

**Consumer Credit and Over-indebtedness:
The Parliamentary Response: Past, Present and Future**

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The candidate confirms that the work submitted is her own and that appropriate credit has been given where reference has been made to the work of others

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To Daniel, Naomi and Joe:

The “book” is finally finished

ABSTRACT

In 2001 the Government announced the Consumer Credit Review, initiating consultations on changes to the present UK consumer credit legislation. The White Paper 'Fair Clear and Competitive; The Consumer Credit Market in the 21st Century' was published in December 2003 and a Consumer Credit Bill was brought before Parliament in 2005, gaining Royal Assent on 30th March 2006. Within the Review, over-indebtedness became a focus of concern and one of a suggested number of reasons for reform of consumer credit legislation. The aim of this thesis is to consider the parliamentary approach to consumer credit regulation with particular reference to over-indebtedness. Such examination allows conclusions to be drawn as to how Parliament approached the development of consumer credit legislation and to what extent the perceptions and regulation of consumer credit we see today reflect their historical development.

The study is based primarily on an historical analysis of attitudes and approach displayed by Parliament, not only towards the development of dedicated consumer credit legislation but also that relating to personal bankruptcy and debt enforcement, an issue integral to over-indebtedness. The starting point is the early 19th century, a time when the first push for general credit reform became a real and increasingly visible issue. The historical inquiry illustrates to what extent parliamentary attitudes drove the policy behind legislative reforms, as the regulation developed. The research illustrates that Parliament has ultimately regarded consumer protection as the *raison d'être* for consumer credit regulation; as the centuries have progressed, it has been the borrower and the changing nature of his/her condition that has captured the legislature's imagination. The welfare of this individual has become of the utmost priority, never more so than in the case of the changing nature of the 'vulnerable' consumer. Within this the regulation of unfairness has grown to have increasing significance vis-à-vis considerations of reform. The external influence of Europe, with its own established strategy for consumer policy has contributed to this, resulting in a UK regulatory framework that not only aims to provide basic legal protection for all consumers and safeguards for the vulnerable, but also strives to regulate unfairness within consumer credit transactions.

CONTENTS

CHAPTER 1:- INTRODUCTION

1. INTRODUCTION TO THE RESEARCH	1
2. PARLIAMENTARY ATTITUDES AND OPINIONS	2
3. THE SCOPE OF THE RESEARCH	
(a) Consumer credit	5
(b) Extent of the Examination	7
<i>The Starting Point</i>	8
(c) Over-indebtedness	12
4. SUMMARY	14

CHAPTER 2:- USURY LAWS AND THE REGULATION OF INTEREST

1. INTRODUCTION	16
2. PARLIAMENT	18
3. 1818 SELECT COMMITTEE	
(a) The Committee	20
(b) Parliament's Reaction	29
(c) Government Policy	33
4. BILLS OF EXCHANGE	35
5. THE 1845 COMMITTEE	40
6. CONCLUSION	43

CHAPTER 3:- PAWNBROKING

1. INTRODUCTION	46
2. THE PRACTICE OF PAWNBROKING IN THE 1800S	
(a) The Pawnbroking Trade	48
(b) The Pawnbroker's Image	51
3. THE DEVELOPMENT OF LEGISLATION	
(a) Early Regulation	55
(b) The Pawnbroking Select Committees	58
(c) Recommendations of the 1870 Committee	62
(d) Parliamentary Debate	67

4. COMPARISON WITH THE USURY LAWS	72
5. CONCLUSION	74

CHAPTER 4:- MONEY-LENDING AND BILLS OF SALE

1. INTRODUCTION	82
2. BILLS OF SALE	
(a) Regulatory Control	84
(b) The Legislature and Bills of Sale	90
3. MONEY-LENDING	
(a) The Money-lenders Market	98
(b) The 1898 Select Committee	99
(c) Parliamentary Debates	103
4. CONCLUSION	112

CHAPTER 5:- ENFORCEMENT AND DEFAULT: BANKRUPTCY INSOLVENCY AND THE SMALL DEBT LAWS

1. INTRODUCTION	122
2. MECHANICS OF DEBT ENFORCEMENT	
(a) Overview	125
(b) Recovery of Small Debts	127
(c) Imprisonment for Debt	129
(d) Bankruptcy	131
3. PARLIAMENTARY ATTITUDES	
(a) Debates	
(i) <i>Bankruptcy</i>	133
(ii) <i>Recovery of Debt other than Bankruptcy</i>	142
(b) Select Committees and other parliamentary proceedings	
(i) <i>1800s</i>	148
(ii) <i>1900s onwards</i>	157
4. CONCLUSION	161

CHAPTER 6:- HIRE-PURCHASE AND MODERN CONSUMER CREDIT

1. INTRODUCTION	167
2. HIRE-PURCHASE LEGISLATION	
(a) The Development of Hire-Purchase Regulation	169
(b) Parliamentary Debates	175
(c) The Molony Committee	182
(d) General Parliamentary Attitude	186
3. CROWTHER COMMITTEE	
(a) Committee Report	191
(b) Parliamentary Response to the Crowther Committee Report	199
4. CONCLUSION	204

CHAPTER 7:- THE CONSUMER CREDIT ACT AND OVER-INDEBTEDNESS

1. INTRODUCTION	208
2. OVER-INDEBTEDNESS	
(a) What is Over-indebtedness?	210
(b) The Importance of Over-indebtedness	219
(c) Over-indebtedness in Parliamentary Debate	221
3. CONCLUSION	230

CHAPTER 8:- THE CONTINUED DEVELOPMENT OF CONSUMER CREDIT LAW

1. INTRODUCTION	236
2. CONSUMER CREDIT ACT REVIEW	
(a) Background to the Review	238
(b) Extortionate Credit	241

3. EUROPE	
(a) The Consumer Credit Directive 1987	247
(b) Other European Directives	257
(c) Impact on UK Consumer Credit Law	262
4. PARLIAMENTARY ATTITUDE	269
5. CONCLUSION	281
CHAPTER 9:- CONCLUSION	285

ABBREVIATIONS

DTI Department of Trade and Industry

DWP Department of Work and Pensions

DCA Department for Constitutional Affairs

OFT Office of Fair Trading

CHAPTER 1

INTRODUCTION

1. INTRODUCTION TO THE RESEARCH

In 2001 the Government announced the Consumer Credit Review. Spurred on by increasing concerns about “over-indebtedness” from various quarters and indications of change from Europe with a modernisation of the Consumer Credit Directive, the DTI initiated consultations on changes to the present UK consumer credit legislation. The proposals for change covered issues such as the financial limit,¹ early settlement regulations,² on-line credit agreements, making the licence regime more effective against loan sharks, making the extortionate credit provisions more efficient and simplifying both the advertising regulations and the rules on multiple agreements.³ The emphasis of all this activity was not only on tackling loan sharks and providing regulation that ‘protects’ the consumer, whilst ‘enabling business to operate competitively in a modern credit market’⁴ but also on research into the cause, effect, extent and prevention of over-indebtedness. As a result of the Review, the White Paper ‘Fair Clear and Competitive; The Consumer Credit Market in the 21st Century’ was published in December 2003 (“the White Paper”).⁵ A Consumer Credit Bill was drafted in response to the White Paper and brought before Parliament in 2005. Its passage was interrupted by the General Election, held on 5th May 2005, but it has now received Royal Assent being the Consumer Credit Act 2006 c 14.

Over-indebtedness has become an increasing focus for both consumers and Government, as is shown by its place within the Consumer Credit Review. The main purpose of this research is to consider parliamentary approach to consumer credit regulation with particular reference to over-indebtedness. There are a number of

¹ The Consumer Credit Act 1974 c 39 has a financial limit, beyond which an agreement will not be regulated under the Act’s provisions, at present this is £25,000 (although the financial limit will be abolished when the Consumer Credit Act 2006 is implemented).

² Allowing rebates in certain situations where an agreement is paid off prematurely.

³ Consumer Credit Act 1974 c 39 s 18 makes provision to ensure the combination of agreements does not result in an evasion of the Act’s regulation, through taking the combined agreements over the financial limit.

⁴ M Johnson Minister for Competition Consumers and Market ‘Review of the Consumer Credit Act: Progress Report’ DTI (August 2002).

⁵ Cm 6040, 2003.

aspects to this. The first is the overall development of consumer credit legislation, since not only is this an obvious indication of parliamentary response to consumer credit, but also the context in which concern about over-indebtedness is to be examined. Secondly, factors affecting parliamentary attitude and the development of the legislation need to be examined to discover what lay beneath Parliament's actions. Thirdly, the meaning of over-indebtedness needs to be considered; identification of the key elements allows conclusions to be drawn as to the extent of over-indebtedness's relevance to parliamentary approach and to the underlying ethos of legislative development and reform.

The primary method by which these issues are explored in this thesis is through consideration and analysis of parliamentary debates, papers and proceedings. The reason this research focuses on parliamentary activity is that in order to fully understand the processes influencing the direction of consumer credit legislation, parliamentary attitude to consumer credit and its regulation is a useful tool. It assists in identifying factors regarded as important during the legislative process. In addition the impetus for any changes in the law, whether successful or otherwise, should be evident from parliamentary activity. Furthermore by exploring parliamentary attitude not only to consumer credit regulation, but also to over-indebtedness, any connection between them will become apparent. The aim is to provide conclusions as to the important factors underlying current reform, specifically as they refer to over-indebtedness and as a corollary to this whether any predictions can be made about the future of consumer credit regulation.

2. PARLIAMENTARY ATTITUDES AND OPINIONS

The underlying basis of the investigation is historical, looking at parliamentary approach and attitudes to consumer credit as legislation has developed. There are a number of reasons for this. As has been briefly noted above, an historical examination of attitudes and approach demonstrates how concerns in relation to consumer credit have been dealt with by the legislature in the past. Past reaction to consumer credit regulation will help analysis of modern reform in that it allows a deeper understanding of why present regulation exists as it does. Furthermore evaluating Parliament's reaction to issues that have been raised in the past facilitates

discussion of present and future direction, especially for questions that recur throughout the period being covered. Certainly in other areas the history of society's attitudes to credit is seen today as relevant, for example when explaining the consumer's own approach to borrowing.⁶

The methodology for the purposes of the present study is different from other historical examinations of consumer credit legislation in one important respect. Whilst an historical approach has been used before,⁷ here the examination of the attitudes and approach to consumer credit is primarily restricted to those exhibited and adopted by Parliament, whether the Government or individual Members of the House of Commons or the House of Lords. There are, of course, many levels to opinions and attitudes towards any economic activity, its regulation and the consequent effect of such regulation.⁸ Indeed much of the writing on attitudes to consumer credit focuses on social aspects.⁹ The purpose of this thesis however is to concentrate on the legislative regulation of consumer credit, more particularly forthcoming reform and how those responsible for this reform view the present concerns raised, particularly over-indebtedness. Whilst legislation itself patently demonstrates the overall approach to the subject being legislated for, in a search for concrete evidence as to Parliament's attitudes to such a subject, it is not enough. It requires support in the form of parliamentary activity such as debate that surrounds

⁶ E Kempson 'Over-Indebtedness in Britain. A Report to the Department of Trade and Industry' (Personal Finance Research Centre, September 2002) [2.6] contains a discussion about attitudes of borrowers to borrowing. Age and a change in trends over the years were both found to be factors attitudes to borrowing and levels of borrowing.

⁷ Using historical evidence as a means of explaining the development of consumer credit legislation as a whole (rather than specifically attitudes relating to such legislation) was used in a study carried out by JJ McManus. In his thesis, McManus set out his theory of 'law and power' as a means of discovering what factors initiate laws. He partially tested his hypothesis through the use of historical analysis of the development of consumer credit law. However he employed a wide approach looking not only to legislative activity but also that of society and the judiciary, JJ McManus 'Law and Power: A Study of the Social and Economic Development of the Law relating to Consumer Credit' (Ph D, Dundee 1985).

⁸ For example judicial opinion and case law, the opinions of society as a whole, individual elements of society, consumer agencies, and, of course, market opinion.

⁹ See, for example D Caplovitz *The Poor Pay More* (The Free Press, New York, 1967); D Cayne and M Trebilcock 'Market Considerations in the Formulation of Consumer Protection Policy' (1973) 23 University of Toronto Law Journal 396; D Caplovitz 'Social Benefits and Costs of Consumer Credit' in RM Goode (ed) *Consumer Credit* Vol 3 (United Kingdom, Comparative Law Series, Leyden: Boston 1978); RD Manning *Credit Card Nation—The Consequences of America's Addiction to Credit* (Basic Books Plymouth: Plymbridge 2000).

legislation (whether only proposed or proposed and accepted), the proceedings of appointed Committees and their subsequent reports, together with other documents which may set out the position of Government at any given moment. Reports of debates and these other records provide hard evidence about what is and was being said about the issues subject to possible legislation or reform thus illustrating views held by and the approach taken by the legislature.

The use of such evidence is a recognised method, other writers, to a greater or lesser extent, using this approach, although not in relation to the specific interrelation between consumer credit and over-indebtedness. JJ McManus¹⁰ relied on parliamentary debates and committee reports when presenting his argument relating to the development of consumer credit law in the 1920s and 1930s.¹¹ Other comment in this area of credit in the 19th century comes from, for example, GR Rubin¹² who used extensive evidence from Select Committee Reports to underline his arguments as to why imprisonment for debt effectively survived its supposed abolition. Ian Duffy examines the legal and institutional framework that defined and regulated the financial collapse during the Industrial Revolution, primarily in the London area.¹³ Duffy also made frequent and detailed use of parliamentary papers as a means of demonstrating the thought processes behind reform relating to bankruptcy, small debts and insolvency.¹⁴

There are of course, limitations to using this means of evidence alone. First, it may be considered too narrow an approach, choosing merely one aspect of attitudes to consumer credit. It can be argued that it is not only legislative opinions but also those of the judiciary and society, (whether commercial or consumer) which influence legislation. However little, especially in the initial period being

¹⁰ McManus 'Law and Power' (n 7).

¹¹ Ibid 131.

¹² GR Rubin 'Law, Poverty and Imprisonment for Debt, 1869–1914' in GR Rubin and D Sugarman (eds) *Law, Economy and Society, Essays in the History of English Law 1750–1914* (Professional Books Limited, Worcester, 1984).

¹³ IPH Duffy *Bankruptcy and Insolvency in London during the Industrial Revolution* (Garland Publishing Inc, New York and London 1985). To Duffy the reports of parliamentary committees and royal commission enquiries were extremely significant in the development of debt legislation, as they provided a comprehensive review and criticism of the law's defects, gathering together information that would be used as a basis for reform and exposing biases within the system.

¹⁴ Duffy *Bankruptcy and Insolvency in London* (n 13) 155–156.

investigated (the early 1800s), has been written in any detail in terms of the views of legislature, the social aspects and the commercial realities of credit seeming to be the focus of attention. Bearing in mind this study is primarily concerned with legislative reform, the approach of the legislature is highly significant. In any event, the views of judiciary and society will be reflected to at least some degree in parliamentary records of debates and proceedings. Secondly, the constitution of Parliament and committees can be biased, and may, therefore, provide a potentially jaundiced view. This is accepted as inevitable; this danger lies in any examination of opinion, regardless of its origin. The point here is that the overall examination relates to legislative development and reform, which relies on positive parliamentary attitude for its success, regardless of the motivation behind it.

3. THE SCOPE OF THE RESEARCH

There are three further issues to be raised with regard to the approach taken by this study. One is the definition of consumer credit adopted. The second is an explanation of the extent to which the development of legislation and parliamentary approach is considered. The third is the question of over-indebtedness.

(a) Consumer Credit

An expansive approach to the meaning of consumer credit has been adopted by the modern legislation and this research follows a similar direction. A wide definition of consumer credit was provided for in the Crowther Committee Report¹⁵

The broad definition of consumer credit used throughout this Report embraces both money that is lent and borrowed as money, without being specifically tied to the purchase of any particular goods and services, and also any part of the purchase price of specific goods and services that is not paid on the spot but deferred for later settlement¹⁶

¹⁵ Committee on Consumer Credit Law 'Consumer Credit: Report of the Committee' (Cmnd 4596, 1971).

¹⁶ Ibid [1.2.2.]. The Crowther Committee Report does go on to create distinctions within this definition, such as distinguishing between purchase money credit and non-purchase money credit (favouring this to the prevailing distinction at the time of lender credit and vendor credit), secured and unsecured credit, instalment credit etc. Detailed explanation of the

This is reflected in the statutory definition of a consumer credit agreement.¹⁷ Consumer credit under the Consumer Credit Act 1974 consists of any transaction, regardless of the purpose, consisting of a cash loan or other financial accommodation, which is conducted between a borrower and a creditor whose status brings him/ her/it within the ambit of the Act.¹⁸ On this basis regulation would cover all loans ranging from advances for the purchase of land or buildings to the everyday tradesman's credit of customers' running accounts, although loans, such as those just referred to are in many instances not covered by the statute's regulation. The reason for this however is not because they fall outside the definition of credit but because they come within one of the exemptions provided for by the Act (whether, for example, due to the specific nature of the credit¹⁹ or because of the status of the creditor.²⁰)

This is the definition of consumer credit that is adopted (i.e. the definition of consumer credit effectively provided for the Act, before the exemptions are applied) for the purposes of this thesis. Although consumer credit in its present form only really emerged in the mid 1900s, its origins go much further back. The use of a wider definition validates the inclusion of these earlier forms of credit, such as trade or business borrowing by the individual and secured loans on land, all of which of course are still in operation today. A qualification must however be made. Whilst this wide definition is employed, lending other than that secured on land is the emphasis of this study. The reason for this is twofold. Whilst secured lending on land accounts for a large proportion of overall household debt²¹ it is unsecured lending that carries more concerns within the concept of over-indebtedness.²² In any event, much secured

various forms of consumer credit and corresponding definition can be found in ch 1.2 of the Committee's Report.

¹⁷ Consumer Credit Act 1974 c 39.

¹⁸ Ibid s 8.

¹⁹ Normal trade credit is exempted under the Consumer Credit (Exempt Agreements) Order 1989 SI 1989/869 art 3(1)(a)(ii).

²⁰ Consumer Credit Act 1974 c 39 s 16; Consumer Credit (Exempt Agreements) Order 1989 SI 1989/869.

²¹ Bank of England 'British household indebtedness and financial stress: a household picture' Quarterly Bulletin (Winter 2004) 426.

²² DTI 'Over-indebtedness in Britain: A DTI Report on the MORI Financial Services Survey' 2004 [4.4].

lending on land is no longer within the ambit of the consumer credit legislation, first mortgages now being governed by the Financial Services and Markets Act 2000.²³

This having been said, there are some types of secured lending considered, such as pawnbroking and bills of sale. This however is due to the particular contribution they make to the progress of consumer credit law and its reform. In essence the direction taken by this research is one of concentration on those areas of consumer credit that have particular relevance either to over-indebtedness or to the development of the legislation as a whole. For this reason there are other connected areas that will not be studied in detail. Pure hire, regulated by the Consumer Credit Act 1974 will not be considered, it not having a specific connection to over-indebtedness. Data protection and credit unions will not be examined in any detail either; these are issues that, whilst perhaps being of some relevance to over-indebtedness (in terms of responsible lending and low cost credit) have not affected the consumer credit legislative reforms to the same degree as those questions that are covered.

(b) Extent of the Examination

When embarking on analysis of attitudes to consumer credit it has been proposed that more than legislation relating to consumer credit needs to be considered. Consumer credit and /or its regulation can, of course, be analysed in isolation,²⁴ however when considering the attitudes to credit in terms of over-indebtedness, it is useful to encompass a wider field of study. Attitudes to other regulation which is pertinent to borrowing, particularly issues relating to default e.g. bankruptcy, insolvency and recovery of debt also have relevance, particularly as “over-indebtedness” suggests some form of difficulty with debt.²⁵ The question is at what point an exploration of all these issues should begin.

²³ C 8.

²⁴ In fact some writers consider it should be treated completely separately from, for instance, debt or default on debt. See for example Lea, Webley and Walker ‘Psychological Factors in Consumer Debt: Money Management, Economic Socialisation and Credit Use’ (1995) 16 *Journal of Economic Psychology* 681–701; MD Shaoul ‘On the significance of Consumer Credit: An alternative to “common sense” accounts’ (Ph D, Manchester UMIST 1992).

²⁵ This is discussed in more detail at text to nn 42–51.

The Starting Point

As has been already mentioned this research will be based on an historical examination of the parliamentary attitudes to consumer credit and over-indebtedness. Apart from the few statutes regulating interest, as referred to above, most commentators seem to give the impression that legislative control of consumer credit only really emerged at the end of the 19th century,²⁶ the one piece of reform worth mentioning before the 1880s being the repeal of the Usury Laws in 1854. Relatively little has been written about legislative treatment of consumer credit or attitude to it in the early part of the 19th century, apart from general announcements that such treatment was conspicuous by its absence. Professor Goode states

Apart from the control of interest rates and the regulation of pawnbrokers, lenders of money and sellers of goods were free to bargain for almost any terms they chose. Legislative control of consumer credit is a phenomenon which did not emerge until the end of the nineteenth century...²⁷

On this basis an examination of legislative opinion of consumer credit should commence at this point. This research however stretches further back, the opinion being that even if consumer credit legislation as such was not present as an identifiable concept, it did exist, albeit in embryonic form, through the control of credit that was made available to the individual. After all cash loans and pawnbroking, both methods of credit provision in the 1800s, come within the employed definition of consumer credit.

Another reason for this approach lies in the early history of consumer credit, which demonstrates that consumer credit in some form was in existence long before the 19th century. The beginnings of consumer credit as a financial tool have in fact been traced back to the old practice of usury and the general practice of lending with interest.²⁸ Lending and borrowing have been found to exist from the early civilisation

²⁶ For example McManus 'Law and Power' (n 7) or RM Goode *Consumer Credit Law and Practice* Vol 1 (Butterworths, London) (2002) 9.

²⁷ RM Goode 'A Perspective of Consumer Credit' in RM Goode (ed) *Consumer Credit* Vol 3 (UK Comparative Law Series, Leyden: Boston 1978) 6.

²⁸ Lending with interest is in fact what usury meant when the term was first in use and "usury" only became associated purely with lending at excessive rates at a later date.

of Mesopotamia although by medieval times it had become the pariah of society.²⁹ In Europe, usury's infamy was primarily due to the Christian religion becoming the driving force behind the regulation of society and the development of the law. However by the late 15th century the Church began to have less of an influence over the burgeoning commercial morality,³⁰ commercial and private credit developing into separate concepts, and with the advent of Protestantism and its recognition of the commercial profit as respectable, the ban on lending with interest was abolished by statute³¹ being replaced with a 10 percent ceiling, later reduced to five in 1713³² ("the Usury Laws"). The Crowther Committee Report neatly describes this development to the whole position relating to consumer credit:

One of the main springs of the case against usury was the very intimate nature of much medieval credit giving—it was in effect arrangements between neighbours—and to extract interest seemed to the opponents of usury to outrage Christian charity and the need for brotherly forbearance and kindness between men. Once consumer credit, even on a small scale, was seen to resemble business credit, and came to be regarded as an economic matter rather than one of morals, the problem of preventing oppression and suffering arising from exploitation of borrowers by lenders became a social question to be prevented or ameliorated by the law of the land³³

This fairly much remained the case until the 1800s.³⁴ Credit for individual purposes whether for business or otherwise was already an established part of every day life

²⁹ R Gelpi and F Julien-Labruyere *The History of Consumer Credit: Doctrines and Practices* (Macmillan, Basingstoke, 2000) gives a detailed description of the development of credit pre-Christianity and the ensuing effect of religion on attitudes to credit.

