequate surplus income to pay a sufficient dividend to unsecured creditors?

★ **Recommendation 18: FLAC recommends that borrowers be permitted to appeal rejections of their DSA proposals to the Circuit Court. In addition, FLAC suggests that more detailed information on the debt profile in cases where DSA applications are rejected by creditors should be researched by the Insolvency Service and be made available.**

'Nil payments' plans

In January 2012, in advance of the publication of the heads of the personal insolvency bill, FLAC published a paper[57] that examined trends noted by international insolvency expert Professor Jason Kilborn in his in-depth examination of the variety of debt settlement schemes across Europe, and

[56] S.68 (4) (together with s.52 (3) d) seem to specifically encourage a PIP to consider coming to an arrangement with a mortgage lender to vary (presumably downwards) the debtor's payment on the mortgage. A DSA proposal can then be made that might provide a dividend for unsecured creditors, whilst the payment arrangement on the mortgage remains outside the terms of the DSA. When the DSA comes to an end and unsecured debt is written off, the payment to the mortgage lender will then correspondingly increase.
[57] FLAC's paper was called *'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'.*

tried to suggest how these might be applied in an Irish context.[58] Kilborn, a Professor of Law at the John Marshall School of Law, Chicago, subsequently spoke at the FLAC conference on personal insolvency held in April 2012, where he delivered a lengthy critique of Ireland's draft personal insolvency framework.

On the question of surplus income available to fund insolvency arrangements, FLAC's paper noted that *'the experience in Europe is that many applicants for debt settlement do not have the capacity to make any payments at all, when minimum income is taken into account';* we also noted in this context the difficulty that some applicants have in paying the initial costs and fees in order to access a scheme. We observed that:

> *according to Kilborn, 'zero payment plans' have constituted a 'significant portion' of all payments plans in a number of the older systems from the outset, for example in Denmark, Sweden, the Netherlands and Germany. Thus, he suggests that these should be called debt adjustment or rehabilitation plans rather than payment plans to reflect their real focus*.

FLAC's paper then went on to compare systems where a no-payments plan is put in place, but is subsequently abandoned where there is ongoing incapacity to pay, with systems where the State may insist on '*the plan running its course for pedagogical purposes',* even though little or nothing may be paid over its course and the debtor would have to be monitored for improvements in income capacity. Here, for example, Kilborn quotes Belgian governmental and parliamentary views that 'no payment plans' have a 'symbolic character'.

The downside, as pointed out by debtor advocate organisations such as the IFF (Institut fur Finanzdienstleistungen) in Hamburg, is the substantial administrative expense on the State '*to achieve moral educational goals*'. FLAC's paper conjectured that in the Irish model as proposed by the Law Reform Commission (LRC) at the time,[59]*'a debt settlement arrangement may yield very little if anything over its lifetime for creditors, particularly in a very poor economic environment such as pertains in Ireland'* and we speculated that '*the creditor approval threshold may then become a problem*'.

Ultimately, it would appear to us that the Personal Insolvency Act 2012 failed to address this fundamental question. If the insolvent debtor qualifies for a Debt Relief Notice (maximum threshold of qualified debts now at €35,000, originally €20,000, together with other restrictive qualifying conditions), there is a potential resolution. If he or she does not and a DSA is proposed, the creditor's meeting decides, with no right of appeal in the event of a rejection.

This begs further questions. Given that there is no provision for a 'nil payments' plan in Irish legislation, and given that the Insolvency Service's own figures tell us that only **543** DSA arrangements in total have been approved in almost four years, we would ask the following:

- How many insolvent debtors have been unable to even apply for a DSA due to lack of income?

[58] *Expert recommendations and the Evolution of European Best Practices for the Treatment of Overindebtedness, 1984 – 2010*, first published in August 2010, by Jason Kilborn, Professor of Law at the John Marshall School of Law, Chicago

[59] In its final report on this issue in December 2010 – Personal Debt Management and Debt Enforcement – [LRC 100-2010].

- In how many cases was any surplus income dissipated by the proposed PIP fees in the arrangement leading to the rejection of the proposal?
- How many debtors with comparatively high levels of unsecured debt still languish, **too** indebted for a Debt Relief Notice and too poor for insolvency?

These questions should be researched and addressed with a view to considering the introduction of a nil payments plan option. This could help to resolve legacy cases of insolvency where the level of unsecured debt exceeds the DRN threshold, without the need for the debtor to petition for bankruptcy.[60] And just to reiterate, as explained above, there is currently no access to the Abhaile scheme for those with unsecured debt only, and therefore no PIP voucher to help smooth the path to bankruptcy in any case.

A final point might be made briefly here. In FLAC's 2012 paper referred to above, we noted that existing European systems tended to vary between schemes that decide in advance that a set amount of payment will be available to creditors in terms of a percentage of the debts owed (such as the Individual Voluntary Arrangement (IVA) system in the UK or debt adjustment in Denmark or Sweden), and those that oblige a debtor to pay to the best of his or her ability over a defined period of time by assigning any surplus income beyond minimum income to the benefit of his or her creditors (as exist in Germany or Austria).

We suggested that in its final report the Law Reform Commission (LRC) appears to have favoured the former approach without much analysis of the alternative. At the time, we offered the view that

> *it is still questionable in the current circumstances in Ireland whether this is the right option* […] '*insisting that a proposal is made to be voted on by creditors at a moment in time that cannot possibly anticipate upward (or downward) changes in disposable income may hamper rather than encourage settlements.*

We forecast that *'[i]n tandem with the necessity for a 60% threshold of creditors* [as was then proposed]*, this may see many applications being blocked on the basis that the creditor regards the proposed percentage towards payment of the debt it holds as insufficient'*.

With an overall total of only **2,160** approved arrangements from late 2013 to the end of Q.1 2017 (not including Debt Relief Notices), we might suggest that our prediction has borne out over time. To be fair, it is likely that there is a higher than normal rate of potential applicants for insolvency arrangements who have mortgage arrears in Ireland than would be the European norm and the presence of debt secured on the family home makes resolution more difficult to achieve.

★ **Recommendation 19: FLAC recommends that the legislation be amended to provide for 'nil payment plans' where there is no surplus income available to a borrower, and detailed data be gathered on such cases to appreciate the scale and scope of the issue.**

[60] See below for more detail recent research carried out by Waterford Money Advice and Budgeting Service (MABS) on insolvency options for MABS clients.

★ **Recommendation 20: FLAC recommends that consideration be given to switching the basis of payment in DSA applications away from pre-set defined payments to payments on an available surplus income basis.**

5.3 - Costs and fees in insolvency – The case for public PIPs

As discussed above, by allowing for a state-funded consultation with a Personal Insolvency Practitioner, the Abhaile scheme is intended to enable some insolvent debtors with home mortgage arrears to have a PIA proposal framed. Thereafter, if the proposal is accepted by a majority of creditors and is confirmed, the PIP's fees are paid out of the money available from the insolvent debtor's income (and assets).

It is clear that the PIP is a commercial actor and must be paid for his or her work as well as being compensated for the costs of insurance, investment in training and systems and other sundry costs of becoming a practitioner. However, it is also clear that the PIP fees incorporated into the agreement are likely to reduce the dividend available to creditors. A number of questions follow from this 'fact of life' of the Irish insolvency scheme:

- To what extent might this result in creditors discouraging debtors from seeking accommodations under the legislation and instead encouraging 'voluntary settlements' which are not legally binding?
- To what extent might this discourage PIPs from making proposals under the legislation?
- To what extent might this adversely affect the approval of arrangements that are proposed under the legislation?

A research report carried out by Waterford Money Advice and Budgeting Service (MABS) provides some interesting findings relevant to these important questions.[61] This study was motivated by the realisation that '*many of its clients are locked out of a statutory service ostensibly designed to assist them, and others in a similar situation, by virtue of the fact that they do not have enough money to put in place an arrangement while also paying a Personal Insolvency Practitioner's professional fee'.* The project was thus put together to assess *'whether the provision of a free-to-access PIP in MABS would have a material impact on outcomes for clients'.* The free to access PIP in question was at that time an employee of the service in question and a qualified accountant who was authorised by the Insolvency Service.

