

MABS National Development Limited

# Review of the Code of Conduct on Mortgage Arrears

Submission of the Money Advice and Budgeting Service – September 2010

## Introduction

The Money Advice and Budgeting Service (MABS) was established in 1992 to help people on a low income to cope with debts and take control of their own finances. It is a free, confidential and independent service. It currently comprises 53 MABS Services, located in over 60 offices nationwide. MABS is funded and supported by the Citizens Information Board.

MABS National Development Limited (MABSndl) was established in 2004 to further develop the MABS Service in Ireland. It provides training and technical support to MABS staff nationally. MABSndl also assists the MABS service in providing educational and informational supports as well as assisting in highlighting policy issues that arise in the course of the money advice work on behalf of clients. MABSndl has responsibility for the ongoing development of the MABS website [www.mabs.ie](http://www.mabs.ie) and for providing the MABS National Helpline service.

MABS welcomes the opportunity to contribute to the revision of the Code of Conduct on Mortgage Arrears (the “Code”) and we trust that the issues we have outlined below will assist you in your deliberations.

## Observations on and Suggested Amendments to the proposed Code

While we appreciate the challenges involved in remodelling the current Code, and we welcome the prominence of the MABS Standard Financial Statement (“SFS”) in recognition of its importance in the process of assisting consumers in arrears to deal with their situation, we wish to make the following comments and suggestions in respect of the proposed wording:

**(i) Repossessions**

While keeping people in their home is obviously a key principle, this should be made explicit in the introduction with the re-insertion of the originally proposed wording “and repossessions should be minimised” in the first paragraph.

**(ii) Financial Difficulties**

This term is used at various points throughout the document, however it is unclear how this term is defined? Is it with reference to the consumer’s individual circumstances or will the lender determine whether or not their customer is in difficulty?

The MABS Money Advice Process takes a holistic view of the consumer’s circumstances, not only looking at income and expenditure, but social and psychosocial issues too. For example, cable t.v. may be an unnecessary item for

some, but could, for others, provide the only social outlet, therefore any definition of “financial difficulty” must have regard to the individual circumstances of the client.

**(iii) Application of the Code**

While credit unions are specifically excluded from the terms of the Code, many credit unions have secured borrowings on the principal private residences of consumers and, in these cases, should be included in the provisions of this Code.

We note the definition of “Borrower” refers to “*all parties named on the mortgage loan account*” and would welcome clarity on whether this definition is intended to extend to Guarantors who may have executed the loan documentation with the main borrower.

**(iv) Training of Front Line Staff**

We note that frontline staff, not directly dealing with consumers experiencing financial difficulties, must be made aware of the lender’s policy for dealing with such consumers and the relevant contact persons and process and suggest that guidelines / checklists be produced in order to monitor this. In our experience working with members of the IBF on the IBF / MABS Operational Protocol – Working Together to Manage Debt (the “Protocol”), we are aware that it can take months for a policy change to filter down to frontline staff in some cases.

**(v) Consumer Confidentiality**

We note that meetings with consumers must be conducted with the “*utmost privacy*”, however we would suggest that this requirement be expanded to ensure that every lender has a comprehensive Confidentiality Policy in place, in legible format, made easily available to the consumer.

**(vi) Notice to Consumers of Changes in Interest Rate**

While we welcome the addition of advance notice to consumers prior to a change in interest rate, we suggest including a minimum notice period, acknowledging that this may be difficult to implement in some cases, and would further suggest that the consumer is encouraged to contact the lender’s ASU should they anticipate difficulties in meeting the higher repayment.

**(vii) Information Booklet**

It is imperative that any information provided to a consumer in respect of alternative repayment arrangements includes comprehensive details of the impact these alternative arrangements will have on the consumer’s long term

financial position, including an impact on the consumer's credit rating, and impact on mortgage repayments in the long term.

**(viii) Review of Arrangements**

The Protocol recognises the importance of reviewing a consumer's situation in order to ensure that the repayment continues to be affordable and sustainable and has the effect of reducing the overall indebtedness of the consumer. In addition we suggest that the structure and measurable outcomes of such review be set out in the Code to protect consumers from what can be an intrusive process if not carried out respectfully and holistically, and from being required to provide information that is excessive in the circumstances.

**(ix) Lender / Borrower Engagement**

Pre-Arrears

Bearing in mind the obligations on all data controllers under the terms of the Data Protection Acts, 1988 and 2003, there must be a reasonable basis for the lender to believe that a consumer will experience difficulty in making their mortgage repayments, that does not involve the lender excessively monitoring a consumer's account. We would suggest that parameters for establishing this be set out either in this Code, or as part of a guideline issued under the Code.

Arrears

While we welcome the assertion that contact with a consumer must be "*proportionate and not excessive*", proportionality must be based on the consumer's personal circumstances. We suggest setting out parameters for proportionate communication, particularly in relation to vulnerable consumers, having regard to the provisions for the Mental Capacity Bill, 2008.