³⁰ By this time there was already some distinction between the finance of trade and the finance of the private individual for private purposes in Europe, though less so in England. Crowther Committee Report (n 15) [2.1.2].

³¹ The first Act to grace the statute books was in 1545 (37 Henry VIII c 9). This allowed interest on loans but at a ceiling of 10 per cent. This state of affairs lasted for seven years before the position was effectively reversed by the Act of 1552 (5 & 6 Edward VI c 20), but was then re-instated in 1572 (13 Elizabeth c 8, made perpetual by 39 Eliz. c 18). WS Holdsworth *A History of English Law* Vol 8 (Methuen London 1903–1972) 100–113 gives a potted history of the usury laws. The Crowther Committee Report (n 15) also charts the progress of legal limits on interest rates in ch 2.

³² Act of Queen Anne in 1713 (12 Anne 2 c 16).

³³ Crowther Committee Report (n 15) [2.1.6].

³⁴ With the caveat that there had been some legislation controlling pawn broking, culminating in the Pawnbroking Act 1800, but this did not directly affect the Usury Laws.

by the start of the 19th century.³⁵ Loans tended to be granted to the more wealthy or well to do borrower often with some form of security being provided, for example a bill of sale or mortgage on property. Unlike the upper middle classes, when the lower or poorer classes wished to borrow cash, the pawnbroker, not the money-lender, was his or her likely port of call.³⁶

The research takes a broadly chronological approach and the starting point is the 1818 Select Committee on the Usury Laws.³⁷ This Select Committee set the ball rolling in terms of open discussion about the direct regulation of credit. The first period concentrated on, the early 1800s through to 1854, (the year of the final repeal of the Usury Laws) saw relatively little regulation relating to credit itself, repeal in fact being the major point of debate. This however does not detract from the relevance of parliamentary activity during this time, the main issue being the regulation or rather deregulation of credit to the individual. Cash loans governed by the Usury Laws were not however the only form of credit at this time, pawnbroking and bills of sale both being methods by which individuals could obtain loans. Pawnbroking provided the individual with small short-term loans, secured by pledge, invariably for purposes of consumption such as living expenses and recreation. Bills of sale were the method used by money-lenders to secure payment of their loans. It was in fact the over-enthusiastic use of this means of security in the latter part of the century that first brought money-lenders to the attention of Parliament. This parliamentary interest in money-lending resulted in the Moneylenders Act 1900³⁸ and subsequent legislation put in place in the early 20th century. Parliamentary

³⁵ Although borrowing for anything other than immediate need did not surface until the mid 19th century. See McManus 'Law and Power' (n 7) ch 2 and Crowther Committee Report (n 15) ch 2.

³⁶ Crowther Committee Report (n 15) [2.1.19]; the working classes (whether they liked it or not) were sometimes also subject to another form of credit, particularly in the North where the payment of wages was by I.O.U.s. 'Their [the bankers] paper had provided a much needed currency after 1797, especially in the industrial North, where, for lack of cash, manufacturers had sometimes been driven to paying accounts for a few shillings by accepting bills, and to paying hand-loom weavers' wages in I.O.U.s which were discounted by publican "bankers"' JH. Clapham *An Economic History of Modern Britain, "The Early Railway Age"* (Cambridge University Press, Cambridge 1930) 265; for problems relating to lack of coinage and the payment of wages see also TS Ashton 'The Bill of Exchange and Private Banks in Lancashire 1790–1830' in TS Ashton, RS Sayers *Papers in English Monetary History* (Clarendon Press Oxford 1953) 37–49.

³⁷ Report from the Select Committee on the Usury Laws HC (1818) 376.

³⁸ 63 & 64 Vict c 51.

activity, attitude and resultant regulation surrounding all these developments are analysed in turn.

It is not however only in relation to dedicated credit legislation that the 19th century has significance. This period was rich with bills, legislation, committee and commission reports relating to insolvency, bankruptcy and debt. The relevance of these areas to over-indebtedness has already been noted and they are considered at length once pawnbroking, bills of sale and money-lending have been explored. The parliamentary debates and activity surrounding the development of the enforcement and default laws however extends further than the 19th century, although the basis of much of the bankruptcy law had been established by then. The question of imprisonment for debt in particular continued to be a focus of concern, from the 1920s to the 1950s. It is also around this time that hire-purchase really started to interest Parliament. Up until this point hire-purchase had been unregulated—it was abuses within the system that first raised questions as to legislation. There is plenty of debate and activity surrounding hire-purchase, all of which is drawn on for the purposes of this research. Furthermore with hire-purchase being the category of credit from the Industrial Revolution, which perhaps more than any other typifies modern consumer credit, it leads logically to the present regulation contained in the Consumer Credit Act 1974.³⁹

The final arena within which parliamentary attitudes and approach to consumer credit are explored is that of the current legislation and the proposed reforms. It should be pointed out here that bearing in mind the rate of development in this area the cut off point for this study will be March 2006. Over-indebtedness has had a large part to play in recent consideration of consumer credit regulation and the latest reforms are considered in this light. However besides the Consumer Credit Review and the over-indebtedness agenda, one other major factor is considered, namely Europe. The Consumer Credit Directive became part of European law in 1987, although little it provided for changed what was already in the Consumer Credit Act 1974. The significance of Europe however cannot be underestimated. Any influence it may have or have had on UK consumer credit legislation is subjected to

³⁹ C 39.

investigation, not only in terms of direct regulation of consumer credit but in relation to other more general forms of control in the consumer market. Indeed Europe continues to be active in terms of consumer credit. There have not only been consultations on the proposed amendments to the Consumer Credit Directive,⁴⁰ but also a number of other Directives have been passed, all of which affect consumer credit to some extent. Additionally, in Europe too the question of over-indebtedness has arisen, having been identified as a potential problem to be targeted by consumer protection policy.⁴¹

(c) Over-indebtedness

The Task Force on Over-indebtedness was established in 2000 by the then Minister for Consumer Affairs, Dr Kim Howells. Its remit was to consider in particular improvements in transparency of information, principles of lending practice and provision of notification to consumers party to free/low interest agreements.⁴² Members of the Task Force were taken not only from various financial bodies such as the Consumer Credit Association, Financial Services Authority and the British Bankers Association but also from the National Association of Citizens Advice Bureaux.⁴³ The Task Force was given a more permanent role after the White Paper⁴⁴ was published and various working groups have been established, such as the Ministerial Group on Over-indebtedness⁴⁵ and the Advisory Group on Over-indebtedness.⁴⁶ These groups' remit is to consider the strategies that should be put in place to deal with over-indebtedness and to undertake regular monitoring of the situation.

⁴⁰ Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit [1987] OJ L 042/48.

⁴¹ 'Opinion of the Economic and Social Committee on Household Over-indebtedness (own initiative opinion)' CES (5/11/2002) [1.1].

⁴² Task Force on Tackling Over-indebtedness 'Second Report' (January 2003) [2.2].

⁴³ Ibid [2.4].

⁴⁴ Cm 6040, 2003.

⁴⁵ This group's terms of reference relate to Government policies—both in terms of their development and implementation.

⁴⁶ This group's terms of reference include an advisory capacity and monitoring over-indebtedness.

Over-indebtedness has attracted an element of infamy, many discussions having taken place as to its effect.⁴⁷ There is one flaw when looking at these examinations of over-indebtedness as a whole and that is the absence of a standard or universally agreed definition as to what this “phenomenon” (as it is so often referred to) actually is. The Crowther Committee Report in 1971 referred to possible dangers of consumer indebtedness and problems with excessive commitment. The nearest thing to any kind of definition is in paragraph 3.7.2. ‘an individual is borrowing excessively if the cost of borrowing is greater than the monetary and non-monetary returns’. Even so, this does not specifically refer to over-indebtedness as a term and really all it is doing is giving clarity to the phrase “excessive borrowing”. Here however might be the key to identification of over-indebtedness. The phrase is a relatively recent expression but one that seems to indicate a link with the idea of excessive borrowing and over-commitment (with the resultant possible effect of default). All of this is facilitated by consumer credit, with unsecured lending (that is lending other than by way of mortgage on land) being found to be the greater problem.⁴⁸ There is another particular element that has become clear from statistical research conducted into over-indebtedness and that is the incidence of over-indebtedness in more vulnerable consumer groups, such as those with low income.⁴⁹ Whilst these consumers represent the minority, it has been made clear that protecting them is a priority.⁵⁰ There are then a number of issues that are particularly pertinent to over-indebtedness in terms of consumer credit: borrowing other than mortgages, over-commitment and vulnerability.

⁴⁷ See, for example, Kempson Report to the DTI (n 6); DTI, DWP ‘Tackling Over-indebtedness Action Plan 2004’ (2004); DTI DWP DCA ‘Tackling Over-indebtedness Annual Report 2005’ (2005); DTI ‘Over-indebtedness in Britain: A DTI report on the MORI Financial Services Survey 2004’ (2005) [3.1]; DCA ‘A Choice of Paths better options to manage over-indebtedness and multiple debt’ (July 2004).

⁴⁸ DTI ‘A DTI Report on the MORI Financial Services Survey’ (n 22) [4.4].

⁴⁹ The MORI Financial Services Survey 2004 identified certain consumers as being ‘over-represented on the over-indebtedness indicators’, namely those with a low income, the younger borrower (in their 20s or 30s), those with insignificant savings (less than £1000), those in rented accommodation and single parents. DTI ‘A DTI Report on the MORI Financial Services Survey’ (n 22) [4.5].

⁵⁰ DTI ‘Response from Melanie Johnson, Minister for Competition, Consumers and Markets, to the Second Report of the Task Force on Tackling Over-indebtedness’ (February 2003); White Paper (n 5) [5.2].

These then are the areas that have particular relevance to the research. However in order to fully explore the relevance of over-indebtedness, it is necessary to look more deeply at the approach not only to consumer credit, a primary source from which over-indebtedness arises,⁵¹ but also to its particular consequences i.e. excessive borrowing and over-commitment. Therefore, besides consumer credit regulation, as has already been mentioned, the legislative framework that guides the recovery of debt procedures is considered, as those debtors who are over-indebted may well become subject to one or more of these processes.

4. SUMMARY

Here then is the framework of this thesis. The aim is to analyse and draw conclusions about parliamentary attitude to the development of consumer credit legislation and any influence, whether direct or indirect that over-indebtedness may have had. Consumer credit for the purposes of this examination is the wide definition of consumer credit given by the Consumer Credit Act 1974. The identification of factors behind the development of consumer credit legislation will give some insight into how modern the concern about over-indebtedness actually is and how far this issue has influenced consumer credit. However to do this successfully not only must the progression of the regulation be considered but also over-indebtedness itself. The exploration of over-indebtedness is achieved by analysing the various current descriptions that exist, together with any indications from Parliament as to how they view the problem.

The analysis of the consumer credit legislation is an historical one. It is however refined in two ways. First it is, in most part, the attitudes and approach to consumer credit displayed by Parliament that are examined, such attitudes having particular relevance when it is the possibility of new legislation that is being considered. Secondly, not all related areas of consumer credit are examined in detail, but rather two specific areas are concentrated on. One, naturally, is the general regulation of credit and its terms; the other is the regulation dealing with some of the

⁵¹ In research that has been conducted, consumer credit commitments are used as an indicator of possible over-indebtedness. 'Task Force 'Second Report' (n 42) [4.5]; Kempson Report (n 6) [4]; DTI 'A DTI Report on the MORI Financial Services Survey' (n 22) [3.1].

consequences of credit, primarily default. A large element of over-indebtedness or the concern about it seems, certainly on an initial examination, to be tied in with the issues of over commitment and excessive borrowing, issues which, some feel inevitably, lead to default. To gain a general picture of over-indebtedness, therefore, this issue is important.

The starting point of the historical analysis is the early 19th century. This is a time when the desire for general credit reform became a real and increasingly visible issue. The evidential basis of this investigation is primarily parliamentary records i.e. debates, Bills and select committee/ commission reports. In essence the study aims to illustrate a clear picture of parliamentary attitudes to consumer credit, what drove the policy behind legislative reforms, the part over-indebtedness has had to play within this and, in addition, provide some suggestion as to the direction the law may take in the future.

CHAPTER 2

USURY LAWS AND THE REGULATION OF INTEREST

1. INTRODUCTION

In any investigation into parliamentary attitudes to credit and into factors that may have influenced the legislature, there are a number of aspects to be considered. These include matters such as regulation of default,¹ means by which credit is made available² and the instruments of credit used.³ However the starting point for a chronologically based study is the regulation of the credit itself, and the interest charged upon it, this being the earliest form of statutory control.

Regulation of credit had a chequered history up until the early 1700s. In 1713 an Act was passed⁴ establishing a ceiling rate of 5 per cent, which remained in place for at least the next 100 years. The regulation of interest rates was commonly referred to as the “Usury Laws” and apart from pawnbroking,⁵ these laws constituted the only real basis of credit regulation until the mid 1800s, they themselves being the subject of many attempts at reform and repeal. Consumer credit for the purposes of this study includes all types of credit made available to the individual, primarily for private purposes, but also encompassing credit that may be required by the individual for small business. Credit governed by the Usury Laws is therefore relevant, covering, as it did, both loans for private purposes and commercial lending to the individual businessman, whether or not secured.⁶

¹ I.e. bankruptcy, insolvency and the recovery of debt, issues that will be returned to in later chapters.

² Eg money-lending, pawnbroking, hire-purchase.

³ Eg bills of exchange, bills of sale.

⁴ Act of Queen Anne 1713 (12 Anne 2 c 16).

⁵ The rules relating to pawnbroking were embodied in the Pawnbroking Act 1800 (39 & 40 Geo III c 87).

⁶ Although they only regulated the interest rate. For loans secured on land, for instance, the security itself was governed by the law of real property, the mortgage being effected by actual transfer of the land in question with the right of re-conveyance on repayment.

The historical aspect to the examination of attitudes to consumer credit is to begin in the early 1800s, mapping early progress of the regulation of consumer credit and the development of attitudes surrounding it. In this chapter the main focus is on the Usury Laws. In a consideration of attitudes and approach to these Laws various elements need to be discussed. The first issue is the question of the membership of Parliament in these early days of politics and government. Ways in which this may have affected the general direction taken to the relevant issues is explored, identifying any parliamentary bias with which reformers had to contend. Secondly, the Select Committees set up in 1818 and 1845 to consider the Usury Laws are examined, both in terms of the witness evidence given at the inquiries and the conclusions drawn by the Committees themselves. Whilst these Committees do not perhaps provide conclusive evidence of parliamentary approach to consumer credit as such, Parliament's reaction to the respective Reports does. Thirdly there is one particular type of credit instrument from this period that is also included in the investigation, namely the bill of exchange. This instrument was a popular way of obtaining credit, and parliamentary interest in the use of this document provides some idea of attitudes to credit as a whole. In addition, interest in the effect of the Usury Laws on this borrowing mechanism gives some illustration as to how Parliament approached the regulation of credit and how far it should extend.

It is as a result of analysing these aspects of early basic credit provision, its regulation and the surrounding parliamentary activity, that some initial conclusions can be drawn as to parliamentary attitudes to consumer credit in the early to mid 1800s. Not only can suppositions be made about attitudes to credit itself and its regulation, but also conclusions can be drawn as to the approach taken towards those individuals that provided and used it. From this opinions can be formed as to what factors influenced the law-makers of this period and whether any identified elements bear resemblance to the concerns surrounding over-indebtedness today.

2. PARLIAMENT

At the beginning of the 19th century the basis for control of credit, primarily through the control of interest rates, was to be found in the Usury Laws contained in the Act of 1713.⁷ This enacted that:

no person or persons whatsoever, ...upon any contract, ...take, directly or indirectly, for Loan of any monies, Wares, Merchandize, or other commodities whatsoever, above the Value of five pounds for the Forbearance of one hundred pounds for a Year, ...and that all Bonds, Contracts, and Assurances whatsoever, ... for payment of any Principal, or Money to be lent or covenanted to be performed upon or for any Usury, whereupon or whereby there shall be reserved or taken above the Rate of five pounds in the Hundred,...shall be utterly void;

in other words, the maximum rate of interest that could be charged for lending was 5 per cent.

The law survived, relatively unscathed, until the 1830s, but movements were afoot before then to reduce its effect or remove it altogether. In 1818 an Act,⁸ the product of a Bill brought by Sir Samuel Romilly,⁹ was passed (with relatively little difficulty)¹⁰ giving relief to bone fide holders of negotiable securities where, unbeknown to the holder, it transpired the security had been given for usurious consideration. In the same year, a Select Committee was appointed to 'consider of the effects of the Laws which regulate or restrain the Interest of Money.'¹¹ This was the first active involvement of Parliament in a review of the Usury Laws as a whole since the 1713 Act,¹² and it is this Select Committee that provides a convenient

⁷ 12 Anne c 16.

⁸ 58 Geo 3 c 93.

⁹ Sir Samuel Romilly was identified with the Whig party. Romilly refers to the Bill in his diary, remarking that the usury law was 'productive of great injustice' with regard to bills of exchange and promissory notes and that as regards negotiable securities it was 'a most unjust law' Sir S Romilly *The Life of Sir Samuel Romilly written by himself with a selection from his correspondence, edited by his sons* Vol III (3rd edn, Murray, London, 1840) 348.

¹⁰ Ibid 351.

¹¹ House of Commons Select Committee 'Report of the Select Committee on the Usury Laws' HC (1818) 376.

¹² Although there was a Committee appointed in 1777 to consider the laws against usury as they related to the purchase of annuities—House of Commons Committee 'To consider laws

starting point for the investigation into parliamentary and legislative activity and attitudes to credit.

However, before contemplating the attitudes of early 19th century Parliament, it would be helpful to consider its composition, it not being the diverse representative forum of modern day politics. In the 18th century through to the beginning of the 19th century, local government of the country was the domain of powerful local families and individuals, who viewed their control as a natural consequence of their social status.¹³ In Parliament, there was a very heavy representation of those who owned land; the leading figures in the House of Lords were landowners, the landed interest also enjoying a majority presence in the House of Commons.¹⁴ Many MPs were independent, there still being no pervasive party structure or discipline, and Parliament could not have been described as representative—the distribution of seats was extremely uneven and weighted in favour of the South. Members that sat for the English boroughs were elected by a small minority of its inhabitants, the majority of the boroughs having electorates of less than 500,¹⁵ the franchise being determined by charter and dependent on local custom.¹⁶ As far as the county Members were concerned the voting qualification of a “40 shilling freeholder” still stood, a relic from 1434.¹⁷ Majority support was “bought” by the parties of the State (the Whigs and the Tories) by means of pocket boroughs, sinecures and the like.

Reform did gradually begin take place from the early 1830s and as the Industrial Revolution took hold and the country began to evolve socially and economically, Parliament began to feel the strain of the divide between the industrial and financial classes and the landed gentry. Influence in national affairs became the domain of industry and finance and conflict between these interests and the landed

against usury and the present practice of purchasing annuities for the life of the grantor' HC (1777) 36.

¹³ WR Cornish and G De N Clark *Law and Society in England 1750–1950* (Sweet and Maxwell, London, 1989) 11.

¹⁴ *Ibid* 9.

¹⁵ Keith Feiling *A History of England* (Redwood Press Limited, Trowbridge, London, 1970) 792.

¹⁶ Cornish *Law and Society in England* (n 13) 9.

¹⁷ Feiling *A History of England* (n 15) 792.

interest became inevitable;¹⁸ this is reflected in the parliamentary records. The middle classes however, were still struggling to get a real foothold, and only with the Representation of the People Act 1867¹⁹ did their presence (although an upper middle class presence) start to match the predominant landed class,²⁰ the latter's influence only starting to wane by the 1850s. In the early 19th century then, the landed interest, or their representatives, were still very much the parliamentarians of the day. As we shall see, the influence of the landed gentry is very much in evidence not only in the debates of Parliament but also to some extent in the various Select Committees that were set up, a majority of witnesses being from or acting as champions for that element of society.

3. 1818 SELECT COMMITTEE

(a) The Committee

There were two Select Committees set up in the 1800s that dealt specifically with the regulation of interest or “usury”, the first in 1818 and the second in 1845. The first of these, ‘The Select Committee appointed to consider the effects of the laws which regulate or restrain the Interest of Money’²¹ mainly owed its appointment to the efforts of the Chairman of the Committee, Mr Arthur Onslow, sergeant-at-law. Arthur Onslow, MP for Guildford from 1812 to 1830, whilst interested in many areas of reform, such as the law relating to habeas corpus and tax, had been attempting to have the legal maximum on interest rates repealed for at least the past year. Neither was this the first time he had attempted to reform the rules relating to credit transactions—for example in 1816 he attempted to interest the House of Commons in reform ensuring the protection of creditors from fraudulent devices.²²

His first serious attempt at reform of the interest rate legislation was his motion to repeal the Usury Laws in May 1816. In his opinion whenever the charging

¹⁸ DL Keir *The Constitutional History of Modern Britain since 1485* (6th edn, A and C Black, London, 1960) 23.

¹⁹ 30 & 31 Vict c 102.

²⁰ Feiling *A History of England* (n 15) 898.

²¹ 1818 Select Committee Report (n 11).

²² RG Thorne *History of Parliament; House of Commons 1790–1820* (Secker and Warburg, London, 1986).

of interest had been prohibited by law it had increased ‘the evil of usury’.²³ As he saw it, the debtor was not so much obliged to pay for the use of the money, but for the risk of the creditor in incurring penalties for breaking the law in charging for the provision of credit.²⁴ The main concern was that at times when the market rate of interest was high²⁵ (as it had been for some time at this point), the Usury Laws were affecting the ability to obtain loans, especially secured loans, as the legal rate of interest was too low to make it viable for lenders. People therefore turned to annuities on lives (outside the ambit of the regulation) as a means of evasion, but with very expensive consequences for the borrower.²⁶ In 1817 Onslow introduced a measure in the House of Commons and was given leave to bring in his proposed Bill for repealing the law that regulated the rate of interest.²⁷ When the Bill²⁸ was debated in June of that year, an extension of time was suggested as some Members felt they could not give to the subject the degree of attention it deserved. The following April, feeling the pressure, Onslow (although he felt now was the right time for his Bill to be debated and passed) said he would bow to the opinions and doubts of others and agreed to the compromise of appointing a Select Committee to investigate the matter further.²⁹

One striking aspect of the Committee was that the majority of the witnesses that gave evidence were from the commercial world, for example bankers, such as Nehemiah Rothschild brought over from Holland, solicitors and high flying

²³ Parl Debs (series 1) vol XXXIV cols 723–732 (22 May 1816).

²⁴ It is interesting here that he effectively makes a distinction between interest and usury ie the usury was not the charging of interest itself but unscrupulous charges (which may encompass extortionate interest but might include other charges as well). This view makes a very interesting comparison with an article written by D Masciandaro ‘In Offense of Usury Laws: Microfoundations of Illegal Credit Contracts’ (2001) 12 Eur J of Law and Economics 193 in which he hypothesises that high interest rates alone cannot constitute usury; the usurer’s interest is not so much in the interest charged but the collateral of the borrower and it is the ability to use property for illegal credit collateral that ensures the continued existence of usury.