An overview of key findings of the research in the Executive Summary of the report is as follows:

- In 32 of the 122 cases, clients had already had a consultation with a PIP. In 19 of those 32 cases no solution was offered by the PIP. In each of the remaining 13 cases, bankruptcy was proposed. By contrast, the Waterford MABS PIP managed to secure 10 DSAs and 2 voluntary arrangements among these 32 clients.
- In a further 27 of the 122 cases, '*alternative arrangement/case progression routes other than the DSA/PIA'* had to be found and the research report appositely remarks in this context that '*given the level of intensive support required, it is unlikely that the level of long-*

[61] Waterford MABS Personal Insolvency Practitioner Research Report, August 2016. We would like to clarify that FLAC was a member of the Steering Group established to oversee this piece of work.

term support to low income debtors, to achieve a resolution to their difficulties, could be provided by a PIP on a commercial basis'.

- Of the total of 66 cases (out of 122) progressed through the Insolvency Service system, 61 were DSA applications and only 5 were for PIAs. Of these, 30 DSAs were approved, 10 rejected, 2 withdrawn, 5 ended in voluntary arrangements and 14 were pending at the conclusion of the project. Of the 5 PIAs, one was withdrawn, one ended in a voluntary arrangement and 3 were pending at the conclusion of the project.
- Of the 30 approved DSAs, it is important to note that 13 resolved unsecured debts where the debtors held a mortgage and these arrangements will have the impact of making the mortgage sustainable in the long run. Please see footnote number 45 on page 35 of this submission above for details of the legislative provisions that give rise to this possibility.

Ultimately the report concluded that the research had '*provided a window into the potential of insolvency for debtors on a very low income and demonstrated that effective solutions can be found in even the hardest cases. On this basis the research concludes with a strong recommendation that a business case is now developed to expand and maintain this service within MABS'.* Our understanding is that proposals to create a free to access PIP facility within the MABS network are currently under active consideration by the Citizens Information Board (CIB).

A number of organisations including MABS and FLAC were very critical of the decision to install a purely commercial insolvency practitioner system into the legislation back in 2012 and correctly pointed out that this would disadvantage debtors on low incomes with little disposable income to fund arrangements. It is important again to understand that this is not a criticism of existing insolvency practitioners who have a living to earn. It is apparent, however, albeit from a limited sample in the Waterford MABS research, that a free-to-access PIP may be able to deliver results for low income clients that a commercial PIP cannot; moreover, it suggests they may, in many instances, be working with a very different client base.

Whilst it may be suggested by some that the Abhaile scheme overcomes this, this is at best only partially true. First, as already noted, Abhaile only currently applies to family home mortgage arrears cases where that family home is in danger of repossession. Second, even if (as we recommend above), Abhaile is to be expanded to unsecured debt insolvency cases, that will only at best allow the costs of investigating and framing the proposal to be met, and not the PIPs fees in the arrangement. With the MABS PIP all of the insolvent debtor's surplus income (if there is any) is available for creditors.

★ **Recommendation 21: FLAC recommends that the legislation be amended to provide for a state-funded, free-to-access PIP service within MABS as suggested by the Waterford MABS pilot project.**

5.4 – Sundry proposals

- **Arrangements automatically coming to an end in the event of six month default**

Section 123 of the Act in relation to PIAs (the parallel section for DSAs is s.85) provides that:

(1) Where the debtor is in arrears with his or her payments for a period of 6 months the Personal Insolvency Arrangement shall be deemed to have failed and shall terminate where the personal insolvency practitioner notifies the Insolvency Service and the debtor of such default.

(2) For the purposes of subsection (1), a debtor is in arrears with his or her payments for a period of 6 months on a given date if — (a) at the beginning of the 6 month period ending immediately before that date, one or more than one payment in respect of a debt became due and payable by the debtor under the Personal Insolvency Arrangement, and (b) at no time during that 6 month period were any obligations in respect of those payments discharged.

(3) Where the Insolvency Service receives a notification of default referred to in subsection (1), it shall record the failure of the Personal Insolvency Arrangement in the Register of Personal Insolvency Arrangements.

FLAC believes that this provision is unduly punitive. It effectively means that where the debtor misses a payment and does not redress that failure to pay within the following six months (even though he or she may make the next six successive payments), his or her arrangement will be deemed to have come to an end automatically. There is no room for discretion here; the arrangement terminates as a matter of law without recourse to any appeal or review mechanism.

It should be pointed out that the perceived harshness of this provision is certainly mitigated by the rules in the Insolvency Service of Ireland's DSA and PIA working protocols that allow the PIP to grant the debtor a payment break to avoid payment default (with the creditor's consent in the case of a PIA incorporating a family home mortgage). It is notable, however, that such 'payment breaks' are not provided for in the legislation; their status may therefore be legally questionable. Further, it may be overly optimistic to assume that, following approval of the arrangement, the relationship between the insolvent debtor and the PIP will always be such that the debtor will feel confident in approaching the PIP to seek a break in payments. There may be circumstances where this is not the case, or where the default will take place before there is an opportunity to seek the payment break. In that case, if the debtor is unable to redress the failure to make one payment within the following six months, his or her arrangement will terminate.

Whilst adherence to arrangements by debtors and consequent certainty for creditors is the keystone of the insolvency system, it may be overly reliant on the ability of households to always honour their payment obligations to the letter, despite ongoing difficult financial circumstances and particularly where unforeseen expenses may materialise. The rigidity of this section seems to open up debtors who have engaged and who have subjected themselves to a difficult and intrusive process to have their arrangement automatically ended with all the serious consequences that ensue (as further detailed in s.124), even where payments may have been made over a considerable period of time and even where creditors might themselves prefer for the arrangement to continue.

★ **Recommendation 22: FLAC recommends that Section 123 of the Act in relation to PIAs (and s.85 in relation to DSAs), relating to the automatic termination of arrangements in the event of non-payment, be amended to allow the debtor to seek a review prior to the insolvency arrangement coming to an end and/or by allowing a majority of creditors at a creditor's meeting to vote in favour of the arrangement continuing.**

- **Removing the €3 million cap on Personal Insolvency Arrangements**

FLAC does not encounter instances involving this cap in either our free legal advice clinics or in our support work with MABS. However this issue was raised by a number of PIPs in the Insolvency Service of Ireland Consultative Forum discussions. Agreement could not be reached on recommending the removal of the cap as a number of creditor groups objected to it.

Under s.91 (4) all secured creditors must consent in writing to allowing the existing €3 million limit on secured debts in a PIA to be exceeded. If this consent is not forthcoming, a PIA cannot be proposed. FLAC notes in this respect a case referred to by personal insolvency practitioner firm McCambridge Duffy in its submission on this issue to the Consultative Forum. Here the holder of a small judgment mortgage secured on a property in negative equity (effectively rendering the judgment mortgage to have no current value) refused consent to waive the limit. Because all secured creditors must agree to waive the limit, this precluded a PIA proposal and ultimately the debtor was forced to surrender his family home.

The Irish Society of Insolvency Practitioners (ISIP) in its submission suggested that '*removing the €3 million limit will encourage more individuals with significant debt to avail of PIA's'* and that '*the cap was initially legislated to protect the bank's balance sheets. However, since the bank's balance sheets have since improved….there is simply no justification for retaining the cap.'*

Ultimately, where all other eligibility criteria are satisfied, access to the legislation should be dependent upon being insolvent and not about how much the debtor owes. If there was a rationale in 2013 for this limit that no longer applies, FLAC suggests it should be removed.

★ **Recommendation 23: FLAC supports the recommendation from a number of insolvency practitioners that the €3 million cap on Personal Insolvency Arrangements be removed.**

- **Reasonable living expenses and arrangements below RLEs**

Section 23 of the Act establishes guidelines on what constitutes a reasonable standard of living and corresponding reasonable living expenses for those entering insolvency arrangements. This was critically important in guaranteeing debtors a minimum standard of living while they are resolving their over-indebtedness and returning to solvency. FLAC very much welcomes that the Insolvency Service is proposing to review those guidelines and intends to again avail of the expertise of the Vincentian Partnership for Social Justice in its work on minimum income standards.