Status of Account

Where a consumer is in arrears, the lender should, within a specified period from the date the arrears first arise, contact the consumer advising him / her of the status of the account, and provide such consumer with the information set out in Step 1, 20(a) **at a minimum** (we suggest this addition as the proposed wording suggests that the information set out is all that is required).

MABS Involvement

The MABS 7 Level Model of engagement with clients ensures that each client receives a level of service tailored to their needs. The support structure offered ranges from full representation with creditors, including the provision of a Special Account payment facility, to directing clients with capacity to deal with their financial affairs to our Self Help Materials (with assistance, if required). This

model is a product of 17 years experience in dealing with people in debt or in danger of getting into debt and has proven to be successful with clients and creditors alike. We are, therefore, concerned that an onus placed on a financial institution to inform a consumer of the existence of MABS and the importance of independent advice is not understood by financial institutions as compelling a consumer, who would otherwise have capacity to deal with their own financial situation, to attend a MABS office. This not only puts pressure on limited MABS resources, but imposes a service on a consumer who may not wish to use it, resulting in missed appointments (which could have been used to assist someone else) and a dependency on a service whose core ethos is client empowerment.

We suggest that a suitable standard wording be agreed where institutions are referring their customers to MABS.

#### Lender's Agents

The requirement that the lender explain the role of their agent to the consumer should be extended to the lender's legal advisers where the legal adviser's are acting as debt collectors on the lender's behalf.

#### Consumer's Agent

Consumers, particularly vulnerable consumers, who choose to engage MABS to act on their behalf should have this decision respected by lenders. Accordingly, lenders should be precluded from contacting consumers where an agent is on record to act on the consumer's behalf.

### **(x) Provision of Information**

#### Lender Contacts

The contact name of the lender representative dealing with the consumer's mortgage arrears should be included in the initial communication with the consumer to encourage a relationship between the consumer and the lender representative.

#### Passing of Information

It is unclear why information would not be sent directly to the ASU by the consumer, rather than through the lender to the ASU (with no determined timeframe), thereby adding an unnecessary additional layer of communication.

#### Supporting Documentation

Anecdotal evidence suggests that some lenders are requesting information and supporting documentation far in excess of what is required to deal with the consumer's arrears situation. In order to avoid this, we suggest that an

exhaustive list of supporting documentation be appended to the Code, prohibiting the seeking of excessive information. Furthermore, we would anticipate that this supporting documentation would only be sought from non-MABS clients / Self-Help consumers, thereby underlining the integrity of the MABS process.

**(xi) Assessment**

Can't Pay / Won't Pay

It is our view that a lender **must** distinguish between “can't pay” and “won't pay” debtors. In this regard, we suggest replacing the word “may” with “shall” in Step 3 of the MARP and inserting a guideline of distinguishing characteristics based on the personal circumstances of the consumer.

Payment History

While previous payment history is informative to some extent, it should not be the basis of rejection of lower repayment proposals which are due to a change in borrower circumstances or by virtue of the fact that the consumer has attended MABS and has produced a realistic budget.

Anecdotal evidence suggests that consumers who are put under pressure to make unsustainable repayments are doing so at the expense of essential items and, in some cases, borrow further in order to make repayments. This is clearly not an affordable, sustainable arrangement and should not be used as a measure of the likelihood of a consumer reneging on an affordable repayment plan.

**(xii) Resolution**

The lender should be encouraged to explore all viable options with the consumer, to enable the consumer to make an informed choice as to the option most suitable to him / her. Accordingly, we suggest deleting the words “*at a minimum, one or more of*” and replacing with “*including*”.

In addition to those options set out in the proposed Code, a number of additional options have been suggested by MABS money advisors and these are listed in the ‘Conclusion’.

**(xiii) Unsustainable Mortgages**

We are concerned that the wording “*where it is concluded that the mortgage is unsustainable*” gives the lender unilateral authority to determine the sustainability of a mortgage, without having regard to all relevant factors. We would suggest that a test for “unsustainable” be established and imported into the Code.

**(xiv) Appeals**

MABS would welcome the inclusion in the Code of standard terms of reference for any appeals process, and that such processes be sent to consumers on refusal of a repayment proposal.

Furthermore, the appeals and complaints procedure to the Financial Services Ombudsman should also be made readily available.

**(xv) MARP – Repossessions**

Reasonable Effort

We would welcome a definition of “*reasonable effort*” to agree an alternative arrangement and would suggest that this is with reference to all stages of the MARP having been exhausted.

Lender’s Right to Enforce

MABS suggests that the lender’s basis for enforcing their right to repossess be set out and explained to consumers having difficulty making their repayments.