²⁵ Higher rates of interest were still allowed for loans where a ship or the cargo was the security (bottmry and respondentia bonds respectively) and during the war period the Government itself ‘had been offering more than the legal rate’ JH Clapham *An Economic History of Modern Britain, The Early Railway Age* Vol 1 (2nd edn, Cambridge University Press, Cambridge, 1967) 347–348.

²⁶ For an explanation of this practice, see text to n 44–46.

²⁷ Parl Debs (series 1) vol XXXVI cols 100–103 (1 May 1817).

²⁸ Bill for repealing Laws which prohibit Taking of Interest for money or Limit Rate HC (1817) 245.

²⁹ Parl Debs (series 1) vol XXXVIII cols 236–238 (21 April 1818).

merchants. The emphasis of the questions put to the witnesses was on the inconvenience of the usury laws to secured lending on land and in general to the commercial world. Looking at the calibre of the witnesses this is perhaps hardly surprising. Indeed this did not escape the notice of some MPs who were against the proposition as a whole. Mr Alderman Heygate in a debate on the Usury Laws Repeal Bill in 1824³⁰ questioned the authority of the witnesses examined by the Committee, being as they were, primarily great lawyers or capitalists. As he put it ‘the question was, not how the measure would affect the great monied men, but the small dealer who wanted accommodation.’³¹

Some of the witnesses were or became quite eminent and two in particular stand out. The first witness to be called was David Ricardo. David Ricardo was not just a stockbroker, but also an immensely wealthy one, having amassed his fortune from timely investment in the East India Company and his own broking business. He became one of the most influential economic theorists of his time ‘developing Adam Smith’s ideas into a coherent set of ideas about value, wages, rent, etc.’³² He was a member of Parliament from 1819 to 1823, securing Lord Portarlington’s borough at the instigation of Henry Brougham, who himself during his parliamentary life became a noted reformer.³³ As pro reform, Ricardo was a powerful witness indeed for Mr Onslow’s proposal. Another heavyweight drafted in as one of the individuals to give evidence to the Committee was Sir Samuel Romilly, a noted campaigner for legal and social reform. Romilly’s legal reform, as Ricardo’s economic philosophy, was stimulated (though not dominated) by Jeremy Bentham’s ideas;³⁴ his social reforms springing from more philanthropic tendencies.³⁵ Both these witnesses,

³⁰ Parl Debs (series 2) vol X cols 556–569 (23 February 1824).

³¹ Again in a later debate the same year the authority of the witnesses and the recommendations made as a result of their evidence were questioned—Parl Debs (series 2) vol XI cols 288–289 (8 April 1824).

³² Cornish *Law and Society in England* (n 13) 645. See also Thorne *History of Parliament House of Commons* (n 22) 11–13.

³³ His taking up of the seat prompted the following wry comment from George Tierney, a prominent Whig, who said ‘This will add one to our numbers, and if he speaks as profoundly as he writes, [he will] very considerably bewilder the understanding of many country gentlemen’ Thorne *History of Parliament; House of Commons* (n 22).

³⁴ For an analysis of how Bentham’s ideas influenced economists of the time see Cornish *Law and Society in England* (n 13) 63–68.

³⁵ *The Dictionary of National Biography* Vol XLII (Smith Elder & Co, London, 1885–1900) 188 contains a condensed description of Sir Samuel Romilly’s life and times.

although perhaps with differing agendas, were united in their belief that the Usury Laws should be repealed.

As all the witnesses were from the mercantile world or were concerned for the welfare of landowners, it would be tempting to conclude that the witnesses and the parliamentarians involved in the issue were not excited at all by the plight of the small time, individual borrower. This may to a certain extent be true, bearing in mind the unrepresentative nature of Parliament of the time. Yet there is evidence of an underlying element of uneasiness about how credit affected borrowers as private individuals. As one witness says,

In a commercial country like ours, with a large capital, usury laws must, I apprehend, always be injurious to the true interests of the community³⁶

Another states his worry for feckless young men from higher society families caught up in debt:

All experience has proved that usury is committed by men of the most rapacious character; men who have no feeling for the distress of others; and the law seems, by its policy, to have endeavoured to guard men against their own folly in borrowing money³⁷

Yet another feels

the consequence is that the needy and distressed borrower is compelled by various devices, to evade the laws against usury, to pay a more exorbitant commission, and other expenses, in order to obtain a loan of money, which, although he could not probably obtain at the limited interest of 5 percent, he could obtain at a small advance upon that interest, if the laws of usury did not prevent such transaction from being legal³⁸

Particular phrases in these opinions stand out; 'true interest of the community', 'feckless young men from higher society families caught up in debt'

³⁶ 1818 Select Committee Report (n 11) 11–14.

³⁷ Ibid 34 per Richard Preston.

³⁸ Ibid 54–57 per Joseph Kaye. Samuel Gurney thought free interest rates would induce the 'extravagant and inconsiderate to get more largely in debt' Ibid 25.

'guard men against their own folly in borrowing money' 'needy and distressed borrower'. All these phrases are interesting in that they not only raise issues relating to the financial consequences of credit, but other consequences, such as debt and unwise commitment to debt, issues that related to all borrowers not just those that were the main emphasis of the Committee. However it cannot be denied that these witnesses were in the minority, being only three of more than 20, the majority only having more financial issues in mind.

Certainly it could be argued that the evidence presented to the Committee was not balanced.³⁹ Onslow, with the exception of only one witness forcibly against repeal, (Richard Preston, the only other MP besides Sir Romilly) and one verging on indifference (Samuel Gurney), seems to have surrounded himself with friends to the cause. Furthermore, to all appearances, we have here a Select Committee and a collection of witnesses that are only concerned about how the present laws and proposed reforms affected their interests and those of their peers, whether landed or commercial. There is very little mention of any other class of borrower, such as the ordinary man on the street and how any reform might affect him. To this extent then it could be said the Committee was biased. There is no real evidence however that this was intentional, and it is important to bear in mind that the Usury Laws only really affected the borrowers who came from the landowning and mercantile elements of society. Borrowers from the lower classes tended to be those that took advantage of tradesman's credit or resorted to the pawnbroker, neither of which forms of credit were regulated by the Usury Laws.⁴⁰ As the Crowther Committee concluded much later in 1971 'the moneylender was more often the last resort of the impecunious among the middle and upper classes rather than the really poor, who went to the pawnbroker.'⁴¹

³⁹ The Select Committee has in fact been described as a 'propaganda exercise' by philosophical radicals to 'convert public opinion' PS Atiyah *The Rise and Fall of Freedom of Contract* (Clarendon Press, Oxford, 1979) 550.

⁴⁰ Tradesmen's credit was not affected by the Usury Laws as interest was not charged as such—J J McManus 'Law and Power: A Study of the Social and Economic Development of the Law relating to Consumer Credit' (Ph D, Dundee, 1985) 56 and the pawnbrokers were regulated by the Pawnbrokers Acts 1796 (36 Geo 3 c 87) and 1800 (39 & 40 Geo 3 c 99).

⁴¹ Committee on Consumer Credit 'Consumer Credit: Report of the Committee' (Cmnd 4596, 1971) [2.1.19].

The 1818 Select Committee came to three conclusions, which it outlined in its Report making it clear they considered reform was necessary. First, they addressed the ineffectiveness of the law as it stood:

Laws regulating or restraining the rate of interest have been extensively evaded and have failed of the effect of imposing a maximum on such rate; and that of late years, from the constant excess of the market rate of interest above the rate limited by law, they have added to the expense incurred by borrowers on real security and borrowers have to resort to the mode of granting annuities on lives, a mode which has been made a cover for obtaining higher interest than the rate limited by law, and has further subjected the borrowers to enormous charges, or forced them to make very disadvantageous sales of their estates ⁴²

Evasion, especially by means of annuities, was frequently cited as one of the main reasons for promoting the repeal and it raised its head in nearly every debate on the subject. As Sergeant Onslow stated, borrowers were often forced to borrow by granting annuities at exorbitant rates, a common practice being to grant annuities for 99 years determinable on 3 lives at an effective rate of 15% or 4 lives at an effective rate of 14%.⁴³ It was an ‘injurious practice’.⁴⁴ The system essentially consisted of a sum of money being paid by one individual (X) ‘the buyer’ to another individual (Y) ‘the seller’ who, in return, contracted to pay a certain annual sum to X for the length of Y’s life (or the life of another, for example the spouse of Y). The yearly sum would be agreed on the basis of so many years’ purchase.⁴⁵ Security might also be taken as insurance against payment. It is easy to see how the landed and higher-class families would be the main customers for this device.⁴⁶

Annuities however were not the only evasion. Fraudulent or pretended sale of goods was another means of lending and obtaining credit at rates higher than the maximum allowed:

⁴² Report from the Select Committee on the Usury Laws 1818 (n 11) 1.

⁴³ Parl Debs (series 1) vol XXXVI cols 100–103 (1 May 1817).

⁴⁴ Parl Debs (series 2) vol V col 175 (17 April 1821).

⁴⁵ S Campbell ‘Usury and Annuities of the Eighteenth Century’ (1928) 44 LQR 473, 473–491.

⁴⁶ Ibid.

Had the law which fixed the maximum rate of discount at five percent been maintained in operation, it would have produced inconveniences of two kinds. In some cases, parties requiring the command of money would have been unable to obtain it, and would consequently have been subjected to many very serious evils, such as forced sales of their goods at ruinous prices, injury to their credit and in many cases actual suspension of their payments; in other cases parties would probably have obtained the money by resorting to circuitous contrivances for the purposes of evading the law, which would necessarily have entailed upon them great additional trouble, discredit and expense⁴⁷

The second conclusion the Committee came to related to the general state of the commercial market. It was the opinion of the Committee

That the construction of such laws, as applicable to the transactions of Commerce as at present carried on, have been attended with much uncertainty as to the legality of many transactions of frequent occurrence, and consequently been productive of much embarrassment and litigation⁴⁸

The uncertainty here referred to, for example, the experiences of commercial men, on the Stock Exchange. There were evasion practices, such as continuation,⁴⁹ which when challenged in the courts were adjusted accordingly, but the status of such transactions remained dubious. Although from a different quarter, this was not the only concern relating to uncertainty. Those that opposed the reform were also mindful of the problems that uncertainty could bring. To them however it was fluctuation in the money and property markets that they thought would ensue from repeal that caused them concern.⁵⁰ One MP, Sir Robert Heron thought it would introduce uncertainty into mortgages—nobody would be disposed to lend until they

⁴⁷ House of Lords Select Committee 'Report from the Select Committee of the House of Lords appointed to inquire into the effect of the alterations made in the laws regulating the interest on money' HL (1845) 611 [57].

⁴⁸ 1818 Select Committee Report (n 11) 1.

⁴⁹ This was basically a procedure whereby one could buy stock but delay payment, by meeting the difference between the price at the date of sale and that prevailing at the agreed date of payment, as explained in David Ricardo's evidence to the 1818 Select Committee (n 11) 5–8.

⁵⁰ Parl Debs (series 1) vol XXXVI col 104–105 (1 May 1817).

had the highest rate of interest.⁵¹ Sir J Wrottesley, a few years later, felt repeal would result in uncertainty in the money markets, thus disadvantaging 'monied men.'⁵²

The third and final resolution of the Committee was a more practical one:

That the present period, when the market rate of interest is below the legal rate, affords an opportunity peculiarly proper for the repeal of the said laws.⁵³

This opinion was echoed a number of times in debate. As Sergeant Onslow pointed out (when discussing the Committee's Report in 1821) whenever the market rate of interest was below the legal rate, this was the proper time to enter into consideration of the subject when there was little risk of injury to the markets or public credit and therefore the economy.

The Committee's Report was made and presented to Parliament in May of 1818. It was clear that the Committee itself did not, to any significant degree, address the plight of the borrower with fewer or less valuable assets. Nevertheless, the evidence of concerns for landowners as private borrowers is clear. Can the other issues raised by the witnesses be seen as an indication of concern with regard to credit as consumer credit? The definition of consumer credit being used for the purposes of this study includes not only loans of money to private individuals for private purposes, but also business credit obtained by unincorporated individuals (i.e. small business), thus encompassing mercantile or trade borrowers who were also discussed during the Committee's proceedings. Furthermore, although matters of finance were the major concern for many witnesses, this could have included personal finance (for example through investment on the Stock Exchange) as well as business finance. The Committee proceedings, therefore, whilst dealing with only a small element of consumer credit can still show us attitudes to that credit, whether the argument was for the repeal or for the retention of the Usury Laws.

⁵¹ Parl Debs (series 2) vol V col 177 (12 April 1821).

⁵² Parl Debs (series 2) vol X col 159 (16 February 1824).

⁵³ 1818 Select Committee Report (n 11) 1.

It is clear from the witnesses' evidence that many concerns centred on the expensive nature of credit under the prevailing law through the devices used to evade such laws, together with the effect on borrowers with secured loans when 'money became scarce.'⁵⁴ The general thrust of opinion, apart from the one dissenting voice of Richard Preston, was a desire for credit to be unfettered. The view was that not only should the borrower have access to the credit that he desired, at a reasonable price, but he would also be more effectively shielded from unscrupulous and expensive practices by the openness of the market, rather than by statutory regulation.⁵⁵ Furthermore there was a recognition that some borrowers, due to their circumstances, were likely to pay more for their credit than others. As Joseph Kaye states

it must be extremely inconvenient to all persons having large pecuniary transactions, that a maximum should be put upon the interest or value of money, as it is the general means of procuring all the necessaries and luxuries of life; and it can never be expected that men in good circumstances and men in distressed circumstances, should be able to obtain loans of money upon the same terms; the consequence is that the needy and distressed borrower is compelled by various devices, to evade the laws against usury, to pay a more exorbitant commission, and other expenses, in order to obtain a loan of money, which, although he could not probably obtain at the limited interest of 5 percent, he could obtain at a small advance upon that interest, if the laws of usury did not prevent such transaction from being legal.⁵⁶

The proceedings and the conclusions of the Select Committee then give some sense of attitudes to credit, although not necessarily a truly parliamentary one. Most of the witnesses were not MPs but here was a forum where the issues were brought to the attention of Parliament. Credit was debilitating when expensive, inconvenient

⁵⁴ Meaning coinage. There was simply not enough coinage in circulation at the beginning of the 19th century, due to the preceding years' wars and silver rather than gold being the standard (silver attracted more value by being melted down and exported rather than used as coin) Mary Poovey (ed) *The Financial System in Nineteenth Century Britain* (Oxford University Press, New York, Oxford, 2003) 8. With an enforced low interest rate, when the pressure was felt by the lender, he would turn to the borrower with the secured loan demanding full payment, forcing the borrower to sell his land at a lower price than it was worth to pay off the outstanding sum.

⁵⁵ Of course the arguments for the retention of the Usury Laws were also based on notions of protecting the landed interest from a perceived result of repeal, for example that an uncapped rate would cause the value of land to fluctuate wildly.

⁵⁶ 1818 Select Committee Report (n 11) 54.

when regulated in an impractical way. Already there is the contrast between private borrower driven to expensive evasion practices and the commercial borrower driven to costly inconvenience. Whilst inconvenience was perhaps the Committee's primary motivation for reform at this stage, there was already an undercurrent of unease as to how expensive credit could affect the private individual.

(b) Parliament's reaction

The Committee's position has been considered in some detail, but was this a reflection of Parliament's attitude to consumer credit? The answer to this question can be found in the debates that surrounded and followed the Committee's Report. There were various strands to the overall debate about the Usury Laws. One underlying current to the arguments for repeal was the approach that money and credit should be treated as any other commodity. Here the new economists were doing battle with the conservative element of the commercial world and society in general who believed that amongst other dangers they would face, the repeal of the Usury Laws would allow speculators to dominate the markets and all businessmen would be tempted into becoming lenders of money rather than continuing any other trade. As an example, one MP in debate says 'Are we or are we not, to give up the money market to adventurers and speculators?'⁵⁷ an opinion also apparent in evidence given to the Committee:

to open a rate of interest of money, would be, in all probability, to throw the largest part of the trade and commerce of the country into the hands of speculators, instead of keeping it in the hands of those who have fair and proper capitals.⁵⁸

⁵⁷ Parl Debs (series 2) vol XI col 283 (8 April 1824) per Mr Davenport.

⁵⁸ 1818 Select Committee Report (n 11) 40.

The more radical elements, however, demonstrated the increasingly influential economic philosophy of laissez-faire, the principles of utilitarianism originating from Jeremy Bentham⁵⁹ and the belief in the inviolability of freedom of contract. To them, the Usury Laws were the antithesis of these ideas:

[If] taking of interest is viewed in its proper light, it consists in a bargain between the lender and the borrower, which is exactly of the same nature as all other bargains... It was impossible to conceive how any legislative interference could be more detrimental to the industry and wealth of the country than that which directly checked the natural course of capital⁶⁰

a man with money had as good a right to dispose of it in the most profitable manner as if any other commodity⁶¹

He [Mr Philips] could not see why money should not be an article as free in the market as land or goods⁶²

There was also the argument, already aired in the 1818 Select Committee that the Usury Laws harmed landowners, whilst those who opposed the removal of the restrictions claimed that a repeal of the Usury Laws would actually cause more damage to such borrowers than the law as it stood. Worries about the value of property and how it would be affected ran deep; concern for the “landed interest”, as during the hearings of the Committee, featured very heavily in any debate on the proposed repeal. As mentioned elsewhere the greatest disquiet centred around whether fluctuations of the rate of interest possibly caused by the repeal, would induce lenders on mortgage securities to ‘frequently and suddenly to call in their principal and expose the borrower to danger of foreclosure or expense of repeated conveyances’⁶³ whilst others felt the capped interest rates fettered the real securities market and left landowners having to go elsewhere for credit, ultimately at a much greater cost.

⁵⁹ Jeremy Bentham wrote on the Usury Laws in 1818. The Treatise ‘In Defense of Usury’ can be found in *The Works of Jeremy Bentham* Vol 3 (William Tait, Edinburgh, 1843).

⁶⁰ Parl Debs (series 1) vol XXXVI cols 1267–1268 (30 June 1817) per Sir H Parnell.

⁶¹ Parl Debs (series 2) vol X cols 560–561 (23 February 1824) per Mr Wynn.

⁶² Parl Debs (series 2) vol V cols 177–178 (12 April 1821).

⁶³ Parl Debs (series 1) vol XXXVI col 100 (1 May 1817).

Another major criticism of the Usury Laws was that the sanctions were so harsh they were rarely resorted to. According to a Mr Attwood in a debate in the April of 1824 the Usury Laws were 'inoperative and not resorted to.'⁶⁴ The penalties for breach of the law were three times the whole of the debt (even if only a small part of the debt was judged to be usurious) and

Juries cannot be found who will make themselves the instruments of putting into force such monstrous and atrocious injustice ... [they]...will not commit the...iniquity of stripping men of their futures, of plunging them into beggary, without a cause; nor lend themselves to be the instruments of robbers, profligate open and undisguised under the name of the law.⁶⁵

This harsh approach of the statute law is indeed indicative of all the debt law of the time, especially imprisonment for debt, a subject that will be revisited when investigating and discussing other areas of regulation relevant to consumer credit.⁶⁶ Perhaps the argument against the Usury Laws can be best left in the hands of the Dublin Chamber of Commerce of 1824 which considered that the Usury Laws

encourage recourse to evasive expedients, ruinous in numberless instances to both parties; to the lender in the risks his cupidity tempts him to incur and to the borrower, forced into circumstances which render him in a yet greater degree the victim of extortion...the usury laws, mischievous in their evasion are also mischievous in their observance...⁶⁷

It is obvious then that in Parliament there was real interest in improving or at least protecting the position of those who borrowed money, albeit in the relatively small spheres of mercantilism and real estate. But was there any concern for the ordinary man on the street in his position as borrower? The Solicitor General in a debate in 1825 felt that borrowers could be divided into three classes—mercantile borrowers, landed borrowers and general borrowers. In his opinion, and he was not alone, the repeal would benefit the merchants but not the landowners. With reference to the general borrower, such a person usually stood in need of just small sums when

⁶⁴ Parl Debs (series 2) vol XI col 311 (8 April 1824), Mr Attwood strongly believed in parliamentary reform and was an influential economic theorist

⁶⁵ Ibid.

⁶⁶ Ie those relating to default. See ch 5 of this study.

⁶⁷ Parl Debs (series 2) vol XI cols 36–38 (31 March 1824).

necessities were pressing, might be without sufficient security and therefore must submit to terms imposed, however oppressive. For these reasons he viewed the repeal as undesirable.

Concerns for all borrowers were voiced generally in the debates, a surprising amount bearing in mind the general status of the Members that were speaking. Even though the enthusiasm was predominantly for the protection of landowners there was still an indication of a real concern for borrowers, and not just those from that particular class.⁶⁸ Interestingly, the plight of the lower class of borrower tended to emanate from those that argued against repeal. This may have been because the more conservative elements of Parliament still saw interest charging as somehow immoral, and therefore of the greatest evil to those who needed protecting the most i.e. the lower classes. Emotive language was often employed to put forward these views, with references to the ‘extortion and cruelty of the usurer’,⁶⁹ ‘usurers had in all times been cruel and it was the nature of avarice to be callous and merciless’,⁷⁰ and that the repeal of the laws ‘would break asunder the bonds of social intercourse.’⁷¹ There was also, however, a more measured element to the opposition of repeal on behalf of all and/or other classes of borrower, with the anxiety that repeal would promote extravagance,⁷² and that necessity or inducement might drive borrowers to bad bargains.⁷³ These are clear statements of concern for the vulnerability of the “customer” of credit, an issue that not only gains momentum within the discussions surrounding the Usury Laws, but as will be shown by the examination of the development of consumer credit legislation, eventually becomes an extremely important element to policy in relation to modern regulation reform.

⁶⁸ Parl Debs (series 2) vol IX col 1014 (17 June 1823).

⁶⁹ Parl Debs (series 2) vol X cols 551–555 (23 February 1824).

⁷⁰ Ibid.

⁷¹ Parl Debs (series 2) vol XI col 284 (8 April 1824).

⁷² One MP, Mr Calcraft probably makes the most significant statement in that he says ‘By repealing those laws, they would facilitate the borrowing of money by extravagant persons, without conferring any advantage on the steady and industrious part of the community’ Parl Debs (series 2) vol X cols 162–163 (16 February 1824).

⁷³ Parl Debs (series 2) vol XII (17 February 1825); Parl Debs (series 3) vol XLVIII cols 725–726 (31 May 1839).