Sections 65 for DSA's, S.99 for PIAs and S.85D (of the Bankruptcy Act 1988 as amended) for bankruptcy establish the important principle that an arrangement must allow the debtor sufficient income to maintain a reasonable standard of living for its duration. For example, s.99 (2) (e) makes it mandatory that:

> *'a Personal Insolvency 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*

In turn, s.99 (4) provides that:

> *For the purposes of subsection (2)(e), and without prejudice to subsection (3), in determining whether a debtor would have sufficient income to maintain a reasonable standard of living for the debtor and his or her dependants under the Personal Insolvency Arrangement, regard shall be had to any guidelines issued under section 23*

It may be argued the wording of these provisions allows a PIP or the Official Assignee to deviate from exact compliance with the reasonable expenses guidelines, in that it provides that 'regard shall be had' to them rather than making them mandatory in every respect. On this question, it is worth noting that the Waterford MABS research referred to above found that creditors such as asset purchasing or credit servicing firms and some credit unions do not appear to necessarily adhere to RLEs and may not support arrangements framed within them. This led in some instances to the PIP having no choice but to opt for a 'least-worst' option of making payments from income below the relevant RLEs in order to get a deal that would return the debtor to solvency.

★ **Recommendation 24: FLAC recommends that the Insolvency Service research the frequency of deviation from the reasonable living expenses guidelines in insolvency arrangements and that the legislation be amended where necessary to more stringently provide for the necessity to adhere to Reasonable Living Expenses guidelines in arrangements.**

Excludable and excluded debts

In examining the key features of debt settlement schemes across Europe, Professor Jason Kilborn's 2010 paper looked at whether there should be exceptions to the principle of discharge for certain classes of debt and what effect these may have on the debtor's return to solvency. He noted that the thinking on this issue has evolved considerably in Europe over the years, to a position where the number of exempted debts in legislative schemes had reduced considerably. From a situation where debts concerning maintenance payments to children and spouses, debts concerning student loans, debts to the State in the form of fines, taxes and state owned utilities, and damages to third parties were excluded from debt settlement, he cited an expert report prepared for the Council of Europe in 2007 which recommended that maintenance payments to a debtor's child should be the only exception. Thus, he concluded that 'existing laws in Europe seem to have followed the recommendation to avoid eroding the discharge with exceptions'. He contrasted this with the United States where, at the time of writing, a total of 19 broad categories of debt were specifically identified as not subject to discharge. Kilborn's view was the fewer exempted debts the better. Nonetheless, he did recommend that liability arising out of a court order made in family law proceedings, damages in personal injuries or other tort cases and liability in fraud cases should be exempted from debt settlement arrangements, and it is difficult to find fault with these exemptions.

Ultimately, the Personal Insolvency Act 2012 opted for a system whereby certain debts are automatically excluded and others are 'excludable' at the election of the creditor concerned. Excluded debts include maintenance orders, court-awarded damages in tort cases, debts related to fraud and the proceeds of crime. The list of excludable debts is lengthy, comprising any Revenue debt, Social Welfare debt, household charges and property taxes, nursing home support payments and apartment management company fees. Again, it is difficult to quibble with any of the items in

the excluded category but it is worth asking what evidence is available to show how the variety of (primarily state) creditors in the excludable category have exercised their right to exclude. For example, has this led to proposals for arrangements being vetoed by other creditors due to a lack of disposable income caused by an excluded debt being prioritised?

- ★ **Recommendation 25: FLAC recommends that the Insolvency Service carry out research into the effect of excludable and excluded debt provisions on access to solutions under the legislation for insolvent debtors.**

6. Other legislative proposals in the area of debt law

6.1 Programme for Government proposals

The current administration's 'Programme for a Partnership Government' (May 2016) contains a section on 'Protecting & Promoting Tenancy Rights and Home Ownership'.[62] The core objective of this section, insofar as it concerns protecting home ownership and avoiding the repossession of family homes, is to accelerate the resolution of remaining difficult-to-resolve mortgage arrears cases and to build on recent reforms to insolvency and bankruptcy. In pursuance of this objective, further detailed commitments are as set out as follows:

1. Establish a new national service to standardise the supports available to borrowers in mortgage arrears, with powers and resources needed to advise, assess, negotiate and recommend solutions.
2. Review the thresholds and the processes for Personal Insolvency Arrangements (including SMEs) and raise where appropriate.
3. Establish a dedicated new court to sensitively and expeditiously handle mortgage arrears and other personal insolvency cases, including through imposing solutions, including those recommended by the new service. The hearings of this court could be held in private if requested by the debtor.
4. Work with the Central Bank to amend the Code of Conduct on Mortgage Arrears to include an obligation on providers of mortgage credit to provide a range of sustainable arrears solutions. This Code of Conduct will be put on a statutory basis.
5. Fund an information campaign to encourage engagement in the new resolution process.

Each of these headings is briefly considered below, but not necessarily in the order in which they appear in the government document.

A new national service to standardise supports and encourage engagement:
This commitment is essentially covered by the establishment of the Abhaile service. However as outlined above, there is currently insufficient information as to what targets have been set for this service and the extent to which it is delivering real results for homeowners at risk of repossession. The last commitment above, to fund an information campaign to encourage engagement in the new resolution process, is also clearly linked to the delivery of Abhaile. This seems from outside observation to not have fully gotten off the ground, despite a national launch by Tánaiste and (then)

[62] Pages 28-29.

Minister for Justice and Equality, Frances Fitzgerald TD, and (then) Minister for Social Protection, Leo Varadkar TD at the head office of the Citizens Information Board in Dublin in February 2017.

Reviewing the thresholds and the processes for Personal Insolvency Arrangements:
In terms of this commitment in the context of reviewing the thresholds for Personal Insolvency Arrangements, it should be noted that PIPs are broadly in agreement that the €3 million cap should be removed, as outlined above. In terms of reviewing processes, a number of changes to processes are outlined above in Section 6 of this submission.

Putting the Code of Conduct on Mortgage Arrears (CCMA) on a statutory basis:
This commitment - to oblige lenders to provide a range of sustainable arrears solutions and to put the CCMA on a statutory basis - has not been publicly progressed in any shape or form as far as FLAC is aware.

On the question of the range of sustainable arrears solutions, the problem frequently articulated by FLAC and many others is that while Rule 39 of the CCMA sets out a list of alternative repayment arrangements that a lender may offer, there is no express obligation on a lender to offer any one of them. Instead, lenders need only 'explore all of the options for alternative repayment arrangements' they have chosen to include in their Mortgage Arrears Resolution Process (MARP). Thus, although mortgage write-down is included in the Rule 39 list as '*reducing the principal sum to a specified amount',* it is never seen in a lender's MARP. Instead, the particular emphasis in recent years has been on 'split mortgages' and 'capitalisation of arrears' arrangements, many of which are putting households under severe financial pressure to make payments to unsecured creditors and to meet essential expenses, which has led in a number of instances to the failure of these arrangements.[63] A further frustrating aspect of this Code is that although Rule 40 obliges a lender to 'document its considerations of each option examined', lenders very seldom provide any significant detail of their deliberations to the borrower, thereby compromising his or her already limited right of appeal.