Full and Honest Disclosure

The requirement should be that the “*borrower knowingly fails to make a full and honest disclosure...*” and we suggest that this section be amended accordingly.

Furthermore, the SFS must be accompanied by watertight guidelines and FAQs similar to those in use with the Common Financial Statement in the UK to ensure that misinterpretation of the SFS does not result in immediate legal action.

Justifiable Circumstances

We are concerned that leaving a discretion for lenders to determine what circumstances justify repossession of a consumer’s home may leave the section open to misinterpretation and abuse and would suggest that this piece be removed from the Code.

Notice to Consumers of Legal Action

We suggest that a specific notice period be inserted for notification to consumers of legal proceedings for repossession of their property and would further suggest that this be 7 days in line with the provisions of the Land and Conveyancing Law Reform Act 2009.

Notice to Consumers Following Repossession

Section 103 of the Land and Conveyancing Law Reform Act 2009 imposes a duty on the lender to get the best price reasonably available. Subsection 2 imposes a further duty to provide the borrower with a notice “in the prescribed form” containing information relating to the sale so that the borrower may ensure that the obligations imposed on the lender in the remaining subsections have been

complied with (see also pg.284 Wylie, the Land and Conveyancing Law Reform Act 2009: Annotations and Commentary).

Accordingly, we suggest an expansion of the requirements contained in the Code so that the consumer is not only made aware of their continuing obligations under the terms of the mortgage (if any), but also that the sale was carried out in their best interest.

It is imperative that a Plain English Consumer's version of the revised Code is published at the same time as the revised Code and that all associated documentation can be readily accessed and understood by mortgage holders.

## Conclusion

With 1 in 20 mortgages now in arrears, the Code of Conduct on Mortgage Arrears must come some way to redress the balance between consumers and lenders and provide consumers with sufficient protections for their family homes, while recognising the rights of lenders to take action in circumstances where borrowers are not engaging with them.

In 2009, 35% of MABS clients had mortgages, rising to 39% in the first two quarters of 2010. MABS has used both the Code and the MABS/IBF Protocol to put in place affordable sustainable repayment plans for clients. This is increasingly challenging where there is a protracted period of unemployment and /or where it becomes clear that a mortgage is no longer sustainable.

As most consumers recognise the importance of keeping a roof over the heads, some will borrow or allow other expenditure items (including essentials) to suffer in order to reduce the arrears, and consequent risk of homelessness, resulting in unsustainable arrangements and increasing levels of personal debt. For this reason it has always been MABS view that personal debt problems must be addressed holistically, we therefore welcome the proposal within the Code that there will be a Standard Financial Statement (in) a standard format agreed by the Financial Regulator, the Irish Banking Federation and the Money Advice and Budgeting Service (MABS) for the purpose of obtaining financial information from borrowers in arrears or at risk of going into arrears. MABS has had several meetings with the IBF in relation to a SFS for the purposes of the MABS /IBF Protocol and is due to meet again with the IBF in early September to discuss proposals in this regard.

We have previously set out our views on 'priorities' to the Mortgage Arrears Group. Other possibilities for 'resolution' suggested by MABS staff members in response to the **current** consultation on the Code of Conduct on Mortgage Arrears include:



- a. Where a borrower is in a fixed rate agreement and cannot afford the repayments, due to changed financial circumstances, and an alternative product available from the same financial institution is affordable, then the borrower should be facilitated in switching to that alternative product without penalty (Example: switching from a fixed rate mortgage to a variable rate mortgage).
- b. In instances where a borrower holds a sub-prime mortgage at an interest rate on which they cannot afford the repayments, due to changed financial circumstances, the borrower should be facilitated by reducing the interest rate to a rate equivalent to the standard variable rate of regulated institutions without penalty.
- c. Where a borrower co-operates with the lender and adheres to a mutually agreed solution the borrower's credit rating should not be adversely impaired if the revised payment terms fall short of the original contractual repayments.
- d. As an alternative to voluntary repossession, borrowers should be afforded the opportunity to dispose of the property themselves within a mutually agreed time frame. This action allows borrowers negotiate on fees and sale price, thereby reducing residue debt to the minimum possible.
- e. Irresponsible lending on the part of a financial institution should be allowed as a defence to borrowers. Where proven, the remedy to borrowers being that the sale of the mortgaged property results in the full and final settlement of the amount outstanding. Judgements as to what constitutes irresponsible lending to be adjudicated on by the Financial Services Ombudsman following a complaint made to his offices by a borrower following established procedures.

We submit therefore that 'Step 4 Resolution' might take account of further options for resolution which may emerge from the work of the Mortgage Group.

MABS is conscious of the level of work already undertaken by the Mortgage Arrears and Personal Debt Expert Group, whose final report is eagerly anticipated, and makes this submission in order to assist the emergence of a robust regime for the resolution of mortgage arrears.