(c) Government Policy

Before drawing any final conclusions as to parliamentary attitudes to consumer credit, there is one other issue which should be considered and that is Government policy. Up until 1830 the Tories enjoyed a dominant influence in Parliament and Government policy on reform of the regulation of interest rates was slow to materialise. When it did, it appeared to be to do nothing or rather to do nothing that would “rock the boat”. There was concern about the effect on ‘public credit’⁷⁴ and the general state of the economy at the beginning of the century, the country still recovering from the costs of the Napoleonic Wars. In the debate on the Usury Laws Repeal Bill in 1817 the Chancellor of the Exchequer stated that he agreed with general principle of the measure, but was not sure if the ‘public mind was prepared’—even though he acknowledged now was the time to press forward.⁷⁵ This position continued until 1824 when the Chancellor felt that the ‘present period was as good as could be selected’⁷⁶ to repeal the laws, although this was not enough to get the Bill passed. At this point policy started to demonstrate a positive attitude to repeal, perhaps illustrating the growing influence of political economy and the principles of laissez- faire.⁷⁷ As was stated by the Dublin Chamber of Commerce:

the laws in question are directly at variance with the enlightened policy which the wisdom of the House has so distinctly recognised and so beneficially applied, as the rule of legislation; the policy founded upon the principle that to liberate private interests from legislative interference and to leave them as far as practicable to the discriminative management of the individual, is the most effectual means of providing not only for their advancement, but their security...⁷⁸

⁷⁴ Parl Debs (series 1) vol XXXIV cols 732–733 (22 May 1816).

⁷⁵ Parl Debs (series 1) vol XXXVI col 104 (1 May 1817). Such a policy may have been the result of Government nervousness to change because the country was still recovering from many years of wars in Europe and abroad.

⁷⁶ Parl Debs (series 2) vol X col 161 (16 February 1824).

⁷⁷ Political economy, espoused by Adam Smith and other like-minded economists such as Jeremy Bentham, certainly enjoyed influence in Parliament and policy development at this time. P S Atiyah *The Rise and Fall of Freedom of Contract* (n 39) 506–508.

⁷⁸ Parl Debs (series 2) vol XI cols 36–38 (31 March 1824). One MP even referred to the freedom of trade as the ‘favourite idol of the House’ Parl Debs (series 2) vol XI col 283 (8 April 1824).

From the time of the Report of the 1818 Select Committee, Sergeant Onslow tried on many occasions to get his Bill passed. However, despite attempts to introduce numerous Bills, such efforts were often defeated by seemingly obstructive behaviour and technical difficulties. As one MP John Smith notes in February 1825, the Usury Laws Repeal Bill before the House at that time had been lost because they 'had deferred the measure to meet the convenience of gentlemen who had opposed it'.⁷⁹ The first inroad into the Usury Laws was not made until the 1833 Act giving the Bank of England certain privileges,⁸⁰ passed during a Whig administration, when certain bills of exchange and promissory notes were not to be subject to the Usury Laws if they had less than three months to run (that is those bills negotiated /discounted by the Bank of England). Excuses given for the delay in bringing in the measure had ranged from consternation as to whether the 'public mind' would be ready for such a measure,⁸¹ to worries that it would harm or indeed ruin landowners. By the time the Bill was passed Sergeant Onslow was no longer a member of the House of Commons. He perhaps would have been pleased to see with what little interference this particular clause of the Bank Charter Bill was accepted. On the relevant day, Lord Althorp was able to quash what dissent there was, with a short statement to the effect that he was surprised he even had to discuss the Usury Laws at this stage. The measure would be good for all by giving security to the Bank.⁸²

What then can be said about parliamentary attitudes to credit up to this point? It is clear that at the time of the 1818 Select Committee, interests of the influential, namely the landowners and most powerful commercial men, were the predominant consideration. There is however some reference to the dangers of borrowers over committing themselves, as a new emphasis began to emerge in relation to the Usury Laws and their effect on credit and the borrower. There is also evidence that vulnerability of borrowers, whether landed or otherwise was engaging the interest of Parliament. In many cases this concern was used as an argument against the repeal being pressed for by those who believed in the economic philosophies of the time. It was economics that eventually galvanised the Government into pressing for change.

⁷⁹ Parl Debs (series 2) vol XII col 151 (8 Feb 1825).

⁸⁰ 3 & 4 Will c 98.

⁸¹ The Chancellor of the Exchequer, as quoted by Serjeant Onslow Parl Debs (series 2) vol V col 175 (17 April 1821).

⁸² Parl Debs (series 3) vol XX cols 482–485 (10 Aug 1833).

It is clear that, although there were conservative elements to many of the parliamentary debates, the overwhelming feeling was that credit was a necessity and desirable and whilst controls were needed they would be most effective coming from the market itself. The emphasis of concern was predominantly commercial. More significantly, the Government did not show any wish to become actively involved in a debate on the Usury Laws until the Bank of England and the country's finances and prosperity as a whole became an issue, by which time it was keen to take an active and positive part in the running of the economy.⁸³

4. BILLS OF EXCHANGE

Bills of exchange were a very popular form of financial instrument through which merchants could avail themselves of credit—praised by one commentator as ‘the highest form of banking security’.⁸⁴ They were used initially to finance foreign trade, but became popular as a form of obtaining mercantile credit at home and were employed not only by the merchants with larger concerns, but by smaller traders and even individuals for private purposes.⁸⁵ These bills were assignable and negotiable, (unlike the promissory note which, whilst negotiable, was not easily assignable) and were rapidly becoming the favoured medium of exchange in England in the early 1800s.⁸⁶ By the 1830s and 1840s, book debts and deferral of payment as a means of credit within a group of producers and merchants, (termed by MJ Daunton as ‘internal or open’ credit⁸⁷) were rejected in favour of this ‘external credit’ which utilised funds from outside the relative safety of a nucleus of producers and traders all known to each other.⁸⁸

⁸³ P Deane *The First Industrial Revolution* (Cambridge University Press, Cambridge, 1965) 211–214.

⁸⁴ G Rae ‘Bills of Exchange’ in Mary Poovey (ed) *The Financial System in Nineteenth Century Britain* (n 54).

⁸⁵ For a description of the development of the law surrounding bills of exchange in England see WS Holdsworth *Introduction to English Law* Vol 8 (2nd edn Methuen, London, 1903–1972) 169.

⁸⁶ R Floud and D McClosky (eds) *The Economic History of Britain since 1700* (2nd edn, Cambridge University Press, Cambridge, 1994) provides a detailed description and diagrams of the mechanism of the bills of exchange used at this time.

⁸⁷ MJ Daunton *Progress and Poverty; An Economic and Social History of Britain 1700–1850* (Oxford University Press, Oxford, 1995) 247. My profile of the system of bills of exchange outlined here is very much based on Daunton's own explanation.

⁸⁸ MJ Daunton *Progress and Poverty* (n 87) 248.

How did the system work? A merchant/manufacturer, for example, who was selling goods, would, as a means of demanding payment, send a bill of exchange to the purchaser. The merchant would be “the drawer” of the bill, the purchaser “the drawee”. Payment would usually be required within three, six or twelve months. The purchaser signed and accepted the bill, thus becoming “the acceptor” and returned it to the merchant who could either retain it until the payment fell due or could, in turn, use it to pay one of his creditors. This further individual (“the payee”) could then use the bill for payment of money he might owe, thereby transferring the bill to someone else. It was, in essence, a transferable “IOU”. It had another advantage, namely that it allowed a purchaser of goods to resell them before he had even paid. For the merchant with a quick turnover, the bill of exchange was an extremely useful tool. It could also be the means by which the holder (or “payee”) could obtain ready cash. The holder of a bill had the option of “discounting” the bill by taking it to a bank. The bank would give cash at something less than the face value of the bill, (the balance effectively being the charge) therefore, at least in theory, receiving a nice return when the bill was paid up and in the meantime giving credit facility to the payee.⁸⁹

Comments on the effect of the Usury Laws on bills of exchange had made an appearance in 1818. In the witness evidence given by Sir Samuel Romilly, he (in response to a specific question) explained that the Usury Laws were used as a means of avoiding payment on a bill by those who were liable. If it could be proved that the original consideration for the bill was usurious, then it was void in the hands of the indorsee, even though he himself had paid full consideration for it and had no notice of the usurious nature of the original transaction. This problem was in fact addressed in a Bill brought into Parliament by Sir Romilly the same year, a Bill which subsequently became law.⁹⁰

Bills of exchange and the Usury Laws however did not become a hot topic of conversation until the 1830s when the Bank of England’s charter was introduced. In 1833 the Bank was given statutory authority, amongst other privileges, to discount

⁸⁹ MJ Daunton *Progress and Poverty* (n 87).

⁹⁰ Act to afford Relief to the bona fide holders of negotiable Securities without notice that they were given for usurious consideration 1818 (58 Geo 3 c 93).

bills of exchange and was given exemption from the Usury Laws if the bills had less than 3 months to run.⁹¹ Lord Althorp, the Chancellor of the Exchequer in the Whig Government, outlined the reason for the change in the law when the House of Lords resolved itself into a Committee for the Bank Charter Bill to be read:

Alteration will be advantageous to bankers and commercial world in general. The effect of bills which cannot be discounted excepting at a certain rate of interest does frequently prejudicially interfere with the commercial interest of the country.⁹²

One gets the impression that the Government hoped to slip this measure through without having to resort to any real debate on the Usury Laws. Lord Althorp openly admitted he knew of the strong objection to a complete repeal of the law—but hoped there would be no objection to bills of such a short date being exempt from the Usury Laws. Certainly if that was the aim, it seemed to work as there was little further discussion of the Usury Laws in the debate. Indeed when the Bank Charter was discussed again in the Commons a couple of months later, Lord Althorp dismissed any criticism of the measure saying he was ‘surprised he had to discuss the Usury Laws at this stage.’⁹³ The same arguments from previous discussions were rehearsed but this time the clause was passed, the majority of speakers supporting the relaxation in the law, again an illustration perhaps of the growing dominance of laissez-faire as the basis of economic policy.⁹⁴ Coupled with this there now also seemed to be a shift in general attitude towards the charging of credit—London was now the credit capital of the world and foreign trade was flourishing. It was being realised that the benefits that would be enjoyed by the economy in relaxing the Usury Laws would be beneficial to the country as a whole.

From then on it was a gradual slide towards abolition and as Lord Ashburton commented in 1839 ‘the principle of abolishing the laws relating to the charging of

⁹¹ Act giving the Bank of England certain privileges 1833 (3 & 4 Will. c 98).

⁹² Parl Debs (series 3) vol XVIII cols 180–187 (24 May 1833). Lord Althorp was very keen to have the Bank’s charter renewed. ‘He believed that the renewal of the Charter was essential as a necessary protection to the public against fluctuations in the amount of paper currency’ Sir Denis Le Marchant (ed) *Memoirs of John Charles, Viscount Althorp, third Earl Spencer* (Richard Bentley & Son, London, 1876) 468.

⁹³ Parl Debs (series 3) vol XX cols 482–485.

⁹⁴ See Deane *The First Industrial Revolution* (n 83).

interest had gradually grown upon them'.⁹⁵ In 1837, an Act was passed allowing an exemption of certain bills of exchange and promissory notes for the operation of the Usury Laws if they were for less than twelve months,⁹⁶ and in 1839 this was extended by an Act allowing all bills of exchange and contracts for loans above £10 being exempt from the Usury Laws.⁹⁷ This last Act, although initially a temporary measure was continued through the means of Acts in 1840,⁹⁸ 1841,⁹⁹ 1843,¹⁰⁰ 1845¹⁰¹ and 1850¹⁰² before the final Usury Laws repeal in 1854.¹⁰³ Indeed the final abolition almost passed without comment. As is noted in the *Law Times*:

The total repeal of these laws is perhaps the most remarkable incident of the past session. After an existence of centuries, after being held in universal honour as the safeguards of the landed interest, they have now been swept away with only three dissentient voices in either House of Parliament.¹⁰⁴

As the legislation progressed there was a notable shift of emphasis in parliamentary debate. It was no longer the landed interest that attracted the concern of the members of the Houses of Parliament but the small individual private borrower, such as 'improvident young men' or 'young men in the army, and others [who] might be induced when the first note was expired, to give another note and be robbed on that to an exorbitant extent.'¹⁰⁵

This was one of those cases in which the general principle of throwing open an article to competition did not apply. There was a necessity of protecting those who were not wise enough to protect themselves; or who, if wise, were too much led away by their passions to protect themselves¹⁰⁶

⁹⁵ Parl Debs (series 3) vol XLIX cols 396–398 (16 July 1839).

⁹⁶ 7 Will 4 & 1 Vict c 80.

⁹⁷ 2 & 3 Vict c 37.

⁹⁸ 3 & 4 Vict c 83.

⁹⁹ 4 & 5 Vict. c 54.

¹⁰⁰ 6 & 7 Vict c 45.

¹⁰¹ 8 & 9 Vict c 102.

¹⁰² 13 & 14 Vict c 56.

¹⁰³ 17 & 18 Vict c 90.

¹⁰⁴ Editorial 'Repeal of the Usury Laws' *The Law Times* (London, Saturday August 19, 1854) 213.

¹⁰⁵ Parl Debs (series 3) vol XLVIII cols 725–726 (24 June 1839) per Lord Wynford.

¹⁰⁶ Parl Debs (series 3) vol XLIX cols 396–398 (16 July 1839) per Lord Ashburton.

These views were in direct contrast with the apparent views of the Government (predominantly Whig during this period) eager for financial interests to enjoy the advantages of a free market. And yet whilst Government policy now reflected a desire to be finally rid of the Usury Laws the situation of the lower class, private borrower still pricked the conscience of those in power. In June 1839, whilst giving notice for leave to bring the bill to make the 1837 Act permanent, the Chancellor of the Exchequer clearly states

he would most willingly introduce a measure for the total abolition of the Usury Laws but he was afraid that in doing so he should be risking the good which he expected from a partial abolition, and he would rather make sure of that than risk the whole.¹⁰⁷

In July, again he comments:

the repeal of the usury laws would be an advantage; but it was expedient at the same time to preserve the exception contained in the Bill for preventing imposition upon the poor.¹⁰⁸

In the event by the 1839 Act all negotiable securities over £10 were exempt, thus to a great extent relieving business men from the restriction of capped interest rates whilst attempting to retain control for private borrowers. In terms of landed interests, there was an attempt to include security on land in the exemption when it was being renewed in 1845, but to no avail. The excuse, a very handy one as has been illustrated during these years, being that time was needed to consider the measure more deeply and consult those who would be affected. As it was, landed interests were not finally free from the fetters of the Usury Laws until 1854 with the final abolition.

It seems then at this stage, that financial concerns continued to take precedence with attitudes to reform of credit legislation primarily directed in this area, whilst there also being an undercurrent of concern for the individual private

¹⁰⁷ Parl Debs (series 3) vol XLVIII col 35 (6 June 1839). At this point the Chancellor was Thomas Spring-Rice, a Whig.

¹⁰⁸ Parl Debs (series 3) vol XLVIII col 1414 (4 July 1839).

borrower and the consequences of easy credit. The difference here, compared to the position at the time of the 1818 Select Committee is Government intervention, the Government, from 1830 to 1841 being a Whig administration, but before that time being dominated by the Tories. Financial interests were the Government's interests at this time, and they therefore prevailed. Parliamentary attitude to credit, consumer or otherwise was that if freedom of credit was good for commerce and finance then it was to be applauded and legislation should facilitate the freedom. There is no doubt however that whilst of little influence at this stage, interest in the situation of all borrowers, not just those at the upper end of the market, was filtering through to the parliamentary forum.

5. THE 1845 COMMITTEE

There was in fact another Committee set up to look into the Usury Laws before their final abolition took place in 1854. This time it was a Select Committee of the House of Lords. Its remit was slightly different from that of the 1818 Committee in that it was appointed 'to inquire into the effect of the alteration made in the laws regulating the interest on money', in essence, should the accommodation allowed to the Bank of England with regard to the Usury Laws be fully extended to the general commercial public?

This time all the witnesses were bankers or brokers. Again, as with the 1818 Select Committee this gives the impression of bias. These witnesses were however from the class affected by the changes, although one could not say for sure whether they were all the experts in the field. The major concern was evidently going to be business based and the same, now generally accepted principles of laissez-faire utilised as justification for change. As George Warde Norman says in his evidence:

My decided opinion is that the usury laws are injurious generally and that the power of lending money at above five percent ought not to be confined to the Bank of England...I conceive it to be desirable for the public that all dealers in money should have the same power of asking what they think expedient for their commodity, as dealers in other articles for theirs; that borrowers

and lenders, like buyers and sellers, should adjust their bargains without any legal interference.¹⁰⁹

In spite of the very commercial nature of this particular Committee appointment, there is some attention given to individual borrowing for private means (albeit still the “higher class” of borrower). A number of witnesses mention the plight of ‘young gentlemen’ and how they acquire their credit. For example one witness Samuel Jones Loyd is asked ‘Would an expensive young gentleman find a greater facility of raising money now than he did before?’ Mr Loyd claims he is unqualified to answer but says:

I apprehend that before the alteration of the law, persons so circumstanced did find, without very great difficulty, the means of raising money but that the effect of the law was to throw them into the hands of less reputable people and also on other accounts, to subject them to very heavy expenses for the risk and trouble and discredit of the proceeding.¹¹⁰

Perhaps the most notable aspect of this Committee however is the frequent referral to bankruptcy. There is no doubt that one reason for this was that this was a topic very much at the forefront of the minds of a number of MPs at this time.¹¹¹ The really significant point here is that there is definite suspicion demonstrated as to the fact there is a connection between bankruptcy and credit itself. Opinions range from the inconvenience of a fixed rate of interest leading to more bankruptcies,¹¹² to the opinion that although high rates of interest may have brought on bankruptcy and ruin, the relaxation in the law that had already taken place had not made the situation

¹⁰⁹ Report of the Select Committee of the House of Lords (n 47) [30].

¹¹⁰ Ibid [103]. Other witnesses also addressed the issue of private individuals, rather than businessmen obtaining credit. George Carr Glynn (businessman and banker) [109]–[155], Mr Joseph Maynard (insolvency practitioner)[371]–[475] cf James Cook (a produce broker who argues against the relaxation of the laws) ‘Are not there many cases of individual who have been saved and become prosperous afterwards by aid of the relaxation of the law?...I know such an opinion is entertained by many of my friends in the City, and it is possible that persons have got facilities, instead of being compelled to sacrifice their property, and have been considerably benefited. Still I believe that under any circumstances those individuals would have obtained those facilities without the repeal of the law’ [615].

¹¹¹ This will be discussed in more detail later in ch 5 in the examination of legislation and attitudes to credit as illustrated by legislative activities in relation to bankruptcy, insolvent debtors and small debts.

¹¹² Report of the Select Committee of the House of Lords (n 47) [57].

worse.¹¹³ Evidence given and the obvious undercurrent of the questioning show a clear concern for the causes of bankruptcy and, more significantly, whether and to what extent credit, and the terms of granting credit, caused bankruptcy.

Once the issue of the Usury Laws had been settled was there any further evidence of parliamentary attitude to consumer credit? In other areas, especially regarding default, it was in abundance and this will be addressed in a following chapter. However, as a postscript, there was another aspect to bills of exchange that raised many of the old issues. In March of 1854, Lord Brougham introduced a Bill to permit registration of dishonoured bills of exchange and promissory notes,¹¹⁴ allowing execution on such bills by the creditor and preventing any dealings with the debtor's property until the matter had been resolved. Even though Parliament seemed to have accepted restriction through interest capping was not a good idea, they were still nervous of any other change and evidence of prevarication is evident, the Lord Chancellor requiring a Select Committee and 'consultation with the City for opinions'.¹¹⁵ What is interesting about this proposed measure is that so many of the underlying arguments with regard to the repeal or retention of the Usury Laws, the Laws no longer in existence, are re-rehearsed here. Contracts entered into freely should be protected by the law, 'The sound principle is that debtors and creditors should make their own terms with another'¹¹⁶ as against the argument that the idea that the law might assist in the prevention of "careless" credit.¹¹⁷ It seems that although the Usury Laws were no longer in existence, the arguments that surrounded their repeal still exercised the minds of Parliament.

¹¹³ Report of the Select Committee of the House of Lords (n 47) [109]–[155] [711].

¹¹⁴ Parl Debs (series 3) vol CXXX col 618 (13 March 1854). An explanation is contained in the witness evidence of John Gilmour in the Select Committee appointed to consider the Bill, Select Committee on Bills of Exchange and Bills of Exchange and Promissory Notes Bill HC (1854–1855) 237.

¹¹⁵ Parl Debs (series 3) vol CXXX col 620 (13 March 1854).

¹¹⁶ Parl Debs (series 3) vol CXXXV col 1086–1089 (1 August 1854) per Sir Erskine Perry (Liberal).

¹¹⁷ In the end the Select Committee considered two Bills, one presented by Brougham and another presented by Mr Keating and other members of the House of Commons. This latter Bill dealt with fraudulence on procedure, but it did not go as far as Brougham's own measures. It was adopted by the Committee, mainly on the basis of cost and it became law the same year. Select Committee on the Bills of Exchange Bill and the Bills of Exchange and Promissory Notes Bill (n 114).

6. CONCLUSION

So, in conclusion, what can the parliamentary progress of the repeal of the Usury Laws tell us about the attitudes of Parliament to consumer credit? The Usury Laws based their control on dictating the maximum amount of interest that could be charged for credit. This credit encompassed loans for private purposes and credit required by the individual for business. The Usury Laws were however increasingly unpopular, particularly in financial circles, being seen as both economically and protectively inefficient and, in addition, inconvenient. The arguments rehearsed in Select Committee and Parliament, for and against repeal, centred on the concerns of two particular species of borrower, in other words those from the landed and mercantile classes. That is not to say the individual, private, lower class of borrower was completely ignored; he did possess a degree of interest for some of the individuals involved in debate and even, if somewhat fleetingly, for Government itself. What is apparent in the earlier half of the century is that Parliament, still dominated by the landed classes, was fearful of change. A divide over opinions to credit developed and became a contest primarily between commercial and landed interests. Yet whilst only sporadic concern was shown for those lower classes who were involved in credit, there is a clear sense of how credit is perceived, whether for commercial or private concerns, even if only as it affected one or two sections of society.

The final repeal of the Usury Laws slipped in the back door, with very little fuss. As the century progressed these Laws had been gradually whittled away with the various amendments allowing for the exemption of negotiable securities; the business and financial classes must have been satisfied with the developing state of play. In contrast the landed interest were still affected by the Laws until full repeal: perhaps an indication of the fact the dominance of their interests was in the wane in the newer, more representative Parliament. In any event it seems that in the end the Government wanted to be rid of what were perceived as the remnants of an inconvenient law, the Chancellor of the Exchequer iterating that what was needed

was a decisive step rather than a halfway house with regard to capped interest rates.¹¹⁸

What then, was the approach to credit? Credit, it seems was seen as not only essential but a desirable financial tool, especially in terms of business and economic health countrywide. This is not to say it was only a business concern, as there was recognition that credit for private purposes, whether out of need or for less urgent reasons, still required consideration. Indeed, (rather remarkably bearing in mind Parliament was still top heavy class wise) concerns were already exhibited as to the temptation of credit that could not be afforded, an issue emphasised by consumer groups today. Furthermore, even though the predominant view was that over-regulation of credit could be ruinous, protection against unscrupulous creditors was seen by some as also a question that needed to be considered. Already then, albeit indirectly, over-commitment and protection against unfair practices, both issues connected with over-indebtedness, were arousing some interest. Even price differential based on the status of the borrower attracted some comment, another issue relevant to modern concerns; one method of combating over-indebtedness is seen as providing affordable credit to vulnerable consumers.¹¹⁹ Problems associated with unmanageable debt was also an issue starting to attract attention as is underlined by the connection made between credit and bankruptcy, demonstrated in the later 1845 Select Committee.