In terms of the proposal that the CCMA be put on a statutory basis, it was recommended by the government-appointed Mortgage Arrears and Personal Debt Group in 2010 that the CCMA be put on a statutory basis, thereby making it expressly admissible in repossession proceedings in the courts. The issue became more critical when the Supreme Court held in the ***Dunne and Dunphy*** case[64] that a lender's right to obtain an order for possession should only be affected in circumstances of non-compliance with the three-month moratorium on bringing repossession proceedings that follows the exiting of a borrower from the MARP. The net effect of this ruling is that alleged breaches of the CCMA/MARP process are not expressly admissible in repossession proceedings. Thus, no matter how cursory a lender's MARP engagement may have been, this does not appear to be a matter that a

[63] At the end of 2016, according to the Central Bank, of 38,406 arrears capitalisations, 77.5% were meeting to the terms of the arrangement, meaning that 8,641 (22.5%) were not. Of the 27,079 split mortgages, 93.9 % are said to be meeting the terms of the arrangement, meaning that 1,359 (5.9%) were not. Between them arrears capitalisations and split mortgages accounted for 54.2% of restructured mortgages on family homes at the end of 2016, up from 49.6% at the end of 2015, 43.1% at the end of 2014 and just 25.9% at the end of 2013.
[64] *Irish Life and Permanent plc* -v- *Dunne* and *Irish* Life and *Permanent plc* -v- *Dunphy* [2015] IESC 46 (Supreme Court, Clarke J, 15 May 2015).

borrower can subsequently raise in his or her defence to argue against the granting of a Possession Order.

Amongst a number of key passages in the judgment of Clarke. J on behalf of the court in Dunne and Dunphy are the following:

> *If it is to be regarded, as a matter of policy, that the law governing the circumstances in which financial institutions may be entitled to possession is too heavily weighted in favour of those financial institutions then it is, in accordance with the separation of powers, a matter for the Oireachtas to recalibrate those laws. No such formal recalibration has yet taken place.*

and

> *In the absence of there being some legal basis on which it can be said that the right to possession has not been established or does not arise, then the only role which the Court may have is, occasionally, to adjourn a case to afford an opportunity for some accommodation to be reached'*

In July 2015, in *Stepstone Mortgage Funding Ltd and Hughes,*[65] the High Court applied the decision in *Dunne and Dunphy* and granted a Possession Order, as the moratorium had been complied with, even though it also found that the plaintiff lender engaged in *'tick box'* and *'formulaic'* compliance with the CCMA.

In passing, there is an interesting apparent contradiction between these rulings and the current Circuit Court regulations governing the repossession process. According to the most recent relevant rules (the Circuit Court Rules (Actions for Possession, Sale and Well-Charging Relief), SI 171/2016) further detailed information of the case against the defendant borrower must be set out in the grounding affidavit that must accompany the lender's Civil Bill. Heading G of the guidelines on assembling the grounding affidavit - 'Application of regulatory code' – provides:

> *[Where the agreement for security on foot of which the proceedings have been commenced, or any loan agreement to which it applies, is or was at the material time or times one to which a code drawn up by the Central Bank of Ireland in accordance with section 117 of the Central Bank Act 1989 applies:*
>
> *(a) identify the code concerned, and*
>
> *(b) provide (whether in this affidavit or in a supplemental affidavit) such information as would enable the Court to evaluate the extent to which the plaintiff has, in relation to any relevant provision of the code, been in compliance.]*

However, it must be noted that the Supreme Court makes it abundantly clear that it does not believe a Code to be a sufficient basis for a court to intervene, in the following terms:

> *If it is considered desirable, as a matter of policy, to give the courts a wider jurisdiction in the context of repossession cases which would allow the Court to have a role in deciding the reasonableness or otherwise of the conduct if a lender, then it seems to me that clear*

[65] [2015] IEHC 487.

> *legislation would be needed which conferred that role on the courts and which specified the criteria to be applied by the courts in exercising any jurisdiction thus conferred.*

It is likely that the Court has in mind primary legislation here rather than a Code elevated to a statutory instrument. FLAC believes it is grossly unfair that a borrower is not entitled to raise CCMA/MARP compliance in his or her defence and this should be remedied.

- ★ **Recommendation 26: FLAC recommends that the Government legislate to allow defendant borrowers to raise a lender's failure to comply with the terms of the Central Bank's Code of Conduct on Mortgage Arrears as a potential defence in repossession proceedings.**

Establishing a dedicated new court to sensitively and expeditiously handle mortgage arrears cases

This is arguably the most far-reaching proposal in the government programme but, again, there is no sign of any progression with this commitment. Equally, quite how this proposal would be or would have been implemented is not clarified. For example, it is far from clear how this might be done without interfering with the existing personal insolvency legislation, particularly in terms of the right of a borrower served with a Civil Bill for Possession to apply for an adjournment in the Circuit Court to consult a PIP with a view to proposing a Personal Insolvency Arrangement (PIA) and the right of a borrower whose PIA proposal is rejected to appeal under s.115A to the Circuit Court to have that rejection overturned.

It has been proposed by FLAC and others (including Fianna Fail) at various junctures that a Mortgage Rescheduling Tribunal with statutory powers to look at problem mortgages arrears on a case-by-case basis with a view to proposing resolutions should have been set up.[66] An expert body with the requisite expertise and resources might have settled a significant number of problem cases before the average arrears amount on these accounts climbed to their now alarming proportions.[67] We note that the current government would be vehemently opposed to a body outside of the courts exercising such functions[68], but in light of the urgency of the situation for many households, a dedicated court/ tribunal is required as a matter of urgency and given the complexity involved and the urgency, work should begin on preparing this as soon as possible.

- ★ **Recommendation 27: FLAC recommends that a dedicated court/ tribunal which can deal with problem mortgage arrears on a case-by-case basis with a view to proposing resolutions is required as a matter of urgency and given the complexity involved and the urgency, work needs to begin on this as a priority.**

[66] See, for example, Owner-Occupier Mortgage Arrears: What progress has been made towards resolution? FLAC, January 2015.
[67] At the end of Q.1 2017, the average amount of arrears on PDH mortgage accounts that had been in arrears for over two years was €73,710. At the end of 2013, it was €41,650.
[68] See the recent speech made by the Minister for Justice & Equality, Charlie Flanagan TD in the debate on Fianna Fail's Private Members Bill, the Mortgage Arrears Resolution (Family Home) Bill 2017 on 7 July.

6.2 - Current Private Members Bills on mortgage arrears

- **Keeping People in their Homes Bill 2017**

This Private Members Bill was tabled by Kevin 'Boxer' Moran TD, a member of the Independent Alliance participating in the current coalition with Fine Gael. Amongst those who participated in the drafting of this Bill are advocates associated with an international non-profit organisation, the Open Society Foundations. It was first tabled on 24 February 2017 and the order for second stage was also made on that date. It has not progressed beyond that point since.

In summary, this Bill proposes to amend s.96 of the Land and Conveyancing Law Reform Act 2009 and to substitute s.97 of that Act by adding a number of sub-sections intended to strengthen the powers of the Circuit Court to decide whether to grant, adjourn, vary, postpone, suspend or execute an order for repossession or repossession proceedings in relation to family homes, having regard to all of the circumstances of the case, including the proportionality of granting such an order. Factors that shall be taken into account by the Court include:

a) Whether the order pursues a legitimate aim;
b) Whether the order is justifiable by reference to a pressing social need;
c) Whether the order is proportionate to the legitimate aim being pursued and is the least onerous means of achieving the legitimate aim based on the consideration of a range of stated factors, such as affordability, availability of mortgage-to-rent, availability of a Personal Insolvency Arrangement, adherence to the CCMA and many others;
d) The likely impact of an order on the human rights of the defendant borrower and other household members by reference to the standards set out in the European Convention on Human Rights or the EU Charter of Fundamental Rights, again based on the consideration of a range of stated factors, such as the availability of suitable alternative accommodation for the household and the situation of any dependants in terms of age, disability and vulnerability;
e) An examination of all the circumstances surrounding the execution of the mortgage contract including legal advice obtained, the reasonableness and responsibility of lending decisions and the existence of unfair terms in the contract;
f) The extent and availability of state support to the enforcing entity;
g) The estimated costs per week to the State of emergency accommodation, alternative housing and other support services for the relevant household;
h) Where the enforcing entity is one that has bought the debt, the amount it paid for it and a range of other factors including the market value of the property and tax reliefs available to the enforcing entity.

This wide range of assessments would apply to future repossession and to existing repossession proceedings already in train, provided that where a Possession Order has been granted, it has not yet been executed.