In the general debate as to whether or not the Usury Laws should remain in place, the argument that succeeded was that of freedom, reflecting the economic philosophies of laissez-faire and freedom of contract, which became the dominant thinking of the 19th century. Credit was seen as a commodity that should enjoy a free market, and whilst dangerous totally unchecked, would be contained within the confines of competition. The answer to whether this argument stood up in practice becomes clear when considering ensuing legislative protections in later years.¹²⁰ In terms of protection for those involved in credit, initially it was the needs of borrowers from the financial and landed classes that received the most attention,

¹¹⁸ Parl Debs (series 3) vol CXXXV col 1347 (4 August 1854).

¹¹⁹ Secretary of State for Trade and Industry 'Fair Clear and Competitive The Consumer Credit Market in the 21st Century' (Cm 6040, 2003) [5.46]–[5.54].

¹²⁰ For example the Moneylenders Acts, Bills of Sale Acts and protections relating to default.

reflecting the constitution of Parliament of the time. There was a change in emphasis in the second half of the period, perhaps due to the growing voice of the middle classes in the House of Commons, with a growing realisation that may be there was a connection between the terms of credit and its consequences. However it was the requirements of the borrower, but the financial borrower, that dominated, resulting in legislative protection being removed, competition and market forces being seen as an adequate check.

In conclusion then, the earlier debates and parliamentary papers concerning the Usury Laws show us attitudes to consumer credit, primarily from a financial point of view, rather than from issues of social concern, for example consequences of over-commitment. There are however glimmers already of what will become the modern attitudes to consumer credit. It was, however, primarily the interests of the financial and landed classes that generated the most discussion and ultimately action, the consequences of credit particularly for private individuals only emerging as an issue meriting discussion mid century onwards. Parliamentary debate and Committee proceedings also show the emerging struggle to find a balance between the interests of commerce and the need to protect the borrower, sometimes even from himself. This is a dilemma that, it will be shown, has relevance throughout the history of consumer credit legislation. This time round however it was finance and free trade that won the day.

CHAPTER 3

PAWNBROKING

1. INTRODUCTION

Credit regulation at the beginning of the 19th century was intrinsically based in two pieces of legislation: that controlling interest rates (“the Usury Laws”) and the law relating to pawnbroking. It has already been demonstrated, by investigating the circumstances surrounding the demise of the Usury Laws, that this was a time when the extent of legislative regulation of credit became an increasingly visible issue. In the examination of the development of arguments for and against the Usury Laws, it is clear that in the earlier 1800s the emphasis of concern lay with borrowing by landowners and commercial credit. This is not to say there was an absence of concern for the borrower who used credit for private purposes, but such interest was buried within the individual approach of those involved in the amendment process of the Usury Laws, rather than being a focus of concern in itself.

In order to find more obvious attitudes to consumer credit it is essential to consider other forms of credit open to the individual at this time. In the early 19th century the basic loan, together with trade credit (and to a lesser extent friendly societies and check clubs¹) provided the basis of unsecured lending. There were however other methods of borrowing money, through the facility of various forms of secured lending. These consisted of the bill of sale, mortgages, and, primarily for individual private purposes, pawnbroking. Pawnbroking was effectively secured lending, in that it consisted of a loan facility that required the giving of security, in the form of a pledge, whereby goods would be deposited with the pawnbroker, being returned to the owner on payment of the sum due plus interest and costs. Furthermore it provided financial accommodation primarily for relatively small amounts.

¹ Termed as “self-help credit” by the Committee on Consumer Credit ‘Consumer Credit: Report of the Committee’ (Cmnd 4596, 1971) [2.1.51]–[2.1.53].

In the terms of reference of this present study, the central aim is to unearth parliamentary and legislative attitudes to consumer credit. Pawnbroking was primarily an accommodation employed by individuals to bridge the gap between income and expense, whether in a business or private capacity. In reality it tended to facilitate “consumption” of some sort, such as everyday living expenses, recreation and the purchase of new goods.² To this extent then, it was credit for consumption, credit for the consumer and therefore credit particularly relevant to this study. Indeed, the trade, as practised by the *monts-de-piétés* in Europe,³ has been described by one commentator as the ‘ancestor of consumer credit.’⁴ Any parliamentary activity relating to this form of credit will therefore help give an insight into the parliamentary attitudes to consumer credit at this time (even though it was not referred to in these terms), and whether the legislation put in place to regulate it addressed concerns relating to consumer credit that still affect the legislature today, in particular over-indebtedness.

The investigation into parliamentary attitudes to this form of consumer credit is conducted in a number of ways. As an introduction, there is a consideration of the practice of pawnbroking and its place within society in the 1800s, exploring some of the concerns raised by this method of credit provision and how it was viewed in general. The development of the legislation is then considered by examining the proceedings of the Select Committees that led to the reforms and how the Committee’s recommendations were received in Parliament. From here conclusions are drawn about the factors that contributed to the development of pawnbroking regulation and how they equate with the underlying ethos of reform today.

² M Tebbutt *Making Ends Meet: Pawnbroking and Working Class Credit* (Leicester University Press, St Martin’s Press, New York 1983) 21–22.

³ *Monts-de-piété* were organisations set up by philanthropic organisations, funded by charity, the purpose of which was to provide assistance to the poor in place of the money-lender. In Italy *monts-de-piété* started opening up as early as the 1400s, becoming so ensconced in the community that in Florence the *monts-de-piété* later became the principal bank of the Tuscan state—R Gelpi and F Julien-Labruyere *The History of Consumer Credit: Doctrines and Practices* (Macmillan Basingstoke 2000) 43.

⁴ Gelpi *The History of Consumer Credit* (n 3) 119.

2. THE PRACTICE OF PAWNBROKING IN THE 1800s

(a) The Pawnbroking Trade

By the 1800s, pawnbroking in Britain, as in much of Europe, was well established as a means of borrowing money by the individual. It was a credit system operated predominantly in the urban areas and the standard of practice varied.⁵ It is difficult to say how many pawnbrokers existed in the early 19th century as many evaded the licensing procedures.⁶ What can be stated categorically is that it was always a private enterprise,⁷ although there had been some abortive attempts to “nationalise” the trade or replace it. In 1572 a Bill was drafted establishing state run pawnshops but this never really got off the drawing board.⁸ In the 1800s Bills introducing an Equitable Loan Company, a British Pledge Society, charitable pawn shops and mont-de-piétés all experienced a similar fate.⁹

Domination of the pawnbroking trade was by those who provided a service for the lower and working classes. Regular custom was for weekly pledges of amounts less than £10, loans over £10 attracting the regulation of the Usury Laws (whilst they were still in force). These pawnbrokers ran a trade that varied from the “low” regular trade of loans under 5s,¹⁰ the medium trade (loans between 5s and 10s) and the auction trade.¹¹ That is not to say that pawnbrokers’ shops did not also enjoy

⁵ Trade practice has been described as being anything ‘from the respectable to the extremely seedy’ WR Cornish and G De N Clark *Law and Society in England 1750–1950* (Sweet and Maxwell, London, 1989) 239.

⁶ Tebbutt *Making Ends Meet* (n 2) 2.

⁷ Crowther (n 1) [2.1.16]; Cornish *Law and Society in England* (n 5) 239.

⁸ Crowther (n 1) [2.1.16].

⁹ A more detailed discussion of these abortive attempts can be found in Tebbutt *Making Ends Meet* (n 2) 109–111.

¹⁰ In fact a diverse range of goods would be taken to the pawnbrokers as pledges but the most common items produced by the poorer classes were clothing and bedding Crowther (n 1) [2.1.16]; this practice is also described by a number of witnesses to the 1870 Select Committee on the State of the Laws affecting the Pawnbroking Trades 1st Report HC (1870) 377 eg qq 1322–1332, 1476–1482.

¹¹ These latter transactions were pledges for values exceeding 10s, which if not redeemed had to be sold by auction, hence their name—1870 Pawnbroking Committee (n 10) q 88 per Mr A Hardaker. This witness confirmed that in fact the majority of trade took place for pledges under 10s—q 129.

customers from other walks of life. The higher class of clientele required a discreet service that offered loans based on pledges consisting of more valuable items such as jewellery and plate, a service provided by the 'city pawnbroker'.¹² As one witness to the 1870 Select Committee, set up to examine pawnbroking, says when describing the character of his own pawnbroking business

I hardly like mentioning any particular party; but professional people and others (I might say Members of Parliament themselves, for I have had them) come to me to borrow money, and I am sure all those people whoever they are, of that character, who have plate and jewels to pledge would prefer to come to a silverbrokers¹³

There was not complete freedom as to what could be pawned, and rules existed as to what items could not be accepted as pledges, most obviously goods which did not belong to the pledgor, whether stolen, or merely in the pledgor's temporary possession.¹⁴ These restrictions were introduced in the hope of reducing the fraudulent pledging of stolen goods, a constant concern that plagued the respectable element of the trade. Pawnbroking was also subject to other regulation, both as regards the general terms of business and the interest rates that could be charged.¹⁵ Regardless of these restrictions it was an irrefutable fact that loans obtained by these means were expensive for the borrower,¹⁶ and yet many pawnbrokers effectively saved families from real destitution by providing ready means of raising cash.

Not all pawnbrokers could, however, be described as an asset to the community. There was a difference between the licensed pawnbroker who relied on the weekly custom of the regular pledgor and the more unscrupulous, many of whom existed, who gave small loans to the desperate at rates above the legal maximum. Small pledges were particularly sought after in the larger towns and cities. As one witness states with regard to pledges in Liverpool, 'The number of small pledges

¹² Tebbutt *Making Ends Meet* (n 2) 5.

¹³ 1870 Pawnbroking Committee (n 10) q 3249.

¹⁴ Tebbutt *Making Ends Meet* (n 2) 70–71, for example, laundry given for washing.

¹⁵ Although the interest rate was more generous than that allowed by the Usury Laws. The regulation was contained in the Pawnbrokers Act 1800 (39 & 49 Geo III c 99).

¹⁶ In reality rates could be as high as 800 % per annum.

taken in is so much greater than that of the high class of pledges, that I could hardly give the proportions'.¹⁷ There were economic difficulties in low pledging and small loans, such loans being unprofitable to offer at the legal rate—they were therefore eschewed by the more respectable face of the trade.¹⁸ One aim of the Pawnbroking Act passed in 1800 was to set up a licensing and supervisory system that would channel lending to respectable pawnbrokers. However the rates were still not sufficiently attractive to many brokers as far as the market for small pledges was concerned and the illicit sector continued to thrive. Those who were refused credit by pawnbrokers, because the goods they offered were of too poor quality, would turn to more expensive forms of credit i.e. the “wee pawn” or dolly shop.¹⁹ This was also true of those desperate for very small loans. As was commented on in the House of Commons in 1860:

It was found that to take pledges under 5s, issue a ticket gratis, and meet the expenses of warehousing the articles was not a remunerative business. The consequence was that the pledges were refused and the poor were driven to unlicensed shops where they were charged, not 200, but 800 per cent.²⁰

Another Member of the House opines that

the licensed...were not compelled to accept pledges under 5s and unless they did the poor were necessarily driven to those who were unlicensed.²¹

¹⁷ 1870 Pawnbroking Committee (n 10) q 205 per Mr A Hardaker.

¹⁸ Tebbutt *Making Ends Meet* (n 2) 13.

¹⁹ J H Treble *Urban Poverty in Britain 1830–1914* (Redwood Burn Ltd, Trowbridge and Esher, London 1979) 133.

²⁰ Parl Debs (series 3) vol CLVII col 1578 (29 March 1860) per Mr Mellor (Liberal). This MP was speaking on behalf of country pawnbrokers, in favour of the 1860 Bill, which allowed an extra halfpenny to be charged on duplicates of pledges under 5 s. Interestingly, those representing the city trade were against this fee, arguing that many pledges under 5s were for only 3d 4d or 6d and an extra halfpenny would be too much for the average pledgor. Maybe this was because the pawnbrokers in built up areas had to deal with many more low pledges. It was claimed that ‘The pledges under 5s in the pawnshops of London alone amounted to 1,650 in one month’ many of which were for only those amounts referred to above Parl Debs (series 3) vol CLVII col 1578 (29 March 1860).

²¹ Parl Debs (series 3) vol CLVII col 1579 (29 March 1860) per Mr Humberston (Liberal-Conservative).

Pawnbroking enjoyed a prime place in working class credit provision from the 18th century right through to the latter stages of the 19th century. However it was only the rapid development of hire and instalment credit in these later years that signalled the end of pawnbroking's heyday. Competition in the credit market became fierce and with these new forms of consumer credit customers no longer had an essential need for ready cash for purchases. As far as the better class of clientele were concerned, a new way of raising money had also opened up with the banks taking business in the form of the overdraft. Personal jewellery was taken as security and the overdraft was cheaper and seen as more respectable way of raising money. With the establishment of branch banks, the local pawnbroker lost his position as the community banker, and effectively his unique position in society as a whole.²²

(b) The Pawnbroker's Image

The idea of the pawnbroker was far more disliked by the high-minded middle classes than by the working classes, the latter being far more predominant in their use of the facility. It was the idea of regular pledging that was found to be distasteful by the objectors, rather than use of the facility as a means of commercial borrowing or the occasional use of the pawnbroker when matters of personal finance became desperate. To some, the idea of the pawnshop was irreconcilable with ideas of respectability or thrift and self-help, the latter being seen as solutions to the problems of poverty. Pawnshops provided a scapegoat for what were seen as the evils of industrialisation and working class demoralisation, for example behaviour such as drunkenness. Pledging and drinking were regarded as inextricably linked, and pledging was blamed for the 'religious laxity of a minority and fundamental cause of working class impiety'²³—the weekly pledge cycle was an abyss of debt into which the poor were sucked. The practice was described as having

a most injurious effect; it has increased intemperance to a very great degree; it has increased crime, as I have stated in detail, to a large extent²⁴

²² Tebbutt *Making Ends Meet* (n 2) 134–136 and ch 5 which deals generally with the decline of pawnbroking.

²³ *Ibid* 23, 107, 113.

²⁴ 1870 Pawnbroking Committee (n 10) q 1856 per M W Hector. Another witness also has strong opinions on this, agreeing with the notion put forward that pawnbroking induced

Savings, as self-help, were the key according to this strain of thought. In times of stress, the worker should be living on his savings, put aside whilst times were good, rather than relying on an anticipation of future income.²⁵ And yet, in some respects, pawnbroking provided the working classes with the very facility they needed for self help.

The 1840s did witness some attacks on the trade from other quarters “closer to home” this being both a time when the working classes felt a particular need to be heard and a period of emerging chartist sentiments.²⁶ Pawnbroking generally suffered a deterioration of its image during economic hardship and yet it was like any other trade, suffering just as much during economic depressions, the average pawnbroker not realising the huge profits they were perceived to enjoy. As was pointed out in the House of Commons in 1824

Pawnbrokers were, he knew not why, considered as unfair traders; and it was said they made exorbitant profits. They were placed under greater restrictions than any other class of traders; and it was absurd to talk of their making exorbitant profits, when their business was open to the competition of all; as all traders should be.²⁷

The organised sector of the trade was sensitive to the bad press they received. During periods of economic slump they made visible contributions towards alleviating the plight of the poor, such as participating in national campaigns to help those most in need.²⁸ Pawnbrokers coveted their image as trustworthy members of the community and were just as keen to see the demise of “rogue” traders in the business as everyone else. It was regarded by many as a trade of valid worth to the community, requiring, like any other respectable trade, skill, discretion and business

stealing through the means of being able to get rid of stolen items and in turn, through allowing the thief to realise money from his misdemeanour, encouraged the purchase of drink. Ibid q 1374.

²⁵ H Bosanquet *Rich and Poor* (2nd edn, Macmillan & Co London, Macmillan & Co New York, 1898) 99–100.

²⁶ Tebbutt *Making Ends Meet* (n 2) 28–29. In brief the Chartist movement championed the cause of voting rights and democracy for all.

²⁷ Parl Debs (2nd series) vol XI col 1857 (25 May 1824) per Sir F Burdett (at this stage an independent MP although he did later join the Tories).

²⁸ Tebbutt *Making Ends Meet* (n 2) 29.

acumen. More than anything else, the business required a sound assessment of the borrower and his projected ability to pay back the loan.²⁹ It cannot be denied that pawnbroking was a very important form of credit giving, especially to the poorer working class element of society,³⁰ and was seen as having ‘an important social function in helping the working poor’.³¹ Pawnbrokers were seen as a necessary evil, with a role to play not only in the management of poverty but also in the smooth circulation of ready cash in the poor communities. Weekly bills needing to be settled with the local retailers would often be satisfied by means of money obtained by pledging goods with the pawnbroker. Small business owners, who themselves relied on credit would also turn to the pawnbroker to ‘tide them over between payments’.³²

Pledging was however, a costly way to borrow money. There was no escaping the fact that the smaller the loan, the higher the interest. A loan from the pawnbroker could therefore be very expensive, particularly for the regular, short-term pledgor. This, more often than not would be the housewife struggling to make ends meet on a family income, irregular in nature, circumstances triggered by the seasonal nature of much of the work available.³³ There was often a shortfall between income and need, and financial accommodation in the form of a loan was needed to bridge the gap. Once the convenience of the transaction had been experienced, customers would be more ready to return again, their visits becoming a regular occurrence,³⁴ even evolving into a reliance on credit. This reliance was not necessarily inexpedient, being in itself a feature of everyday life for many working class communities, allowing a relationship to develop between businesses and their customers. As a result of this, people whose livelihood depended on seasonal work, would choose to remain in the community, thus reinforcing this relationship, which led to increased facilities of credit, the creditors secure in the knowledge that they

²⁹ C Booth *Life and Labour of the People in London Final Volume* (Macmillan & Co Ltd, London, 1902) 83.

³⁰ Cornish *Law and Society in England* (n 5) 239.

³¹ Gelpi *The History of Consumer Credit* (n 3) 128.

³² Tebbutt *Making Ends Meet* (n 2) 21–22.

³³ *Ibid* cc 1 & 2 for a detailed discussion of pawnbroking, how it helped the poor make ends meet and its relationship with the housewife.

³⁴ As H Bosanquet remarks “a habit of pawning that which can seldom be got rid of again” *Rich and Poor* (n 25) 99.

would be paid at a given time.³⁵ Essentially, the pawnshop served a number of clear purposes, including the provision of short term credit allowing anticipation of income and therefore some ability to “shop around”, without being tied to one single retailer who would charge more for goods given on account and the mitigation of the harsh impact of seasonal working.³⁶ Even detractors from the practice of pawnbroking recognised that the greatest difficulty for labouring classes was irregularity of income. The pawnbroker was, it appears, a financial means of escaping charity or the Poor Law.³⁷

There was also another element to the recourse of individuals to the pawnbroker and this was “the belief in tangible assets”³⁸—i.e. pledging the assets available allowed them to “work” for the owner. Cost was not so much an issue as allowing the assets to provide financial accommodation when required. Banks were mistrusted, as opposed to the more respectable pawnbroker, who was seen as a reliable member of the community. No example could illustrate this more than the practice of using the pawnshop as a safe place to keep valuables (whilst enjoying the financial accommodation they allowed), jewellery, money and even children being pawned for short periods of time.³⁹ The rate of interest was not of paramount importance to the regular customer, and although the allowed rates were high when viewed as yearly calculation, in real terms there were not, per se, prohibitive. As one witness states in the 1870 Committee

The interest is a small matter. When a person pledging an article for a small sum, had the ability to relieve the article a penny or twopence, or threepence interest, will be no obstacle to his relieving the article. If he has not the money to relieve it at all, and it is forfeited, it matters not what the interest is.⁴⁰

³⁵ Tebbutt *Making Ends Meet* (n 2) 19. D Caplovitz explains this psychology of the low income consumer ‘For them credit provided a system of enforced savings with the discipline enforced from without’ *The Poor Pay More* (The Free Press, New York, 1967) 97.

³⁶ Treble *Urban Poverty in Britain 1830–1914* (n 19) 131–132.

³⁷ Bosanquet *Rich and Poor* (n 25) 99.

³⁸ Tebbutt *Making Ends Meet* (n 2) 16.

³⁹ *Ibid* 17–19.

⁴⁰ 1870 Pawnbroking Committee (n 10) q 1974.

Like doorstep lending today, the convenience of the small sum loan outweighed the extra cost incurred—it seems the fact the poor paid more for their credit, a recognised fact of the more modern consumer credit market.⁴¹

As we have seen then, pawnbroking was very relevant to society in the 1800s being an important form of credit provision. Whilst far less popular today as a form of credit facility, there is no doubt the issues raised by the problems associated with pawnbroking still concern the legislature. It will be subsequently demonstrated during the course of this study that social issues connected with the consequences of credit, vulnerability to unfair practices and expensive credit are extremely important in terms of the underlying ethos of current credit reforms. The regulation of pawnbroking was a step in this direction. As the Crowther Committee suggested in their Report in 1971, as far back as 1800 the Pawnbroking Acts indicated a first real legislative attempt at consumer protection, particularly with reference to the poor.⁴² For a more detailed investigation of parliamentary and legislative attitudes to this form of consumer credit, then, the development of the pawnbroking legislation needs be considered in more detail.

3. THE DEVELOPMENT OF LEGISLATION

(a) Early Regulation

Statutory regulation of pawnbroking came in fits and starts. There were a number of statutes enacted in the 18th century, mainly relating to what might be termed licensing issues, such as the prevention of fraud and registration,⁴³ but there were also statutory provisions relating to the charging of interest. In 1756 pawnbroking gained exemption from the Usury Laws, profit from above the legal rate of interest

⁴¹ For discussions of this question—D Caplovitz *The Poor Pay More* (n 35); D Cayne and M Trebilcock ‘Market Considerations in the Formulation of Consumer Protection Policy’ (1973) 23 *University of Toronto Law Journal* 396; E Kempson and C Whyley ‘Extortionate Credit in the UK—A Report to the Department of Trade and Industry’ (June 1999). The issue of affordable credit is also one taken up by the White Paper ‘Fair Clear and Competitive The Consumer Credit Market in the 21st Century’ (Cm 6040, 2003).

⁴² Crowther (n 1) [2.1.17]. The Pawnbrokers Acts referred to are those of 1796 (36 Geo III c 87) and 1800 (39 & 40 Geo III c 99).

⁴³ Eg 1784 Act (25 Geo III c 48).

being collected from the payment of warehouse rent which was left to the individual parties to agree.⁴⁴ This exemption was diluted in 1784 by the imposition of a maximum interest rate of ½ d per 2s 6d per month on all loans up to £10. This was an equivalent of 20% if the full amount were lent for the full period—perhaps not such a shocking rate. However, ‘If the ½ d was charged on 3d lent for a week, the rate of interest was over 800 per cent per annum’⁴⁵—rather more shocking, certainly by today’s standards. There was a further reduction of this rate in 1796 to what was effectively a 15% rate for loans between £2–£10.⁴⁶

By 1800 the need for legislative consolidation was recognised and the Pawnbrokers Act⁴⁷ was passed that year. The regulations related primarily to loans under £10, and set out the mechanics for the day-to-day running of the pawn trade (such as the procedure for taking pledges, record keeping etc) and the rates of interest that could be charged as set out in section II. This section effectively provided a sliding scale of permitted charges from a rate of ½d per month for any pledge below 2s 6d up to a rate of 8d for pledges between 40s and 42s. Pledges above 42s and below £10 had a lower maximum rate of 3d per 20s lent. The Act in essence gave the pawnbroker the ability to charge an annual interest rate of 20 % on all sums under 42s and 15% on loans between 42s and £10.⁴⁸ For loans above £10, interest rates were a matter of special agreement between the parties⁴⁹ and after what was effectively the repeal of the Usury Laws for loans over this amount in 1839,⁵⁰ they were simply subject to the principles of free trade and competition, with only lower loans being subject to the maximum rates imposed by the Act.

Following this legislation, pawnbroking enjoyed relative statutory peace in the first two thirds of the 19th century although between the late 1840s and 1860

⁴⁴ ‘Report from the Select Committee on the State of the Laws affecting the Pawnbroking Trades’ HC (1871) 419 iii–iv.

⁴⁵ Cornish *Law and Society in England* (n 5) 240 n 66.

⁴⁶ 36 Geo III, c 87. The progress of this pawnbroking regulation is outlined in Cornish *Law and Society in England* (n 5) 239–240.

⁴⁷ 39 & 40 Geo III c 99.

⁴⁸ Tebbutt *Making Ends Meet* (n 2) 8. Under the 1800 Act transgressions by the pawnbroker could result in a fine or even imprisonment, whilst pawners unlawfully pawning goods that did not belong to them might be subject to whipping.

⁴⁹ *Ibid.*

⁵⁰ Contracts for loans over £10 were granted exemption from the Usury Laws by an Act in 1839 (2 & 3 Vict c 37).

various minor amending Acts were entered on the statute books.⁵¹ In 1856, for example, an Act was passed including dolly shops in the definition of the business of pawnbroking. These establishments (also known as “wee pawnshops”) were quasi pawnshops, which effectively represented the face of the illicit trade. Their business was in very small loans (avoided by respectable pawnbrokers because of their unprofitability) at very high prices, to those most in need, whilst either blatantly flouting the regulation or evading legislative requirements through artificial devices (such as disguising the pledge as a purchase).⁵² There was also an Act passed in 1860 allowing, inter alia, a ½d ticket fee for loans under 5s. However, it had become obvious to observers that in reality the 1800 Act had become a “dead letter”. Many pawnbroking businesses did not bother to register and the regulations were regularly flouted by some elements of the trade (such as the dolly shops referred to above). As one anonymous writer at the time complained

It has been well said, that as the poorest, the most distressed, and the most friendless are those who are compelled to have dealings with, and are exposed to the ‘tender mercies’ of pawnbrokers, ...there are numbers of heartless griping and extortionate scoundrels in that trade...who by every fraud, extortion and oppression, rob, harass and plunder the poor and miserable, and add to the distresses of those whose misfortunes have reduced them to have dealings with the detestable harpies. The taking of illegal and excessive interest is comparatively the least important of their delinquencies, though this to the poor and unfortunate is grinding in the extreme, as these knaves...treat the act of Parliament for the regulation of the Pawnbroking Trade as a mere dead letter.⁵³

It was in this atmosphere of dissatisfaction that in 1870 a Select Committee was appointed to “inquire into the state of the Law affecting the PAWNBROKING TRADES, with a view to its Consolidation and Amendment”.⁵⁴

⁵¹ 1846 (9 & 10 Vict) c 98; 1856 (19 & 20 Vict c 27); 1859 (22 & 23 Vict c 14); 1860 (23 & 24 Vict c 21).

⁵² House of Commons Select Committee ‘Report of the Select Committee on the Pawnbrokers Bill’ HC (1872) 288 qq123–133.

⁵³ Anon *Deadly adulteration and Slow Poisoning or Disease and Death in the Pot and the Bottle* (Sherwood, Gilbert and Piper, London, circa 1830) 184–185.

⁵⁴ (n 10).

(b) The Pawnbroking Select Committees

There were, in fact, two Select Committees appointed. The first and by far the most extensive one took place in 1870, examining over 30 witnesses during the course of 12 hearings, held over 43 days.⁵⁵ A subsequent Committee was then formed two years later to consider the Bill drafted as a result of the initial Committee's investigation, interviewing a further four witnesses before completing their deliberations on the form and content of the new Act.⁵⁶

The parliamentary debates of the time give us no real indication as to what actually caused the appointment of the first committee, but as has been highlighted it is obvious from commentators of the time that the 1800 Act had long ceased to regulate the trade effectively. Borrowers were often taken advantage of and invariably such borrowers were from the 'lowest and most indigent classes'.⁵⁷ There was the added problem of pawnshops being used as a means of handling stolen goods, even though the pawnbrokers themselves, whilst aware of the practice, found it difficult to detect. In addition it is evident that some felt the legislation was outdated and out of line with the general drift of the regulation of credit (such as it was), all other strict forms of regulation of interest on loans having been repealed. As the 1870 Select Committee itself commented at the beginning of its Report 'the laws relating to pawnbrokers originated in a policy which has long ceased to be recognised or enforced in this country.'⁵⁸

So, what action should the 1870 Committee consider? According to JR McCulloch in 1859, it was impossible to prevent borrowing by the 'poor and uninstructed'. Some form of regulation through licensing would be preferable to an attempt to ban the trade

⁵⁵ 1870 Pawnbroking Committee (n 10). The Committee published its conclusions the following year in the 'Report from the Select Committee on the State of the Laws affecting the Pawnbroking Trades HC' (1871) 419.

⁵⁶ 1872 Report of the Select Committee (n 52).

⁵⁷ JR McCulloch *A Select Collection of Scarce and Valuable Economical Tracts: from the originals of Defoe, Elking, Franklin, Trurgot, Anderson, Shomberg, Townsend, Burke, Bell and others* (London 1859) xi–xiv.

⁵⁸ Pawnbroking Committee Report 1871 (n 55) iii.

the object of the legislature should not be to abolish what must always exist, but to endeavour, in as far as possible, to free it from abuse, by enacting such regulations as may appear to be best calculated to protect the ignorant and unwary from becoming the prey of swindlers ⁵⁹

Certainly the legislation was clearly ripe for change and modernisation and the 1870 Select Committee themselves were convinced of this.⁶⁰ Pawnbroking transactions were denied the freedom of contract allowed by the repeal of the Usury Laws, due to the current Pawnbrokers Acts. The Committee comment, somewhat sardonically that

It must, therefore, be presumed that they [the Pawnbroking Acts] have been continued in force either because they are supposed to be of some peculiar benefit or convenience to the public, or because any inconveniences which may result from them have not been brought prominently under the notice of the legislature ⁶¹

The chairman was obviously a man who espoused free trade and found unnecessary regulation of pawnbrokers distasteful. There is certainly a whiff of disapproval early on in the Report with regard to the pawnbroking regulation, and this is also reflected in many of the questions put to the witnesses. The reason for this seems to be that the Committee, very much in the general trend of thinking at the time, approved of free trade principles. This is apparent not only in the Report itself but also in the line of questioning employed during the examination of the witnesses. Witnesses who wished strict regulation or even abolition of pawnbroking are questioned quite aggressively by some members of the Committee and in one particular instance the views of a witness, Mr William Miller, a Glaswegian magistrate, were rather unceremoniously dispatched by the Chairman.⁶² The desirability of freedom of contract seemed to be felt deeply. This is perhaps not surprising when, after all, this is what finally whittled away the powers of the Usury Laws—it is perhaps to be expected that a similar attitude should be taken in other areas of credit.

⁵⁹ *A Select Collection of Scarce and Valuable Economical Tracts* (n 57) xi–xiv.

⁶⁰ Not all the Committee were in favour of modernising the law. One member Mr Orr-Ewing seems most disapproving of pawnbroking in his general line of questioning even referring to the ‘evils of the pawnbroking system’ 1870 Pawnbroking Committee (n 10) q 1540.

⁶¹ Pawnbroking Committee Report 1871 (n 55) iv.

⁶² 1870 Pawnbroking Committee (n 10) qq 1459–1530.

The 1870 Select Committee's approach however consisted of more than a mere examination of the relevance of free trade principles to credit. There was also acknowledgement that there were some matters for which legislation would not be the appropriate answer. For example, witnesses were asked how they thought new legislation and regulation of pawnbrokers could help people who were inclined to spend what money they had on drink:

Do you not think that in those cases which you have mentioned whiskey rather than the pawnbroker is the cause of evil of which you speak?⁶³

Is it not a more correct view, that a man has a disposition to drink, and that, therefore, he has a disposition to get money for drinking?⁶⁴

But if a man begins with a disposition to drink, and has to get money for it, he will get money by any means whether or not, will he not?⁶⁵

This is not to say that complete deregulation was regarded as desirable or envisaged by the Committee. There is indeed some evidence that the trade itself was quite comfortable with some form of regulation, as long as it did not encroach too far into their ability to carry on a profitable business. A number of pawnbrokers were witnesses to the 1870 Committee and the evidence of at least two of them showed this acceptance of some form of regulation. Mr Hardaker, a pawnbroker and Secretary of the Liverpool Pawnbrokers Association, did not argue for a removal of the regulation of interest but rather a simpler form of calculation so that the public could understand what they were being charged.⁶⁶ The witness was also happy for some obligatory attention to the character of the customer, although with the caveat that any procedure be kept simple.

⁶³ 1870 Pawnbroking Committee (n 10) q 1902 per Alderman Carter.

⁶⁴ Ibid q 1906 per the Chairman.

⁶⁵ Ibid q 1909 per the Chairman.

⁶⁶ Ibid qq 18 and 22. This illustrates a very modern concern relating to interest rates and the APR calculation.

Another witness, Mr John Dicker, demonstrated a fairly open mind to regulation of his trade. He wished the rate to be altered, but only so that it adequately reflected the costs of the trade as they were at that time, the original rates having been established 70 years previously.⁶⁷ It was not the principle of regulation but the terms that caused him difficulty

Do you disapprove then altogether of the attempt to regulate the profit of the pawnbroker by Statute, or do you think that the mode of regulating is bad?—I consider the that the mode of regulating is bad⁶⁸

He says in answer to the next question as to whether there should be a rate fixed by law

I think there should be a rate for the sake of convenience, because whatever freedom of contract you may allow the great bulk of transactions will be carried on upon some recognised standard.⁶⁹

Yet another witness Mr Robert Attenborough, showed his approval of the regulation of his trade in the following exchange with one member of the Committee

Then do I understand you to be in favour of a compulsory scale?—Decidedly; most assuredly; it is absolutely necessary. You do not think that absolute free trade would be beneficial?—It would be the most ruinous thing you could do, because, as I said before, I firmly believe that half a million of money at least would be withdrawn from the trade.⁷⁰

Indeed at the beginning of his evidence he says this ‘I look upon the Pawnbrokers Act as an enabling thing. It enables me to do what another man cannot do’,⁷¹ ‘I have no objection whatever to all the regulations; they are of no difficulty or trouble to me in any way’.⁷²

⁶⁷ 1870 Pawnbroking Committee (n 10) q 435.

⁶⁸ Ibid q 436.

⁶⁹ Ibid q 437.

⁷⁰ Ibid q 3292–3293.

⁷¹ Ibid q 3252.

⁷² Ibid q 3256.

So what did the 1870 Committee ultimately perceive the problem to be and how did they resolve to deal with it? Their criticism was that the pawnbroking legislation that existed at the time of the Report was in 'such an unsatisfactory form'⁷³ that it should be replaced completely. They questioned the reason for the legislation's very existence, bearing in mind the complete deregulation of interest in other areas under the Usury Laws and felt that any regulation should be framed as narrowly as possible. This, however, was with the caveat that the reduced regulation should not jeopardise those who needed protection, thus suggesting the desire for a balance of interests. Their recommendations should be considered with these issues in mind.

(c) Recommendations of the 1870 Committee

The recommendations of the Committee covered most aspects of the trade. The concerns about the pawnbroker's liability for the pawning of stolen goods⁷⁴ and fire⁷⁵ were addressed, together with opening hours⁷⁶ and licensing issues.⁷⁷ There was, for example, a wish to rationalise licensing by standardising the duties and mechanics of the licensing procedure, making it an efficient means of policing the trade. Licence duties varied between London and the rest of the country, London duties being much higher. It was proposed that the lower rate should be the standard rate payable by all pawnbrokers with the licensing system being administered by justices of the peace, matters such as previous convictions being an impediment to obtaining a licence.

Their attention turned first however to the terms of the credit given by the pawnbroker. They felt that there needed to be a balance between free trade and the protection of the vulnerable individual. They decided that small advances should still be statutorily controlled but that larger transactions should be subject to the principles of freedom of contract

⁷³ Pawnbroking Committee Report 1871 (n 55) viii.

⁷⁴ Ibid vii–viii.

⁷⁵ Ibid vi.

⁷⁶ Ibid vii.

⁷⁷ Ibid viii.

from the necessities as also the reckless and improvident habits of considerable numbers of the people, it is desirable that the small advances which they obtain from pawnbrokers should still be regulated by statute, so that they may not be subject to imposition from not knowing or sufficiently understanding the conditions under which their goods are pledged⁷⁸

Comprehension of terms then was important. A simple scale was introduced for interest on loans under £2. The Committee removed the more complicated formula of the 1800 Act and replaced it with a scale that allowed ½d interest per month on every 2s (or fraction of 2s) for all loans under £2. For loans over £2 the Committee had wanted there to be complete freedom between the parties. However it accepted that public opinion might balk at such freedom and instead recommended that unless interest on loans over £2 were to be the subject of a special contract between the parties, the statutory interest should mirror that allowed for loans under £2.⁷⁹ Other elements of the 1800 Act were also amended, such as the period of grace, free from interest, allowed on the redemption of pledges and the length of time goods should be kept before redemption was required. Further requirements were also relaxed, such as the need for extraneous detail to be endorsed on the duplicate ticket and the length of time duplicates were to be kept. Safeguards were also introduced in terms of pawnbrokers' liabilities for redemption of goods where the duplicate ticket had been lost or where stolen goods were offered for pledge.⁸⁰

However the 1870 Committee was not simply interested in the minutiae of the mechanics of pawnbroking. The thrust of some of the Committee's questions such as queries about the complicated rates of interest, information that should be readily available to the customers, ability of customers to repay loans, and the level of understanding of customers as to terms and conditions, illustrate this. Indeed to guarantee some level of transparency, the Committee recommended that the rates and the rules for 'forfeiting, selling and accounting for the pledge,' were to be detailed on duplicate tickets for all advances under 40s (and those above if no specific contract was made).⁸¹ Some of the concerns raised, such as ensuring borrowers were aware of the terms of the credit, were relevant to all forms of credit

⁷⁸ Pawnbroking Committee Report 1871 (n 55) v.

⁷⁹ Ibid v–vi.

⁸⁰ Ibid vii–viii.

⁸¹ Ibid vi.

provision to the individual, and in truth issues that were and are pertinent not only at the time of the Committee, but also to the more modern market. The importance of consumer knowledge, for example, was integral to the recommendations of the Crowther Committee⁸² set up in the late 1960s to re-assess regulation of the whole of the consumer credit market as it existed at that time. The underlying basis for much of the Crowther Committee's suggested reform was consumer protection through ensuring equality of bargaining power, one recognised cause of this being inadequacy of knowledge. Deficiency in knowledge can be rectified to some degree, as was recognised by the Pawnbroking Committee, by promoting awareness through legal requirements as to the provision of information.

When compared with the Pawnbroking Committees, similarity with modern issues is evident not only with regard to the Crowther Committee but also the White Paper 'Fair Clear and Competitive; The Consumer Credit Market in the 21st Century'⁸³ which was published by the Labour Government in December 2003 ("the White Paper 2003") The White Paper 2003 was a result of detailed consultations with consumer groups and the credit industry pursuant to the Consumer Credit Review announced in 2001, which had as its *raison d'être* not only the modernisation of the consumer credit legal regime but also finding means of tackling over-indebtedness. The White Paper 2003, it is true, had a wider remit, with its stated aim of minimising over-indebtedness and the consideration of consumer credit as a whole; the Pawnbroking Committees only considered credit provision in terms of pawnbroking. Yet concerns of those 19th century committee members, have a clear comparability with issues seen as related to over-indebtedness, such as better provision and comprehensibility of information (for example advertising and interest calculations),⁸⁴ the curbing of unfair/illegal practices by rogue traders through, for example, tougher licensing and the protection of vulnerable consumers.⁸⁵

⁸² The Committee reported in 1971—Crowther (n 1).

⁸³ Cm 6040. It has also identified a non-legislative free advisory structure as important, suggested proposals envisaging a more accessible advice network, particularly for the vulnerable [5.30]–[5.32].

⁸⁴ *Ibid* ch 2.

⁸⁵ *Ibid* ch 5. All these issues relative to over-indebtedness are looked at in much greater detail later in this study.

The most obvious evidence of the Pawnbroking Committees' concern for this last issue is in the consideration that small loans i.e. those under £2 should still be regulated by legislation. This was because they felt those borrowers most likely to take out such loans would not sufficiently understand or have knowledge of the terms of the loan.⁸⁶ The White Paper 2003 too sees vulnerable borrowers as the group most in need of protection, since this group is most likely to become over-indebted and run into financial difficulty.⁸⁷ Safeguards such as encouraging financial literacy, providing affordable sources of credit and effective licensing procedures are all submitted as ways of achieving this protection. The 1870 Committee's proposals to some extent mirror these recommendations. The simple scale of regulated interest is introduced as something 'readily understood and applied'⁸⁸ and rates and terms of the contract were to be made far more accessible by means of a requirement of written terms being included on the duplicate pawn ticket that had to be provided. To this extent then, it could be said the 1870 Committee was already concerning itself with problems connected to over-indebtedness. Even one of the main reasons cited by the White Paper for a borrower becoming over-indebted, namely a major life changing event or a change in circumstances⁸⁹ (for example illness or unemployment) is considered by the Pawnbroking Committees. It is clear from the reports of the witness evidence however that they were not concerned with over-commitment with regard to debt or over-indebtedness in this situation, but rather the availability of credit at all. The concern here was not that the borrower might become over committed but rather that he/she had means of obtaining credit when it was desperately needed.⁹⁰

There is one other similarity between the 1870 Committee and Government policy behind reforms now being undertaken, and that is the stated desire for balance. Melanie Johnson MP, then Parliamentary Under Secretary of State for Competition, Consumers and Markets, introduced the aim of the 2001 Consumer Credit Review as

⁸⁶ Pawnbroking Committee Report 1871 (n 55) v.

⁸⁷ White Paper 2003 (n 83) [5.7]–[5.9]. The defining elements of over-indebtedness are considered in more detail in ch 7 of this study.

⁸⁸ Pawnbroking Committee Report 1871 (n 55) vi.

⁸⁹ White Paper 2003 (n 83) [5.10].

⁹⁰ For example the evidence of Mr W Hector, 1870 Pawnbroking Committee (n 10) q 1948; 1872 Pawnbroking Committee Report (n 52) per Mr T J Arnold, a London Police Magistrate q 528.

having an emphasis on providing regulation that ‘protects’ the consumer whilst ‘enabling business to operate competitively in a modern credit market’.⁹¹ It is true that the pawnbroker was not competing on the same terms as those who offered unsecured credit and were no longer subject to the Usury Laws, but there is still this feeling of a need for a balance between commercial interests and those of the consumer. The 1870 Committee felt some provisions were unnecessarily burdensome (such as endorsing the duplicate ticket with the amount of profit gained from the pledge, the pawnbroker having to keep the ticket for a year after the redemption of the pledge) and recommended their abolition removing what they perceived to be an unnecessary fetter on the running of the pawnbroking business. As the Report states

It appears to your Committee, that whilst all persons are free to buy and sell goods, and to lend money upon them upon such terms as they may mutually think best, subject to the general provisions of the law, any restraint upon the business of pawnbroking should be kept within the narrowest limits which the necessity of the case may demand⁹²

The end result of both Committees’ efforts was the Pawnbroking Act 1872 (“the Act”).⁹³ The Act allowed a new interest rate of ‘½ d a month for every 2s 0d or fraction of 2s 0d on loans under £2’ and ‘½ d a month for every fraction of 2s 6d on loans over £2’⁹⁴ whilst still providing some protections for the borrower.⁹⁵ This Act, apart from minor amendments in 1922⁹⁶ and 1960⁹⁷ embodied the law relating to pawnbroking right up until the advent of the Consumer Credit Act 1974 by which time the significance of the trade had greatly reduced, the trend of credit sales reducing the trade’s customer base. The main provisions of the Act included an extension of the definition of pawnbroking to prevent evasion, various forms of

⁹¹ DTI ‘Review of the Consumer Credit Act: Progress Report’ (August 2002).

⁹² Pawnbroking Committee Report 1871 (n 55) v.

⁹³ An Act for Consolidating with Amendments the Acts relating to Pawnbrokers in Great Britain (35 & 36 Vict c 93).

⁹⁴ S 10. This equated to 25 and 20 per % per annum respectively. Tebbutt *Making Ends Meet* (n 2) 8.

⁹⁵ Such as information required on tickets, licensing requirements, prohibition of taking pledges from children.

⁹⁶ 1922 (12 Geo. 5 c 5) (to increase charges made by pawnbrokers (extra halfpenny per 5s or part thereof for loans under 40s).

⁹⁷ 1960 (8 & 9 Eliz c 2) (reductions for period of redemption, increase in maximum loan, increases in permitted charges).

control as to the general management and terms under which business was conducted (such as liability of pawnbrokers for the acts of agents or servants, information requirements such as terms on pawn tickets and on display in the shop), licensing requirements, terms and amounts of profit and charges allowed, and other various restrictions pertinent to the trade (e.g. no pledges to be taken from drunks or children). There were also some protections for the pawnbroker himself, such as in the event of forged pawn tickets being produced, or the making of frivolous complaints. Most offences against the Act's various provisions carried liability on summary conviction with a fine of £10, although, under section 45 such a conviction did not necessarily make the contract void. As to the success of the Committee's approach, it is perhaps telling that the Act effectively remained the primary source of regulation of pawnbroking until its complete repeal by the Consumer Credit Act 1974⁹⁸ over 100 years later.

(d) Parliamentary Debate

Despite the fact there were a number of Acts relating to pawnbroking passed over the course of the 19th century, there was little if no parliamentary debate discussing the immediate issues surrounding the trade. Indeed even the extensive Select Committee Report in 1870 and the following Select Committee appointed in 1872, to consider the draft Bill, excited little interest with MPs in either House. The story is much the same for the period following the Act, which, as has been stated, to all intents and purposes remained the law until the Consumer Credit Act in 1974. This was in contrast to the numerous debates that were held, albeit sporadically, to discuss the Usury Laws and their future. Parliamentarians voiced strong opinions in relation to the Usury Laws and some debates were lengthy. The arguments that approved or disapproved of abolition had a similar feel to the arguments for and against pawnbroking i.e. freedom of contract versus protection for the borrower. And yet, there was something slightly different about pawnbroking. The approach of Parliament itself, such as it was, seems much more balanced than to that of the usury legislation. There, the argument was initially dominated by the landed interest, only later for the argument to swing heavily in favour of the merchants, as the middle classes and mercantile interest began to have more say in parliamentary affairs. With

⁹⁸ C 39.

regard to pawnbroking, although there was the occasional parliamentary mention of the trade, the arguments for and against regulation were not so fervently followed. Part of this must be due to the fact that the pawnbrokers themselves were fairly happy with some form of regulation. In theory at least it helped keep the unscrupulous element of the trade in check and to this end helped the trade keep the good reputation that it coveted.