In FLAC's view, there is much to support in this Bill in terms of setting criteria that a court would have to take into account before granting or executing a Possession Order. It is clear that its general and, legitimate aim is to avoid the repossession of family homes wherever possible, whilst emphasising the necessity to adhere to EU measures and human rights standards as mandatory

requirements. Potential sticking points might be the very extensive number of tests the court would have to apply without a corresponding set of guidelines as to how it might apply them. The time that would be taken up in potential argument here could be considerable; the important question of who might present the case on behalf of the defendant borrower is, as always, problematical. It is also unclear as of now who would consider these issues. Would this be the job of the County Registrar, who is a court official rather than a judge and before whom all Circuit Court Civil Bills for Possession are currently returnable, or would the matter have to be adjourned to the judges list to be dealt with on a plenary basis?

A further complicating factor is time. The Bill has not moved on in the parliamentary process since its introduction over four months ago at a critical juncture for many borrowers requiring urgent action. Lastly, of course, this Bill – as with any proposed legislation to alter the balance of power in terms of resolving the mortgage arrears crisis including a FLAC proposal to amend the Land and Conveyancing Law Reform Act 2009 made below - would be likely to run into perceived constitutional difficulties around the property rights of lenders and their right to enforce their security in the event of default in payment by a borrower. The authors of the Bill have clearly apprehended this possibility by framing some of the criteria a court might apply in countervailing public interest terms.

- **The National Housing Co-operative Bill 2017**

A second Private Members Bill is the National Housing Co-operative Bill 2017. This Bill was introduced at first stage in the Seanad on 22 June 2017 with second stage set for a week later on 28 June.[69]Again this Bill, largely drafted by the Master of the High Court, Edmund Honohan, is the product of an advocacy group – Right2Homes – and is currently supported by a variety of Oireachtas members (including John McGuinness TD, Mattie McGrath TD and members of People before Profit) as well as several other groups, including the McVerry Trust, Focus Ireland, the Irish Mortgage Holders Organisation, Irish Homeowners Unite, The Friends of Banking and the Public Banking Forum Ireland.

This Bill proposes the establishment (by An Taoiseach) of an industrial and provident society to be called the National Housing Co-operative Society with the mandate and powers to acquire, manage, rent or sell distressed mortgages so that the occupants of houses can move from the status of distressed mortgagor by means of mortgage to "rent and mortgage". Broadly speaking, it proposes that in all mortgage cases where:

- the lender (mortgagee) proposes to exercise the power of sale, or
- a tenant is served with notice to quit to allow his or her landlord borrower to sell, or
- a judgment or equitable mortgage holder seeks a 'Well Charging Order and Order for Sale' (for example, where a person who has obtained a court judgment for a sum of money against a borrower, registers that judgment against the borrower's interest in the family home and then applies to court to sell that home),

the mortgagee in question must notify the borrower/tenant/occupant of the National Housing Co-operative and must copy the notification to the Co-op. Where the Co-op is satisfied that default in the relevant payments has not occurred for any reason other than inability to pay, it may '*buy the loan and security property at the written down value thereof recorded in the mortgagee's accounts'*

[69] Sponsored by Senators David Norris, Victor Boyhan and Gerard P. Craughwell.

with no negotiation on price (and exempt from stamp duty). If the mortgagee refuses to sell, the Co-op may issue a Compulsory Purchase Order (CPO) at a price determined by arbitration. If there is a challenge to the CPO which is successful, the Co-op would still have the option to purchase in a court supervised sale, which the Bill proposes would henceforth be obligatory in all repossession cases.

Thereafter, the Co-Op's business shall be '*to deal with occupants not just as tenants but as tenants with an option to buy'.* In summary, it would appear that, broadly speaking, in lieu of repossession and sale, the proposed legislation will prevent all evictions of borrowers caused by their inability to pay, all evictions of tenants caused by their landlord borrower's inability to pay and all evictions of judgment debtors by their judgment creditors due to their inability to pay. The Co-op will step in, buy the properties and rent them to the occupants with an option to buy back.

This is a very laudable objective with the potential to prevent many households being rendered homeless and joining a growing queue for very scarce housing, public or private. It is also critical that this measure would protect just home owners but also existing tenants caught in the crossfire between landlords and lenders.

However, there would also seem to be some as yet unanswered questions about this proposed measure. It is not clear how it will be funded, although the issuing of bonds and accessing finance from the European Investment Fund has been mentioned. The powers to be granted to the Co-Op – for example compulsory purchase at balance sheet value, as opposed to the amount actually owed by the borrower - are sweeping and potentially costly and are sure to run into predictably sodden constitutional ground; FLAC would nonetheless suggest there are very strong countervailing public interest issues at stake here also. The proposal could also benefit from more detail as to the future rights of tenants in terms of how rents will be calculated, who is responsible for maintenance and repairs and how security of tenure will be handled. There are also quite a number of diverse amendments proposed to various existing legislative provisions, particularly the Land and Conveyancing Law Reform Act 2009, which are not sufficiently teased out in the text.

- **The Mortgage Arrears Resolution (Family Home) Bill 2017**

A third Private Members Bill recently tabled by Michael McGrath, TD, Fianna Fail spokesperson on Finance is the Mortgage Arrears Resolution (Family Home) Bill 2017. This Bill bears a strong resemblance to a previous PMB proposed back in 2014 then called the Family Home Mortgage Settlement Arrangement Bill. This Bill resumed at second stage in the Dáil on 4 March 2015 but its further progress was blocked at that point when the government parties voted against it.

In summary, the current version proposes the establishment of a Mortgage Resolution Office that would be empowered to make Mortgage Resolution Orders on family homes occupied by 'financially restricted' borrowers as defined. Such borrowers would have access to MABS, PIPS and the services available under the Abhaile scheme to assist with preparing their application. Submissions from the lending institution would be sought and the effect of any order, if granted, would be to amend the terms of the mortgage to make it affordable for the borrower and to prevent any repossession proceedings being initiated or continued against him or her. A lender unhappy with the terms of an order would be entitled to appeal to an Appeals Officer who would have discretion to hold an oral hearing of the appeal and points of law that might arise could be appealed to the High Court.

This Bill was introduced by Deputy McGrath in the Dáil on 28 June and proceeded to second stage on 12 July. The Bill was immediately opposed at that point by the Minister for Justice, Charlie Flanagan TD, who then outlined in considerable detail the grounds for the Government's objections. Given our suggestion that both of the other Private Members Bills summarised above – the Keeping People in their Homes Bill 2017 and the National Housing Co-operative Bill 2017 – would be likely to run quickly into arguments of unconstitutionality, it is perhaps worth summarising the Minister's contribution in a little detail to get a sense of current government thinking.

The Minister begun by claiming that extensive actions had already taken been by the government to address these issues and he suggested that these are achieving demonstrated practical results. He also stated that further important government measures are continuing to come on stream. He then suggested that the PMB '*appears to be incompatible with the Constitution and at a very high risk of Constitutional challenge, following advice received from the Attorney General'.* The core problem here was that not only was a quasi-judicial body proposed to be set up that would have extremely far-reaching powers but also that '*the only appeal provided under the Bill is effectively to a second newly established quasi-judicial body, an Appeals Officer'.* Thus two bodies would have '*extremely wide-ranging powers to intervene in and change the vested constitutional and contractual legal rights and obligations of private parties'* and he stated that '*such powers are exclusively reserved to the Courts, under Article 34 of the Constitution, as part of the administration of justice'.*

The Minister went on to suggest that '*even if the Bill were fundamentally revised, to provide for the proposed Mortgage Resolution Orders to be made by a Court rather than a quasi-judicial body, it would remain at high risk of constitutional challenge*'. This was because '*such Orders would intervene in the bank's legal right to be repaid under a mortgage contract validly entered into with private parties'* and '*these are constitutionally protected vested property rights, under Article 40 of the Constitution'.*

Finally, the Minister informed the house that '*the constitutionality of proposals to impose mortgage resolution solutions has been very extensively discussed between Government Departments and the Office of the Attorney General in recent years'.* The outcome of these discussions appears to be encapsulated in the Minister's final comment on this issue: that '*any legislative interference with private property rights in this area, seeking to achieve an objective of the common good, still has to demonstrate clearly that it is a carefully balanced and strictly proportionate intervention which has taken full account of the respective rights and obligations of both parties.* He concluded that '*the very cursory provision in this Bill falls far short of that standard*'.