The lack of parliamentary discussion makes it difficult to glean a true sense of parliamentary attitude, from debate alone, to pawnbroking as consumer credit, apart from the fact there was obviously little interest. The Select Committees give us rather more insight, their composition being parliamentary based. In 1870 the Chairman, for example, the Right Hon Acton Smee Ayrton, was Parliamentary Secretary to the Treasury from December 1868 to November 1869, described as a "Radical" and in favour of issues such as economic organisation of the army and navy.⁹⁹ Indeed the Committee seemed to be composed of a variety of political affiliations and backgrounds, ranging from Conservatives such as Mr Charles Henry Mills, banker and magistrate¹⁰⁰ to Liberals such as Mr Thomas Hughes¹⁰¹ or Mr John Whitwell, Kendal manufacturer¹⁰² and radicals such as Alderman Carter, coal merchant and cloth finisher.¹⁰³ It cannot be stated categorically that such a Committee would represent a cross section of parliamentary thought, but by the same token, the ease with which the Committee's recommendations were implemented suggests at the very least a capitulation by Parliament in the Committee's conclusions. That is not to say that the recommendations were not implemented without any interference; for example the recommendation that all loans under £2 should be regulated by the law effectively as terms of implied contract (and above if no special contract had been made between the parties) was changed so that the Act applied to all loans of £2 and under, with all loans between £2 and £10 also being subject to the terms of the Act, unless a special contract had been made. It would not

⁹⁹ M Stenton *Whos Who of British Members of Parliament Vol I 1832-1885 A Biographical Dictionary of the House of Commons* (The Harvester Press Ltd, England 1976) The Government at this point was Liberal.

¹⁰⁰ *Ibid* p 271.

¹⁰¹ Who co-incidentally was the author of 'Tom Brown's Schooldays'.

¹⁰² *Whos Who* (n 99) 407.

¹⁰³ *Ibid* 68.

be unreasonable however to describe this as a change of emphasis rather than a change of substance.

Why else was there little visible parliamentary interest? Apathy? Or general satisfaction within Parliament as to the way things were run? There was probably an element of both in these, even though some elements of the middle classes were keen to see the back of pawnbroking. However, perhaps more than anything else it was due to the realisation that the pawnbroking trade was essential to the poorer classes and, as described above, was much more than simply lending small amounts at possibly high interest rates, on security. In one House of Lords debate in 1883 the Earl of Wemyss commented that ‘The pawnbroker was in fact the poor man’s banker’ – this theme of the pawnbroker as indispensable to the poor runs through the debate. Furthermore there was this acceptance that the pawnbroker had an important part to play in small and medium business transactions,¹⁰⁴ by allowing those in times of difficulty to obtain ready cash the pawnbroker played an important part in ensuring the microcosms of local trade continued to function. Pawnbroking had its disadvantages (high interest rates, an avenue for the immoral to obtain money for undesirable activities) yet it helped prevent complete destitution by allowing a means of filling a gap in the income cycle.

One piece of evidence that shows this underlying recognition of pawnbroking as perhaps the best that could be hoped for in the circumstances, was that suggested alternatives to pawnbroking all failed. In 1823 there was an attempt to set up an Equitable Loan Company—a Bill was drafted but no Act ever materialised. Pawnbrokers sent in a petition to Parliament complaining of this development. The Bill attracted little debate, but what there was tended to sympathise with the pawnbrokers position. In the 1840s the Charitable Pawns Bill was put before Parliament and this managed to gather a little more steam, with suggestions of it being referred to a Select Committee. However on the second reading of the Bill, the protagonists and supporters of the Bill (such as they were) had the wind taken out of their sails in no uncertain terms, with Mr Gladstone’s announcement that the ‘Government was collecting information’ on the matter and that the Bill should be

¹⁰⁴ Tebbutt *Making Ends Meet* (n 2) 101.

left for the time being.¹⁰⁵ Even if there were concerns about the pawnbroking trade and a desire for legislative action, after 1854 and the repeal of the Usury Laws, pawnbroking was one of the most regulated forms of money-lending. The tables had turned—far from being ‘persons privileged by act of parliament’¹⁰⁶ pawnbrokers were now the only persons lending money whose trade was directly restricted by Parliament.¹⁰⁷

In comparison to other areas, then, no further attention was needed. There were statutes passed in the intervening years between 1854 and 1872, as outlined above. What is interesting though is that they again excited very little debate indeed. For example, the Bills of 1856 and 1859 were carried through the readings in Parliament with no debate whatsoever, becoming Acts in the same respective years.¹⁰⁸ The Bill of 1860 provoked a little more interest on the second reading, but the debate was not long, the majority of speakers being in favour.¹⁰⁹ The Bill became law without further discussion.¹¹⁰

One other explanation for the lack of debate or demand for more stringent controls may be the approach of the Government itself and the prevailing attitudes of laissez-faire, particularly during the earlier part of the century. The first half of the 19th century was a time in which ‘a large number of restrictions on economic activity...were reduced or removed’,¹¹¹ a prime example being the Usury Laws. However, as has been pointed out by commentators, there may have been other forces at work, besides simple adherence to the principles of laissez-faire. Much of the Government’s stance has been attributed to a recognition of the impracticalities of enforcing cumbersome legislation and a wish to ‘streamline its administrative

¹⁰⁵ Parl Debs (series 3) vol LXXIV col 91 (18 April 1843) (Gladstone at this point was still a Conservative).

¹⁰⁶ Parl Debs (series 2) vol XI col 960 (1 June 1824).

¹⁰⁷ Effectively the desire was to protect the pledgor by allowing a high interest rate to the pawnbroker whilst preventing extortion—Tebbutt *Making Ends Meet* (n 2) 101.

¹⁰⁸ 1856 (19 & 20 Vict c 27) (definition of pawnbroking, penalties for no licence) and 1859 (22 & 23 Vict c 14) (reduction of the penalty payable to informers extended to pawnbroking throughout the country).

¹⁰⁹ See Parl Debs (series 3) vol CLVII cols 1578–1579 (29 March 1860).

¹¹⁰ 1860 (23 & 24 Vict c 21).

¹¹¹ P Deane *The First Industrial Revolution* (Cambridge University Press, Cambridge, 1967) 208.

machinery'¹¹² together with consideration of the pressure exerted by those, mainly the more educated, who believed in utilitarian doctrines and the philanthropic concerns for the state of society as a whole.¹¹³ Certainly the idea of minimal control whilst retaining some protection for the vulnerable was a dominant theme in the consideration of the pawnbroking legislation in the 1870s.

Interestingly this highlights a difference in approach between the Victorian Liberal Government concerned with pawnbroking and the Labour Government of today concerned with over-indebtedness. Whilst they appear to have similar aims in terms of protecting the consumer-borrower without stifling trade, the modern Government is far more proactive in terms of intervention. This may be due to the enormous importance of consumer politics today, for example in relation to over-indebtedness, the consumer him/herself being the driving force behind the demand for reform rather than the simple benevolent wish of the philanthropist to improve the position of those most in need. Furthermore in the White Paper 2003, the issues of economics and cost, both to the consumer and to society as a whole are recognisable factors. The conclusion to Annex C contains perhaps the most telling statement

The costs of over-indebtedness do not just fall on individual borrowers, they have a much wider impact, affecting financial institutions or creditors, and the State as a whole. Over-indebtedness, particularly among low-income groups, also has a significant negative impact on a number of Government objectives—for example, on eliminating child poverty, welfare to work aims, health inequalities and neighbourhood renewal.

In any event, it is clear that the Government in the early 1870s, with its policies of free trade and laissez-faire, was generally satisfied with the pawnbroker and the

¹¹² Deane *The First Industrial Revolution* (n 111) 211.

¹¹³ Ibid 214–215. Bentham himself, whilst an advocate of laissez-faire and freedom of contract, differed from many classical economists in that he believed Government interference could be justified where it contributed to an improvement in the social order—PS Atiyah *The Rise and Fall of Freedom of Contract* (Clarendon Press Oxford 1979) 325–326. Atiyah offers a detailed examination of the correlation between utilitarianism and political economy during this period, particularly in ch 12.

trade's position in society by the time of the Act.¹¹⁴ As the Lord Chancellor, the Earl of Selborne, confirmed ten years later

Nothing therefore could be further from the intention of Her Majesty's Government than to show disrespect to any of the upright and honourable men engaged in the business, or to impose upon them any unreasonable, or unnecessary and inconvenient restraints¹¹⁵

4. COMPARISON WITH THE USURY LAWS

As has been explained in Chapter 2, the basis of the regulation of interest rates on loans was set down in an Act passed in 1713 being commonly referred to as the "Usury Laws". Pawnbroking and the Usury Laws, constituted the only real basis of credit regulation for many years. The 19th century saw a real attempt to change the regulation of credit, the beginning of this trend coming from the amendment to the Usury Laws. To begin with, Parliament's approach to credit, still dominated by the landed classes, was resistant to change and the divide over opinion became primarily one of commercial versus landed interest, only sporadic concern being shown for those lower classes who were involved in credit. In the Committees held to consider the Usury Laws, there is evidence of attitudes that considered credit as debilitating when expensive, with control being regarded as inconvenient when regulated in an impractical way.

Whilst inconvenience to the commercial lender was perhaps the primary motivation for reform at this stage, there was already an undercurrent of unease as to how expensive credit could affect the private individual. The general desire was for credit to be unfettered, so that not only could the borrower have access to the credit that he desired, but at a reasonable price, being shielded from unscrupulous and expensive practices by the openness of the market, rather than by statutory regulation. The seeds of consumer protection were there in the discussions surrounding the Usury Laws, but only started to blossom with the consideration of the pawnbroking legislation. This is where the approach adopted with regard to the

¹¹⁴ Although there were still some concerns about the ability to sell stolen goods through pledging.

¹¹⁵ Parl Debs (series 3) vol CCLXXX col 1247 (22 June 1883).

Usury Laws differs from that adopted later with regard to pawnbroking. The latter had not only visible elements of concern for free trade and open markets, but also a clear goal of protection for the borrower.

One possible explanation for the difference in approach is that the Usury Laws affected mainly those in the upper echelons of society, who, whilst needing basic protection of some sort were perhaps perceived as being able to look after themselves. The pawnbroking legislation however directly affected the most vulnerable in society, as they were the main customers of the pawnbroker. They were, therefore, unlike those borrowers affected by the Usury Laws. It was clear in those early years, when the repeal of the Usury Laws was the issue of the moment, that in Parliament there was real interest in improving or at least protecting the position of those who borrowed money. However such intention primarily appeared in terms of the relatively small spheres of mercantilism and real estate.

There is however one aspect of the approach of the various Committees to these considerations of different problems where attitudes coincide. Credit, it seems was seen as not only essential but a desirable financial tool, especially in terms of business and economic health countrywide. Protection against unscrupulous creditors was seen by many as important, even though the predominant view was that over protection of the borrower could be just as harmful as none at all. As regards the Usury Laws, the argument that won the day was that of freedom. Credit was a commodity that should enjoy a free market, and whilst a possible problem if totally control free, could be contained within the confines of competition. As regards pawnbroking, however, the legislature was more cautious, having a different clientele to consider. This may be an indication as to the reasons why the Committee and the legislature opted to retain a fixed interest rate ceiling, in contrast to its abandonment in other areas of credit provision.

The debates and parliamentary papers concerning the Usury Laws show us attitudes to consumer credit, primarily from a financial point of view, rather than from issues of social concern. In contrast, the development of the pawnbroking legislation demonstrates a real concern for the more vulnerable consumer and the both positive and negative effect credit could have on his/her life as a whole. This

generates a more proactive stance in relation to borrower protection. However, the approach taken by the 1870 Pawnbroking Committee, shows that there was a struggle to find a balance between two distinct groups, the lender and his commercial interests and the borrower, in need of protection. This, it will be seen is a dichotomy that continues through much of the history of consumer credit legislation.

5. CONCLUSION

A number of definite conclusions can be clearly drawn from an examination of the parliamentary attitudes that were expressed primarily in the Committee proceedings apropos the practice of pawnbroking. The first is that it shows an awareness of the importance of credit to the individual, especially as it was credit that gave the ability to negotiate the shortfall between income and necessary expenditure. The credit under consideration by the Committee, that is pawnbroker's credit, was to all intents and purposes consumer credit, being used not only for requirements of every day life but also for general consumption such as funding entertainment¹¹⁶ and the purchase of new goods,¹¹⁷ and therefore of prime relevance to this study in the search for attitudes to consumer credit. The convenience and essential nature of the availability of credit to the individual is an issue that remains very relevant today. Many concerns are raised as to the terms of consumer credit, the practices that are used by lenders and the consequences of over-commitment. However, it is accepted that consumer credit is a necessary, inescapable fact of life. The White Paper 2003 confirms the present Labour Government's commitment to tackling over-indebtedness through the provision of tighter regulation with regard to such issues as information provision and illegal or unfair practices, but it also makes it clear that availability of credit is just as important, especially to those most in need i.e. vulnerable borrowers.¹¹⁸

This idea of availability of credit to vulnerable borrowers is the basis to the second conclusion that can be drawn. The examination of the Pawnbroking Committees and reaction of Parliament demonstrated there was an understanding by

¹¹⁶ Eg alcohol.

¹¹⁷ Tebbutt *Making Ends Meet* (n 2) 21.

¹¹⁸ White Paper 2003 (n 83) [5.46]–[5.54].

the majority at the time that pawnbroking was not only important but also a necessary form of credit for the most vulnerable in society, providing as it did small, short term loans. There was also an acceptance that vulnerable (usually poor) borrowers had to pay more for their credit, whether due to unscrupulous traders or the fact that small, short term loans were costly to service. The legislature had already demonstrated their tacit recognition of this latter problem of cost in the fact that the rates allowed to pawnbrokers were always higher than that allowed by the Usury Laws, at least for the smaller loan, which was, after all, the type of loan most sought after by the poor and the most common bracket of trade for the pawnbroker. It is true of course that once the Usury Laws had been repealed the smaller loan provided for by the pawnbroker was in fact more heavily regulated than any other loan, but at this point the idea of protection for the vulnerable had been developed, with only those less so being left to the mercies of market forces. There was implicit in this a rejection of any assumption that all borrowers were of the same ilk with the same needs; pawnbroking was a distinct form of credit required by a particular section of the market.

Short term credit to the poorer elements of society is also relevant to Parliament's attitude to consumer credit today, such a facility still being regarded as an important element in the overall provision of credit to the consumer. The issue was raised by the Labour Government in its Inquiry into the Vulnerable Consumer and Financial Services undertaken at the end of the 1990s. Here they state 'much consumer policy and regulation appears to assume that all consumers are the same. They are not' short term credit being quoted as one of the financial services that low income consumers often rely on to obtain essentials.¹¹⁹ Yet availability is limited.¹²⁰ The idea behind the Inquiry, amongst other aims, was to frame recommendations that would help alleviate this difficulty¹²¹ an issue now further tackled by the White Paper 2003, through proposals relating to the availability of affordable credit.

¹¹⁹ OFT 'Vulnerable Consumers and Financial Services—The Report of the Director General's Inquiry' 1999 [3.4].

¹²⁰ The concern was that the High Street sources of credit were moving away from the low income consumer thereby denying them a much needed facility.

¹²¹ For the Inquiry's recommendations for vulnerable consumers with regard to credit see [7.0]–[7.1] [7.3] of the Vulnerable Consumers Report (n 119). These included the provision of basic banking services and encouraging credit unions.

In the recognition of these factors, a third conclusion can be made which is that a clear idea of consumer protection was starting to emerge in the 1870s, with general agreement that some form of regulation was required. In the search for a suitable answer to the question of consumer protection, the disadvantages and advantages of pawnbroking were weighed up and some kind of compromise reached and accepted by Parliament. The level of regulation that was provided was, it was hoped, one that would protect the vulnerable consumer whilst ensuring his/her access to credit was not prohibitively restricted. There would certainly be truth in the supposition that pawnbroking kicked off the legislature's interest in regulatory protection for the individual consumer with regard to credit and a search for an answer to the problem of those with the least wealth having to pay higher prices to satisfy their needs.

The question of consumer protection in society's lower income groups has also exercised the minds of a number of commentators.¹²² Cayne and Trebilcock conclude that it is inevitable the poor pay more, because the poor cannot avail themselves of the traditional sources of credit due to the level of risk they represent. Furthermore these borrowers do not provide a profitable source of custom for the regulated mainstream marketplace creditors, much in the same way the respectable pawnbrokers found very small pledges unprofitable to service. What the writers contend is that policy should not try to stifle this form of credit business entirely—such a marketplace is not devoid of competition or structure, and the conditions and associated costs demonstrated by “ghetto merchandising” in fact reflect the retailer's attempts to service local needs. Any structurally sound marketplace will have some imperfections—any consumer protection rule must accommodate this.¹²³ In conclusion they suggest that consumer protection rules should be limited to remedying the imbalance in bargaining power, primarily through the means of marketing methods and disclosure requirements, thus providing a level playing field

¹²² Cayne ‘Market Considerations in the Formulation of Consumer Protection Policy’ (n 41) 396. Caplovitz has also considered the question of expensive credit and those in most need in *The Poor Pay More* (n 35).

¹²³ ‘the most effective small loans law is the one which least interferes with the free flow of market forces; Cayne ‘Market Considerations in the Formulation of Consumer Protection Policy’ (n 41) 416.

without violating freedom of contract. The information of choice (that is information that is readily identifiable) protects by enhancing the operation of free market forces.

The Select Committee in 1870 did not go this far. They were not so concerned with choice—in the late 1800s choice as to credit was not really an issue, more its availability. Where we do see similarity, however, is in this idea of information as a key to an efficient means of consumer, more particularly borrower, protection. The right to be fully informed about the terms upon which credit is given is a step towards providing an effective safeguard for consumers—after all “knowledge is power”. This is certainly a theme that also underlies the White Paper 2003.¹²⁴ Clear understandable information is needed if consumers are to make an informed choice, an added benefit being the encouragement of competition between credit providers, achieving a convenient and the White Paper contends, an effective control on the cost of credit.¹²⁵ It could not be seen as going so far as to accommodate imperfections in the consumer credit market—indeed one of its primary motives is to undertake reform that will solve the market’s identified problems. However, it does address the idea outlined by Cayne and Trebilcock of providing some form of balance in bargaining power by creating a fairer framework of regulation and control, through marketing methods, for example advertising and disclosure requirements and clear statements as to early settlement charges.

This idea of equality of bargaining power as a means of borrower protection and the importance of consumer knowledge was also considered in relation to consumer credit reform in probably the most important and influential report to date on consumer credit—the Crowther Committee Report published in 1971.¹²⁶ The Report explains that a number of factors cause imbalance of bargaining power between parties, in particular one party’s lack of knowledge. Problems with the levels of knowledge can be rectified to some degree by promoting awareness through information requirements and, besides detailed regulation, education and availability of advice. Again this is something addressed by the White Paper, with recommendations encompassing accessible advice forums, and general information

¹²⁴ (n 83).

¹²⁵ White Paper 2003 (n 83) [1.69].

¹²⁶ (n 1) This Report is examined in much more detail in ch 6 of this study.

provision, particularly for the vulnerable.¹²⁷ There is a difference in emphasis however between these two latter day Government reviews. The Crowther Committee was of course about legislative reform but the emphasis was on rationalisation and amalgamation of the consumer credit legislation. This entailed new legislation but not necessarily tighter regulation. It was felt a framework based on function rather than form was needed,¹²⁸ one that would adequately differentiate between commercial and consumer credit. The law as it stood failed to tackle common problems and lacked a coherent consistent policy.¹²⁹ The emphasis of the Consumer Credit Review in 2001 and the White Paper 2003, however, seems to be in tighter regulation. Here the priority for tackling the problems within the consumer credit marketplace, namely lack of transparency, misinformation, unfair practices, illegal lending and, of course, over-indebtedness,¹³⁰ is in amending the law primarily through primary and secondary legislation.

The Pawnbroking Committee's thinking reveals more similarity to that of the Crowther Committee than to this latest review of consumer credit. It is true pawnbroking was seen as a form of credit in its own right, requiring its own calibre of regulation, but with regard to these issues of consistency of policy and a desire to provide protection without over regulation, the 1870 Committee is definitely comparable. There is however one curious element to the approach of the Pawnbroking Committee with regard to regulation. It showed an inclination to reject legislative intervention, and espoused consistency of policy, yet retained perhaps the most restrictive control of all, namely the interest rate ceiling. Indeed restrictions on the charges allowed to pawnbrokers remained in force until the Pawnbrokers Act was repealed in 1974. Maybe this was a reform too far or simply regarded as a protection too effective for the poor borrower to risk its removal. The Crowther Committee for its part rejected a direct imposition of an interest rate ceiling,¹³¹ a policy that remains as firm today.

¹²⁷ White Paper 2003 (n 83) [5.30]–[5.32].

¹²⁸ *Ie credit should not be treated differently simply because it was hire-purchase rather than an unsecured loan from a moneylender—Crowther (n 1) c 1.3.*

¹²⁹ *Ibid* [4.2.1].

¹³⁰ White Paper 2003 (n 83) 5.

¹³¹ Although it recommended retaining the presumption that a rate over 48% was harsh and unconscionable Crowther (n 1) [6.6.9].

The fourth conclusion that can be drawn from an observation of parliamentary attitudes to pawnbroking is that whilst there was this burgeoning concern for vulnerable borrowers and the credit consumer, it carried a qualification that action should not be at the expense of the commercial aspects of the trade reaffirming the importance commercial interest retained. An acknowledgement of this conflict between protection of the vulnerable versus protection of the freedom of trade and ultimately the freedom of contract reveals itself in the 1870 Committee Report, with recognition that restrictions on the pawnbroking business should be kept to a necessary minimum.¹³² This tension between consumer protection and a respect for the free marketplace is also identifiable, both in the later Crowther Committee Report and the White Paper 2003. However, here the emphasis is on consumer protection through healthy competition and effective use of resources, rather than protection of the industry per se.

One aspect in which the two later reviews do differ however is in their approach to achieving this competitive arena. For the Crowther Committee, less regulation would still achieve this aim, without encouraging a flood of credit provision¹³³ although they do concede it may take a little while for the market to settle down, suggesting certain powers be afforded the recommended Consumer Credit Commissioner, such as the investigation of credit practices.¹³⁴ In the White Paper 2003 there is frequent reference to creating a 'fair and free market' within the credit industry and the desire for innovation and competition in the marketplace. However the whole question of over-indebtedness and the review of the Consumer Credit Act is couched in terms of protecting the consumer, not only from the excesses of the industry but also to a degree, from themselves, through more, not less, legislation. Perhaps this difference in emphasis between the Pawnbroking Committees and these later reviews is due to the underlying pressures that prompted inquiry in the first place. At the time of the Pawnbroking Committees there is no doubt that the individual borrower did not have the political muscle that consumers as a group enjoy today. Another factor must be that the Pawnbroking Committee had a much simpler remit; its job was to create effective regulation of pawnbroking. It

¹³² Pawnbroking Committee Report 1871 (n 55) v.

¹³³ Crowther (n 1) [3.8.14].

¹³⁴ Ibid .

was not concerned with the more complex macro-economic issues that had to be considered by the Crowther Committee and the Consumer Credit Review.