6.3 What might be done in terms of a further legislative initiative?

- **Current options**

Currently the only legally enforceable mechanism to revise the terms of a family home mortgage in arrears at present in order to avoid that family home being repossessed is a Personal Insolvency Arrangement (PIA) under the 2012 Act. The introduction in early 2016 of a right of appeal to the Circuit Court where an insolvent debtor's proposed PIA incorporating a mortgage in arrears on a family home is rejected has started to make a difference to the numbers of applications. It must be

emphasised that this right of appeal depends upon one 'class of creditors' (usually unsecured creditors) having approved the proposal. A number of Circuit Court findings on appeal have in turn been appealed to the High Court and this has led to some helpful jurisprudence that has outlined the objectives, possibilities and limitations of the legislation.

The case law emerging from the High Court makes it clear that for a PIA proposal to be confirmed, apart from meeting a number of other conditions[70], the personal insolvency practitioner must formulate the proposal on the basis that it is an acceptable alternative to bankruptcy for a majority of creditors. The comparison between what creditors will receive in the proposed PIA and what they might obtain in bankruptcy is in practice an important factor for the Court to weigh up. In the recent High Court case of RE JD, Baker.J put it as follows:

> *'That a court is mandated, in the context of the personal insolvency legislation to have regard to the comparison between the likely return to creditors in bankruptcy and that available under a PIA, is evident from the objective of the legislation, to provide a means of debt resolution by which a debtor may avoid bankruptcy: see Re Nugent and the Personal Insolvency Acts [2016] IEHC 127. The statutory forms require that the PIA should make detailed comparisons between the PIA and the likely return on Bankruptcy. Clause 3 of the standard form requires that the PIP identify the details of how it is said the Arrangement would be better for creditors than bankruptcy'.*[71]

In practice, as we understand it, this has led to a number of PIA proposals to write down the amount owed on the insolvent debtor's mortgage to the current agreed market value of the property.[72] A dividend is then proposed to be paid to unsecured creditors over the duration of the PIA who might otherwise receive nothing if the debtor was adjudicated bankrupt or the property was repossessed. Thus they are likely to vote in favour of the proposal, triggering a right of appeal should the mortgage lender reject the proposal. The debtor proposes to service the written down mortgage over the lifetime of the PIA (sometimes with the aid of a split mortgage). The portion of the mortgage written down becomes unsecured debt with other unsecured debts of the debtor and so the mortgage lender receives a limited dividend on this sum as well. All unsecured debt is written off at the end of the PIA, leaving the remainder of the (written down) mortgage to be paid.

The key point, as we understand it, is that the mortgage lender is in a difficult position to argue that the return from bankruptcy or repossession will be better in such a case. If it repossesses, it will

[70] Broadly speaking, under s.115A (9) of the Act, the Court must be satisfied that there is a reasonable prospect that an order confirming the coming into effect of the proposed PIA will:

- enable the debtor to resolve his or her indebtedness without recourse to bankruptcy
- enable creditors to recover the debts due to them to the extent that the means of the debtor reasonably permit
- enable the debtor not to dispose of or cease to occupy his or her principal private residence
- be reasonably likely to allow the debtor to comply with the terms of the arrangement
- ensure that the costs of remaining in the family home are not disproportionately large taking into his or her income, contributions from other family members and number of dependants
- be fair and equitable in relation to each class of creditor who has not approved the proposal
- not be 'unfairly prejudicial' to any interested party

[71] [2017] IEHC 119.

[72] Section 102 (6) (g) specifically envisages that a PIA could include a write-down with apotential clawback for the secured creditor if the property is subsequently sold.

incur the costs of sale of the property (anything from 10% to 15% of its value) which must be deducted from the sale proceeds. Under the PIA, it will receive mortgage payments based on the market value of the property and, in addition, a dividend on the portion written down. When the PIA comes to an end, payments on a now sustainable mortgage will continue. We do not know how many insolvent debtors have had the benefit of such arrangements. However it is worth noting that a recent preliminary examination by the Insolvency Service of 100 PIA cases approved by the Court up to 9 January 2017 revealed that 89 debtors remained in the family home and that 30 of these received a principal reduction, averaging €93,338 per case. It is therefore now likely to be a significant feature of personal insolvency practice.

The problem is that this cannot work for everyone with a family home mortgage in deep arrears and in danger of repossession. It will not work for those in positive equity as the mortgage lender can easily argue that the PIA versus bankruptcy comparison is not valid. It will not work for those who cannot service a mortgage on the current market value of the property and the legislation does not envisage a write-down to below this level.[73]

We know that at the end of Quarter One 2017, 32,953 accounts had been in arrears for over two years; a further 8,117 for between a year and two years. The question must then be asked. How many of these 41,000 mortgages could avail of a write-down PIA to resolve their situation? **The sooner insolvent debtors potentially in this bracket get to a PIP to examine this option, the better.**

But what of the rest and particularly those whose cases are currently at various stages of the repossession process? Again, we do not have an exact figure for how many repossession cases are currently before Circuit Courts across the country. However, as already explained, the Central Bank's 2016 *Report on Mortgage Arrears* furnished to the Minister for Finance in October 2016 suggests that approximately 12,000 repossession cases were in progress by the retail banks at the end of Quarter 2, 2016 and a further 2,100 cases or so were said to be in the course of being pursued by 'non-bank entities'. If the current figure is anything like this 2016 estimate of 14,100 cases, this is an enormous number of households facing potential repossession, with more likely to served with proceedings in time.

- **Current powers of the Circuit Court**

The Circuit Court has very limited powers currently to prevent a lender from ultimately obtaining a Possession Order where there is a default in payments. Unless the defendant enters a replying affidavit to the lender's grounding affidavit, setting out a defence to the proceedings or exposing deficiencies in the lender's paperwork, there is little that a Court can do except to adjourn periodically and hope that an agreement can be reached on acceptable payments that will settle the case with the matter being struck out. Anecdotally, it seems that this has been happened in a number of cases, but, again, we have no figures on how frequently and why. Generally speaking, with each adjournment, these prospects recede unless the financial circumstances of the borrower are clearly improving.

S.101 (1) of the Land and Conveyancing Law Reform Act 2009 currently provides as follows:

[73] See Section 103 (2).

> *101 - (1) Upon an application for an order under, and without prejudice to the generality of, sections 97 (2) and 100 (3), where it appears to the court that the mortgagor is likely to be able within a reasonable period to pay any arrears, including interest, due under the mortgage or to remedy any other breach of obligation arising under it, the court may—*
>
> *(a) adjourn the proceedings, or*
>
> *(b) on making an order, or at any time before enforcement or implementation of such an order—*
>
> *(i) stay the enforcement or implementation, or*
> *(ii) postpone the date for delivery of possession to the mortgagee, or*
> *(iii) suspend the order,*
>
> *for such period or periods as it thinks reasonable and, if an order is suspended, the court may subsequently revive it.*

From this it can be seen that the (Circuit) Court does have the power to adjourn proceedings and where an order for possession has been made has a further array of powers to delay the execution of that order. However, theoretically at least, the exercise of these powers is dependent on the court forming the opinion '*that the mortgagor is likely to be able within a reasonable period to pay any arrears, including interest, due under the mortgage or to remedy any other breach of obligation arising under it'.* While the court may have some latitude in terms of determining what a reasonable period is, it is apparent that it cannot exercise this discretion without an evidential basis for arriving at such a conclusion.

It is clear from Minister Flanagan's recent speech that the potential infringement of the constitutional property rights of lenders is very much in the forefront of the government's thinking should it consider further measures to attempt to resolve the mortgage arrears crisis. Equally, the financial health of those lenders, a properly functioning mortgage market, the position adopted on 'non-performing' loans by the European Central Bank (ECB) and the views of those who continue to pay their mortgage (perhaps with some difficulty) are also likely to be significant considerations. Neither however does it want to see a spike in repossessions that would see former borrowers evicted to join the large numbers seeking accommodation at a time when there are very limited housing options.

The lender's legal right to rely on its security and enforce its contract is a clearly a property right.[74] Balanced against this is the borrower's constitutionally protected right to respect for one's home and family life and what might be described as the public interest – avoiding the repossession of family homes and the escalation of an already deep and complex housing crisis. The Minister's speech makes it clear that the government (and the Attorney General) believe that any further action here is severely constrained in stating that '*any legislative interference with private property rights in this area, seeking to achieve an objective of the common good, still has to demonstrate clearly that it is a carefully balanced and strictly proportionate intervention which has taken full*

[74] See *Condon v Minister for Labour*, unreported, High Court, 11 June 1980.

account of the respective rights and obligations of both parties'. Assuming that the government is indeed motivated to do its utmost to prevent the repossession of family homes and thereby prepared to potentially compromise the property rights of mortgage lenders, is there a proportionate way that this can be achieved that will not be struck down in the courts?

Relevant case law suggests that a proportionality test applies when interfering with a constitutional right. The principles of this test were first stated by Costello J. (as he then was) in the High Court in the case of ***Heaney v. Ireland***[75] as follows:

> *"In consideration whether a restriction on the exercise of rights is permitted by the Constitution, the Courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal restraint and the exercise of protected rights, and of the exigencies of the common good in a democratic society. This is a test frequently adopted by the European Court of Human Rights (see, for example Times Newspapers Ltd v. United Kingdom (1979 2 EHRR 245) and has recently been formulated by the Supreme Court of Canada in the following terms. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:*
>
> *be rationally connected to the objective and not be arbitrary, unfair or based on irrational consideration;*
> *impair the right as little as possible; and*
>
> *be such that their effects on rights are proportional to the objective:*

Looking this test (subsequently approved by the Supreme Court in *Iarnrod Eireann v Ireland)*[76] it may be suggested that the objective of any legislative interference would be to seek to minimise the prospect of homelessness and a deterioration in the housing crisis that might result from an increase in the repossession of family homes; that this a matter of sufficient importance to warrant overriding a constitutionally protected right of financial institutions, many of whom have been substantially financially bailed out by the taxpayer and that the resolution of this problem is certainly pressing and substantial.

Undoubtedly, this is a far from straightforward matter and an additional obstacle that poses a real difficulty is the question of retrospectivity. If any attempt at amending legislation did not have retrospective effect, it would be of no use in existing repossession cases. FLAC intends to further research these issues in the coming months with a view to framing amendments to the LCLR Act 2009 in due course.

[75] [1994] 3 I.R. 593, 607.
[76] [1996] 3 I.R. 321.

7. Miscellaneous issues

7.1 - Mortgage-to-rent schemes

Unfortunately, of the 32,953 mortgage accounts on principal dwelling houses in arrears for over two years at the end of Q.1 2017 in particular, a significant number may be manifestly unsustainable mortgages both now and into the medium term. In other words, the capacity to pay of such households is so far off the notional contractual liability that the level of write-down required may be beyond what is considered acceptable even in the public interest. A working definition of unsustainable as opposed to sustainable in this context has never been adopted to our knowledge. However, for homes that are in negative equity, perhaps Section 103 (2) of the 2012 Act provides a benchmark of sorts. It states that:

> *A Personal Insolvency Arrangement which includes terms providing for—*
>
> *(a) retention by a secured creditor of the security held by that secured creditor, and*
> *(b) a reduction of the principal sum due in respect of the secured debt due to that secured creditor to a specified amount,*
>
> *shall not, unless the relevant secured creditor agrees otherwise, specify the amount of the reduced principal sum referred to in paragraph (b) at an amount less than the value of the security determined in accordance with section 105.*

For the many households in negative equity who cannot service a mortgage on the current market value of the property, a mortgage-to-rent (MTR) option, where the former borrower continues occupation as a tenant, may be a realistic and acceptable option for some. However, it is abundantly clear that the MTR scheme has clearly not worked to date – the review of the scheme published in February 2017 refers to only 217 completions over six years out of a total of 3,575 applications.[77] Following that review, then Minister for Housing Simon Coveney TD announced some proposed changes. Some were tweaks to the existing system including the rules around maximum property price thresholds, valuation procedures and the assessment of the suitability of properties. However, there was more than a hint that the focus of the scheme would shift away from housing associations trying to arrange one-by-one MTRs towards encouraging the involvement of private investors. In this regard, the Minister said: *'I want to give Mortgage-to-Rent a shot in the arm by testing alternative funding models that can deliver volume'*. Below we look at a few of such models.

- **Private equity funds**

The *Irish Independent* (9 February 2017) suggested that there are both international funds and existing advocacy groups 'lining up to buy mortgages that are in long-term arrears from banks' to rent them back under the scheme. The Department's *Review* states at page 17 that

> *a number of private equity firms have expressed an interest in purchasing mortgage debt portfolios from commercial banks with a view to exploring the potential for them to access the MTR model for the borrowers in occupation of mortgaged property. They are seeking an alternative arrangement that would see the mortgaged property staying in the funding firm's ownership (as opposed to the traditional MTR model that sees the unit purchased by an AHB)*

[77] *Review of the Mortgage to Rent Scheme for borrowers of commercial private lending institutions*, Rebuilding Ireland – Action Plan for Housing and Homelessness, February 2017, page 10.

> *and the unit itself leased-back to the local authority in circumstances where the borrower is eligible for MTR and the borrower would therefore remain in their own home. The contractual and lease arrangements that would be required in order to secure the units from the local authority perspective and ultimately for the security of the household, requires detailed consideration and agreement by all parties'.*

It thus appears that equity funds might buy such properties from the original lenders and lease them back to the local authorities who in turn will let them to the former borrowers. It is hard to know where the return will be for the funds and more importantly, how much this might cost the State. Debating the matter in the Dáil on 23 February 2017, Eoin O'Broin TD (SF) expressed concern in relation to the potential involvement of equity funds and the implications for future security of tenure. The rents to be charged to former borrowers, now tenants, would need to be closely watched and the question of liability for maintenance of such properties is also critically important. FLAC would echo these concerns about the potential involvement of private equity funds in any MTR scheme and would be anxious to ensure that no household availing of a MTR would be disadvantaged in any manner compared to an equivalent tenant of social housing.

New-style approved housing bodies

Funding for the 'Approved Housing Bodies' (AHB) to purchase the relevant dwellings has long been one of the many issues that has hampered the scheme. Essentially, our understanding is that AHBs have mainly had to offer close to the current market value of the property by a combination of low interest borrowings from the 'Capital Advance Leasing Facility', administered by the Department of Housing, and private funding. AHBs incur the cost of repaying private finance immediately in addition to the cost of maintaining the properties; it would appear that the payments from local authorities to the AHBs for these tasks has not been sufficient in a number of cases to make the MTR viable, as these payments are linked to market rents of the relevant properties.

A significant recent development was the successful application of the Irish Mortgage Holders Organisation (IMHO) to be an approved housing body under the name of ICare Ltd. As we understand it, ICare Ltd is seeking to put in place a MTR model that might see it purchase tranches of impaired mortgages from specific institutions (primarily perhaps AIB) with funds provided by those institutions (at a competitive rate of interest) and financial assistance from the State in the form of Capital Advance Leasing Facility funds from the Department of Housing. It may also be possible for it to access refurbishment grants to fund the cost of necessary repairs. In effect, this seems to amount to a kind of 'special purpose vehicle' housing association. It will then rent those dwellings to the former owners via the relevant local authority.

In his reply to questions from Deputy O'Broin on the potential new approaches to the scheme, former Minister Coveney suggests that the business model here might be '*something along the lines that a local authority will agree to effectively lease a property under a normal leasing arrangement for 20 years with an option to renew after 20 years'.* It would seem on the face of it that this potential element of the scheme provides a better chance of being cost-effective, in that ICare's funding costs will be lower than those of private equity funds and will operate on a not-for-profit basis.

The *Irish Times* of 1 May 2017 reported that:

> *The project has been under development for almost a year and has two elements. One involves a mortgage-to-rent scheme, whereby I Care Housing would purchase the properties of borrowers*

who are eligible for social housing. It would then rent the properties back to the home owner, who would be entitled to have some or all of their rent paid for by their local authority. Tenants would be able to buy back the houses in the future under certain conditions. This element could require funding of €100 million initially, with money sought from the Housing Finance Agency, a state body that provides loan finance to local authorities and voluntary housing bodies. Separately, Mr Hall is looking at purchasing a swathe of non-performing mortgages from banks and vulture funds at a haircut to the original loan. It would then offer to restructure the mortgage for the borrower. This element could require funding of €1 billion or more'.

At the time of writing, our understanding is that the ICare project continues to be negotiated and prepared. An additional dimension to this project apart from the MTR element is the potential it may have to restructure the impaired loans of those who may not qualify for social housing.

★ **Recommendation 28: FLAC recommends that the state put in place as a matter of urgency a properly resourced and funded mortgage-to-rent scheme that incorporates write-off of any residual debt by the lender following sale and guarantees sustainable rents, properly maintained properties and security of tenure in return for honouring the terms of the tenancy as well as an option to potentially buy back.**

7.2 - Reform of debt enforcement system

In its 2010 Report on Personal Debt and Debt Management[78], the Law Reform Commission made a number of specific recommendations to update and modernise the system of the enforcement of money judgments in Ireland. To a significant extent, these recommendations built on research work carried out by FLAC, published in two reports in 2003 and 2009 respectively.[79] To our knowledge, none of these recommendations have been implemented as yet. Though legislation that included provisions to finally bring an end to imprisonment for non-payment of debt was passed in 2015, it has never been commenced as we shall see below, and therefore does not apply in practice.

The consequences of this failure to act upon a very important part of the Commission's 2010 report have been vividly illustrated almost seven years later in a case involving a Money Advice and Budgeting Service client, referred on to FLAC in March of this year. This man, with whom MABS were working principally in relation to his mortgage arrears difficulties, had also had a court judgment granted against him in respect of solicitor's costs. That judgment creditor applied for an Instalment Order to enforce the judgment and subsequently, in the client's absence, an order was made by the District Court that he pay €500 per month instalments on this debt. The client did not attend that hearing and did not provide his financial details to the court, and it proceeded to make the order with no information about his circumstances. It should be noted that attendance at these hearings is not compulsory and many debtors (often under huge financial pressure) do not appreciate the consequences of non-attendance.

The sum of €500 per month was way beyond any possible payment he could ever make and the judgment creditor brought another application for him to attend court to explain his subsequent non-payment. His MABS money advisor provided a statement of his means to the court for this

[78] LRC 100-2010.
[79] 'An End based on Means' (2003) and 'To No One's Credit' (2009).

hearing, together with a proposal to start paying as best he could. He appeared on 21 March in the District Court and, to his astonishment, was then arrested on the order of the presiding judge, brought to a Garda station and removed to Mountjoy Jail to serve a week in prison**.**

The man, a pensioner who has significant health problems, had to spend two days and nights in jail before he was released on High Court bail following an application brought by FLAC. A week later, he was given unconditional release. Having examined the audio recording of the proceedings, the High Court found that the presiding District Court judge had not applied two safeguards required under legislation where a person faces potential imprisonment for failure to meet the terms of an Instalment Order. First the debtor had not been offered legal aid to defend his position. Second the presiding judge had clearly not satisfied himself that the judgment creditor had shown beyond a reasonable doubt that the debtor failed to pay due to his or her "wilful refusal or culpable neglect".

It should be stressed that this was a very exceptional case in terms of the position taken by the judge and would definitely not be the norm. Nonetheless, the fact that the law still permits this to happen is extraordinary, with this case also serving to reveal that the Civil Debt (Procedures) Act 2015 signed into law in July 2015 and which should have removed all possibility of a person being imprisoned on foot of a debt had never been commenced. Not only is this a shocking manner in which to treat a person in financial difficulty and in poor health, it is also a staggering waste of state resources.

The critical point here is that all of this could have been avoided if the client had been obliged to be in court for the hearing, with the court also obliged to have up-to-date details of his financial situation before it could make any Instalment Order, so that it reflected his actual capacity to pay. **A** simple change to the law to ensure that judgment debtors are present for such hearings would achieve this and a requirement that such matters must be heard in private is also, in FLAC's view, a matter of common sense. FLAC proposed this as far back as 2003 and the Law Reform Commission subsequently made a raft of related proposals in 2010, including the setting up of a dedicated Debt Enforcement Office.

The Law Reform Commission also made comprehensive proposals in its 2010 report for an overhaul and modernisation of the system allowing the seizure of a judgment debtor's goods by Sheriffs/County Registrars to satisfy judgment debts, amongst other reforms. These proposals similarly await implementation.

- ★ **Recommendation 29: FLAC recommends that the detailed recommendations made by the Law Reform Commission in 2010 to reform the system of individual debt enforcement mechanisms in Ireland be implemented as a matter of urgency. These include the setting up of a specific Debt Enforcement Office, a complete revision of the system of assembling information on the means of debtors and reform of the Instalment Order including compulsory attendance by the debtor, Garnishee Order and Execution against goods mechanisms.**[80]
- ★ **Recommendation 30: FLAC recommends that the provisions of the Civil Debt (Procedures) Act 2015 which purported to finally bring to an end any imprisonment related to non-payment of debt be immediately commenced.**

[80] Pages 321-330.

7.3 – Mortgage Interest Supplement

The Mortgage Interest Supplement scheme provides short-term income support to eligible people who are unable to meet their mortgage interest repayments in respect of a house which is their sole place of residence. The supplement assists with the interest portion of the mortgage repayment but does not help with payment of the capital portion of the loan or with house insurance. The basic purpose of MIS is to ensure that a person who suffers a short-term loss of income will not have their family home repossessed due to an inability to meet their mortgage interest repayments. In effect therefore, MIS provides a safety net for people struggling with mortgage repayments, in particular those who are unemployed or sick.

However, from 1 January 2014, the Mortgage Interest Supplement scheme has been closed to new entrants. In addition, the scheme is being wound down over a four-year period (by the end of 2017) for the 9768 claimants who were in receipt of the supplement at the start of 2014. The closure of the MIS scheme to new claimants means that people experiencing short-term income difficulties cannot access social welfare assistance to pay their mortgage interest payments.

During the economic crisis, a number of expert, review and inter-departmental groups were established, tasked with examining the issue of mortgage arrears. While sharing the view that Mortgage Interest Supplement should be a time-bound support, each emphasised the importance of the scheme to borrowers experiencing short-term financial difficulties and abolition was not recommended.[81] Nonetheless, the Department of Social Protection is now firmly of the opinion that the most appropriate way in which customers experiencing short-term mortgage difficulties can be supported is through engagement with their lender under the Mortgage Arrears Resolution Process, without access to any financial support.

It is perhaps worth noting that the Central Bank reported an increase (albeit very slight) at the end of Q.1 2017 in the number of borrowers in arrears for under 90 days on their family home mortgage. This is the first such increase since September 2012.

- ★ **Recommendation 31: FLAC recommends that the government consider restoring a targeted use of the Mortgage Interest Supplement payment to assist people with a short-term mortgage arrears problem through their financial difficulties. This might help to prevent temporary financial problems multiplying into insolvency, with the attendant social and economic consequences that may follow for the households involved and for society generally.**

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[81] These included the Inter-Departmental Working Group on Mortgage Arrears, the Working Group on the Review of Mortgage Interest Supplement and the Expert Group on Mortgage Arrears and Personal Debt.