On the whole the general impression given by the Pawnbroking Committee is that of a positive approach to the pawnbroker's credit. The Crowther Committee also adopts such an approach to consumer credit, recognising its importance, just as the 1870s Committees recognised the importance of pawnbroking. According to the Crowther Committee consumer credit provides, amongst other things, convenience, a budgeting aid and the ability to enjoy consumer durables to a greater level that might otherwise not be possible. This Committee favoured the idea of a free market in the sense that some consumer protection would naturally flow from the encouragement of competition. The general impression was that they felt consumer credit as a facility suffered an unjustified stigma and indeed was unfairly blamed for some of society's ills. This had led to a lack of perspective when it came to formulating policy relating to consumer credit.¹³⁵ This is not to suggest that the White Paper 2003 does not recognise the importance of credit to the individual. Indeed, as has already been mentioned, the availability of credit to the consumer, especially the vulnerable one is regarded as having great significance. It is rather that in this latest consideration of consumer credit legislation, the positive aspects of the facility of credit seem to have been buried under the overwhelming concerns for consumer protection.

As a result of all these observations it seems clear the parliamentary attitude to pawnbroking in the latter part of the 19th century, pawnbroking clearly being a form of consumer credit, was in many ways a surprisingly modern one. It seems clear that many issues relevant to modern reform are present in the attitudes and approach to pawnbroking. Over-indebtedness is a case in point. Although perceived as a modern problem, the factors indicated as being of primary relevance to reducing over-indebtedness are the very issues already starting to surface by the 1870s. The ethos seems similar: a fairer regulatory framework, competition and protection for

¹³⁵ This approach is explained in Crowther ch 3 (n 1).

the poor. Even issues such as savings¹³⁶ and assessment of the borrower,¹³⁷ very topical issues of consideration today, are given some mention. The recognition of the need for credit, an awareness of its cost to individuals depending on their station in life, the effect on market forces, freedom of contract and the necessity to protect the vulnerable, whilst not restricting the market were all issues present in the considerations of the Pawnbroking Committee. The draftsmen of the legislation responded to this, implementing and tacitly approving these ideas, as Parliament itself had done, thus providing, by way of the Act, regulation of consumer credit.

¹³⁶ This is particularly relevant with regard to the recent report on future pensions provision. Pensions Commission 'A New Pension Settlement for the Twenty First Century The Second Report of the Pensions Commission' (30 Nov 2005).

¹³⁷ Sharing of data between lenders and careful consideration of the borrowers future ability to repay are seen as important factors in responsible lending. White Paper 2003 (n 83) [5.61]–[5.67]

CHAPTER 4

MONEY-LENDING AND BILLS OF SALE

1. INTRODUCTION

Up until 1854 unsecured borrowing was subject to control by means of the Usury Laws, although inroads had already been made from 1839 with the partial, rolling repeal for loans over £10. With the total repeal of the usury legislation unsecured lenders enjoyed an almost unlimited freedom. Money-lending to individuals flourished in this atmosphere and as the trade expanded so its visibility increased, although direct regulation of money-lenders was not forthcoming until the final years of the century. This does not mean however that there was a complete void with regard to control. One element of the credit market after the demise of the Usury Laws did gain the initial attention of Parliament, namely the facility of secured lending, the regulation of which provided some restrictions for the activities of would be creditors.

There were in fact various forms of secured lending employed in the 19th century. Mortgages were used to borrow money on the basis of the security of real estate, the land actually being conveyed to the creditor although remaining in possession of the mortgagor until such time as the loan was repaid. The terms of the loan itself were regulated by the Usury Laws (whilst still in operation), and the law of equity provided protection in the form of the mortgagor's right of redemption and the more general equitable relief from oppressive and unconscionable bargains. The mechanics of the security were effectively in the domain of land law, this method of lending only later being controlled by regulation over Building Societies, these institutions, as they began to develop, being the main providers of such loans.¹ Another form of secured lending, which allowed chattels to be used as the basis of security for loans of smaller sums of money than those typically borrowed under mortgage, was the pledge. Loan by pledge was provided by the pawnbroker, as has already been examined in detail in the previous chapter. There was however another

¹ Building Societies (Benefit) Act 1836 (6 & 7 Will IV c 32); Building Societies Act 1874 37 & 38 Vict c 42).

means of borrowing small amounts, using chattels as security, and this was by virtue of the bill of sale.² A bill of sale is in effect a type of mortgage, being the means by which property in goods is transferred, with the person granting the bill of sale remaining in possession—as the Crowther Committee Report (“the Crowther Report”) terms it, a “non-possessory chattel mortgage”.³

Whilst 1854 saw the final repeal of the regulation of interest and a removal of the restrictions on unsecured loans, the same year saw the first legislation regulating the use of bills of sale. In subsequent years there were no less than nine Bills brought before Parliament for consideration, resulting in five statutes. The latter two Acts of 1878⁴ and 1882⁵ (as amended by the Acts of 1890 and 1891)⁶ are still in force today.⁷ After the 1882 Act, it was another 15 years before interest in money-lenders’ activities resurfaced with any significance, although the subject rumbled on occasionally making an appearance in Parliament.⁸ However elsewhere the push for reform was gathering steam, not least from the judiciary and the interest in reform surfaced again in the late 1890s. After two committees in 1897 and 1898 the Moneylenders Act 1900⁹ was passed, bringing in swingeing reforms with further

² Cornish outlines the different structures of the various forms of secured lending. Bills of sale were chattel mortgages, with ownership being transferred for the duration of the loan, but possession remaining with the grantor of the bill, very similar to the mortgage of real estate. Pledging was seen however as a bailing of the goods with the pawnbroker, giving the pawnbroker the right of retention until the loan repayment was satisfied. WR Cornish and G De N Clark *Law and Society in England 1750–1950* (Sweet and Maxwell, London 1989) 237–238.

³ Crowther Committee ‘Consumer Credit: Report of the Committee’ (Cmnd 4596, 1971) [2.1.20].

⁴ Bills of Sale Act 1878 (41 & 42 Vict c 31).

⁵ Bills of Sale Act (1878) Amendment Act 1882 (45 & 46 Vict c 43).

⁶ Bills of Sale Act 1890 (53 & 54 Vict c 53) and Bills of Sale Act 1891 (54 & 55 Vict c 35). These Acts were short Acts that clarified the position with regard to certain mercantile documents for which the restrictions of the 1878 and 1882 Acts were inappropriate.

⁷ These Acts regulate bills of sale together with relevant provisions of the Consumer Credit Act 1974, in cases where the bill of sale comes within the confines of a ‘regulated agreement’ under the Act. Bills of sale can be absolute or conditional (i.e. when they are used to secure the payment of money), this latter type of bill being the tool used by money-lenders. The 1878 Act regulated both absolute and conditional bills whilst the 1882 Act’s restrictions applied to conditional bills only *Halsbury Laws of England* Vol 4 (4th edn, Butterworths, London 1973) [612] [820].

⁸ Questions were occasionally raised about the possibility of legislative intervention in the activities of money-lenders but these were dismissed with often equivocal replies from Government Parl Debs (Series 4) vol XXXIX col 1022 (16 April 1896).

⁹ 63 & 64 Vict c 51.

Acts in 1911¹⁰ and 1927¹¹ extending these reforms and introducing a system of licensing.

The purpose of this chapter is to examine parliamentary attitudes and the legislature's approach to money-lending, and to determine what this tells us about attitudes to credit, more particularly consumer credit at this time. This is achieved by examining parliamentary debates and the proceedings of Select Committees, not only surrounding the practice of money-lending but also the more particular practice of secured lending through the use of the bill of sale. A detailed examination of mortgages is outside the remit of this study. However, in any historical examination of the lending of money, a consideration of bills of sale cannot be avoided, bills of sale being a popular device with money-lenders during the 19th century. It was in fact partly as a result of the use of the bill of sale that the practice of money-lenders came under the detailed scrutiny of Parliament for the first time and probably led to the eventual regulation of their business.

Analysis of the parliamentary activity surrounding the bills of sale legislation and the ensuing regulation of money-lending will help identify the motives that led to the development of the statutory control of consumer credit during this period. Once the elements that influenced reform have been considered, the extent to which these factors mirror or have contributed to the modern ethos of consumer credit legislative reform can be discussed.

2. BILLS OF SALE

(a) Regulatory Control

According to the Crowther Report, 'professional money-lending' in the 17th and 18th centuries was mainly to be found in terms of 'loans to needy gentlemen'.¹² By the end of the 19th century however, it is clear from the witness evidence¹³ given to the Select Committee appointed in 1881 to consider amendments to the Bills of Sale

¹⁰ 1 & 2 Geo 5 c 38.

¹¹ 17 & 18 Geo 5.

¹² Crowther (n 3) [2.1.19].

¹³ Inter alia by money-lenders themselves.

Act 1878¹⁴ (“the 1881 Select Committee”), that the clientele would range from the upper classes through to the working classes including young gentlemen from rich families, clergymen, schoolmasters, clerks, traders such as fishmongers or butchers and labourers. There was, however, a seeming lack of interest shown by 19th century Parliament in the general mechanics and effect of the money-lending trade on individuals. The uniqueness of pawnbroking and its effect, certainly on the poor, had brought about action in the form of the pawnbroking legislation of 1872, but apart from the issue of interest (dealt with by the repeal of the Usury Laws), there was no attempt by Parliament to consider the provision of credit through the practice of money-lending as such.

One aspect of money-lending however, did not escape attention and this was the use of the bill of sale. There was usually fierce competition between creditors upon bankruptcy or insolvency of a borrower and creditors would often seek ways of being treated preferentially with regard to other creditors. The most obvious method of achieving this was by assertion of ownership of, or a secured interest in, the bankrupt’s property. As has already been mentioned many forms of security existed, some giving the mortgagee actual ownership, such as mortgages of real property and chattel mortgages (for example in the form of a bill of sale), others bestowing rights over property that fell short of outright ownership, such as the pledge or rights of possession held by warehousemen and factors.¹⁵ It is evident that the bill of sale was a popular form of security. As a commentator at the time writes

the system of credit which prevails so extensively in this country has made bills of sale so general, that in a solicitor’s office of general business, a mortgage of goods and chattels is as frequently resorted to as a mortgage of lands and tenements.¹⁶

This was particularly so for professional money-lenders. With such a high use of this form of security, the whole credit system came under pressure to provide some form

¹⁴ House of Commons Select Committee ‘Report of the Select Committee on Bills of Sale Act (1878) Amendment Bill’ HC (1881) 341.

¹⁵ Cornish *Law and Society in England* (n 2) 237 These rights had effectively become bailments, with detailed rules depending on the type of transaction.

¹⁶ Anon ‘A Treatise on the Law of Bills of Sale’ *The Law Times* (30 December 1854) 151.

of notice for new creditors with regard to existing rights over the borrower's property.¹⁷

In 1854 bills of sale were required to be registered at the High Court under the Bills of Sale Act 1854.¹⁸ If the bills were registered in accordance with the Act then in most cases they succeeded against execution creditors,¹⁹ but there were loopholes that allowed the dishonest to evade the Act's provisions. Registration was required within 21 days of the creation of the bill, which gave money-lenders the opportunity to create what were effectively roll-over bills, recreating a bill every 14 or 20 days so that there was always a bill in force that did not require registration. There was complaint in the House of Commons that the 1854 Act had let 'dishonestly inclined moneylenders and other persons ...drive a coach and six through the Act'²⁰ by means of creating these continuous short bills of sale. Of course this was not the only problem—the grantor of the bill was also subject to extortion, having to pay the grantee/ creditor an extra sum of money if he wished to keep the existence of the bill a secret, secrecy and discretion being of ultimate importance to many borrowers.²¹

The 1854 Act was amended in 1866²² and then in 1878 with the Bills of Sale Act 1878.²³ The purpose of this latter legislation as in the 1854 Act was the protection of creditors who advanced money or credit to a person on the basis of their apparent ownership of goods, by the requirement of registration of bills of sale. However, the 1878 Act also took bills of sale outside the reputed ownership provisions of the bankruptcy rules therefore making registered bills effective against a borrower's trustee in bankruptcy. Before the Act came into force, property in possession of a borrower over which a bill of sale had been granted would pass on

¹⁷ Cornish *Law and Society in England* (n 2) 240.

¹⁸ 17 & 18 Vict c 36.

¹⁹ Unless the goods were actually seized in distress eg for rent, or were deemed to be part of a bankrupt's estate by the reputed ownership provisions of the later Bankruptcy Act 1869 (32 & 33 Vict c 71).

²⁰ Parl Debs (series 3) vol CCXXII col 791 (24 Feb 1875) per Mr Lopes (Conservative).

²¹ This wish for secrecy is outlined by witnesses to the 1881 Select Committee (n 14) q 513 (Mr Abraham Collins) q 730 (Mr Usher).

²² Bills of Sale (Amendment) Act 1866 (29 & 30 Vict c 3). This Act required renewal of registration of bills of sale every five years.

²³ 41 & 42 Vict c 31.

bankruptcy to the borrower's trustee in bankruptcy, under the 'Order and Disposition Clause' of the Bankruptcy Act 1869;²⁴ the grantee of a bill of sale to which the goods were subject was powerless unless a demand for payment had already been made and defaulted upon.²⁵ After the 1878 Act came into force, registered bills of sale were deemed to be good as against the trustee in bankruptcy under section 20. As a result, the possession of a registered bill of sale became an attractive proposition for money-lenders. This was seemingly not only with regard to traders but also other borrowers, money-lenders now registering bills of sale not only in the more traditional forum of the trader-borrower but also as a means of securing loans for small personal loans to individuals. In this latter scenario, a bill of sale would be granted either on trade goods or on personal belongings such as furniture, securing sums borrowed for amounts from as little as £3 up to as much as £500.²⁶

This was an unforeseen development in terms of the overall achievement of the legislation and there was a reported rapid rise in the number of bills. One MP in the House of Commons claimed that the number had quadrupled in just two years,²⁷ although the Lord Chancellor, who felt that the general increase was simply due to increased visibility, met this supposed dramatic increase with some cynicism.²⁸ Indeed the evidence for this stated explosion in the use of bills of sale by money-lenders was also rebutted by one of the witnesses to the 1881 Select Committee.²⁹ In any event it became clear that in many cases bills of sale were being used to exploit borrowers³⁰ and the issue became not so much about the security itself, but rather the mode in which it was used by money-lenders.

²⁴ 32 & 33 Vict c 71 s 15(5).

²⁵ As confirmed by the judgment of Sir James Bacon CJ in *Ex p Harding In re Fairbrother* (1873) LR 5 Eq 223—*Cornish Law and Society in England* (n 2) 241.

²⁶ 1881 Select Committee (n 14) q 775 (Mr William Usher) q 163 (Mr Henry Buer) qq 454–458 (Mr Abraham Collins).

²⁷ Parl Debs (series 3) vol CCLXVII col 396 (8 Mar 1882) per Mr Monk.

²⁸ Parl Debs (series 3) vol CCLXX col 549 (19 June 1882).

²⁹ In this witness's opinion the overall number of bills had decreased since the 1878 Act, registered bills simply taking up a larger proportion of the figures reported. Registration gave the lender more security and less incentive for lenders to grant loans on unregistered bills of sale, something that had been common practice before the 1878 Act. 1881 Select Committee (n 14) qq 500–514 Mr Abraham Collins.

³⁰ Crowther (n 3) [2.1.20]–[2.1.21].

In 1882 an amending Act was passed; this time it was legislation specifically designed to protect borrowers as opposed to creditors. At this point a differentiation in legislative treatment was made between absolute and conditional bills of sale,³¹ conditional bills of sale being security bills, i.e. those used by the money-lenders. Safeguards, which did not affect absolute bills but only security (conditional) bills, included detailed formal requirements, prohibition in most circumstances of bills covering after acquired property, abolition of bills under £30 and restrictions as to the contents of a bill. In general terms the provisions of the Act were fairly draconian—for example non-compliance with registration and attestation provisions resulted in the bill being completely void, not only against trustees in bankruptcy and other creditors but as against the grantor as well.³² This may seem severe, yet equally tough penalties have effectively existed in the consumer credit legislation of today. Section 127 of the Consumer Credit Act 1974³³ automatically prevents, in certain circumstances, the enforcement of an improperly executed agreement.³⁴ This section however will be amended by section 15 of the current Consumer Credit Act 2006, which will, when implemented, repeal sections 127(3)–(5), in effect allowing the court to decide whether an agreement is enforceable, regardless of the infringement.

In 1854 a commentator in the *Law Times* had warned his practitioner readers that ‘a bill of sale is a security that he cannot recommend to his clients as an investment’³⁵ and the Registrar of Court Circuit No 15, Stockton-on-Tees, as a

³¹ Absolute bills were bills not taken to secure monetary payment. For a consideration of the difference in statutory treatment between an absolute and conditional bill of sale *Halsburys Laws of England* (n 7) Vol 4 [602][612] [820].

³² Bills of Sale Act (1878) Amendment Act 1882 (n 5).

³³ C 39.

³⁴ Ss 127(3)–(5). Where the infringement relates to the signing of the agreement (s 61(1)(a)), or where it relates to cancellable agreements—provision of copies or notice of cancellation rights under ss 62–64. The severity of this section was challenged as a contravention of the European Convention of Human Rights in *Wilson v. First County Trust Ltd*, [2003] UKHL 40, [2003] 4 All ER 97, a case relating to a loan from a pawnbroker. The case reached the House of Lords but was ultimately unsuccessful, their Lordships deciding that section 127(3) was in fact compatible both with Article 1 (right to peaceful enjoyment of possession) and Article 6(1) (right to fair and public hearing with regard to civil rights). Their Lordships felt that the lender still had access to the court to argue the enforceability of the agreement and that Article 1 was not contravened as the section was proportionate to its aim of consumer protection.

³⁵ ‘A Treatise on the Law of Bills of Sale’ (n 16).

practising solicitor, echoed this sentiment.³⁶ This was even more so after 1882. The result of the new legislation was that it became difficult for a lender to be sure he/she had complied with all the requirements, and the bill of sale lost its commercial attraction with regard to lending to individuals.³⁷ Indeed the 1882 Act has been described as ‘making it virtually impossible for traders to use chattel mortgages as a device to secure ordinary credit transactions.’³⁸ Over-regulation had effectively killed off the bill of sale as a security device for individuals. The temptation to over-legislate in the consumer credit arena is a question that could be posed with regard to modern reform. One issue is the imposition of an interest rate ceiling. Within current parliamentary debate high interest rates are seen as a major factor in exploitation of the more vulnerable consumer.³⁹ Whilst there has been ample analysis and evidence to show such a restriction does not work and in fact carries the danger of disenfranchising a large section of the lower end of the market,⁴⁰ many MPs still push for this reform.

The Bills of Sale Act 1878 had effectively put the spotlight on the practices of money-lenders resulting in a very different approach to the regulation of lending. As the Lord Chancellor said in 1892, the Bills of Sale Acts were three Acts of Parliament with different objectives. The Acts of 1854 and 1878 had the object of protecting creditors against the fraud of debtors. In 1882, however the tables had turned. Far from the debtors being seen as the culprits, the object was ‘to preserve impecunious and illiterate debtors from the machinations of the moneylenders’.⁴¹ It has been said the provisions of the 1882 Act, which effectively allowed for the non-

³⁶ Lord Chancellor ‘Circular Letter of the Lord Chancellor to the Judges and Registrars of County Courts in England and Wales respecting Bills of Sale and the operation of the Act of 1878’ (C (2nd Series) 2859, 1881) 15.

³⁷ The Act did not affect credit provided to companies, such accommodation being outside its ambit. Bills of Sale (1878) Amendment Act 1882 (45 & 46 Vict c 43) s 17. Cornish *Law and Society in England* (n 2) 242.

³⁸ Crowther (n 3) [2.1.21].

³⁹ And over-commitment eg Hansard HC (series 6) vol 391 col 277 (30 October 2002); Hansard HL vol 654 col 1573 (series 5) (21 October 2003); Hansard HL (series 6) vol 661 col 10 (10 May 2004);

⁴⁰ Eg ‘Market Considerations in the Formulation of Consumer Protection Policy’ D Cayne and MJ Trebilcock *University of Toronto Law Journal* (1973) 23, 396; ME Staten and RW Johnson ‘The Case for Deregulating Interest Rates in Consumer Credit’ (Credit Research Center, Purdue University, 1995); Policis Report ‘The effect of interest rate controls in other countries’ (August 2004).

⁴¹ Parl Debs (series 4) vol III col 532 (4 April 1892) Lord Chancellor, 1st Baron Herschell. Liberal.

recovery of a debt, were the precedent for the later severe regulation of money-lenders under the Moneylenders Act 1900. (“the Act”).⁴² It is difficult to state with certainty from an examination of the parliamentary debates surrounding the 1900 legislation whether the regulation contained in the 1882 Act provided a model for the later restrictions. The idea of preventing recovery of debt in certain situations is certainly apparent in both sets of provisions, but there is some disparity as the Act provided for non-recovery under very different circumstances. Whereas the Bills of Sale legislation contained well-defined guidelines as to the non-recoverability of a debt,⁴³ the Act offered no such clarity. As will be illustrated, the provisions allowed for agreed terms to be set aside at the judge’s discretion with power to make such order as thought fit, thus introducing an element of unpredictability as to the creditor’s ability to enforce his debt. In effect parties to the contract could only speculate as to the validity of their agreed terms. There is no doubt, however, that one consequence of the progress of the Bills of Sale legislation was that it awoke an interest in the proceedings of money-lenders, the regulation of secured lending resulting ultimately in the regulation of unsecured lending.

(b) The Legislature and Bills of Sale

Whilst money-lending itself initially seemed to excite little interest in Parliament, as has been mentioned the general interest in the provision of credit to the individual manifested itself in the discussions relating to the practice of using bills of sale as security for a loan. Bills of sale as a means of securing credit to the individual certainly attracted a fair amount of parliamentary debate and without doubt, more than pawnbroking. In the year of the final repeal of the Usury Laws, lending was still a topic worthwhile considering and a Bill, ‘Bill intituled Act for preventing Frauds on Creditors by Secret Bills of Sale of Personal Chattels 1854’⁴⁴ was given some consideration in Parliament. The issues however, had nothing to do with the plight of a borrower—perhaps to be expected in the year when capped interest rates were abolished, more or less at the behest of the financial and mercantile interest. This Bill and the resultant Act were all about protecting traders, as creditors, against

⁴² Cornish *Law and Society in England* (n 2) 242.

⁴³ Eg if under £30 or where there was non-compliance with the strict formality requirements.

⁴⁴ HC (1854) 55.

fraudulent preferences. As one MP explained in the House of Commons debtors were 'in the habit of transferring to particular and favourite creditors' goods and chattels on the strength of which they had obtained credit from others.'⁴⁵ Concealed bills of sale were certainly a problem. The debate on the Bill was relatively short, and apart from a registered concern from a couple of MPs that the Bill only related to those engaged in trade and subject to the bankruptcy laws, the Act was passed with little other comment, other than hopes expressed as to the advantages that would be brought to the commercial community. The later 1878 Act did not receive much more attention, concerns about apparent defects in the initial legislation, for example evasion of the registration provisions, concentrating on how such defects affected creditors.

As has been discussed the results of the ensuing legislation had a marked effect. The result of allowing holders of bills of sale preference over trustees in bankruptcy⁴⁶ created an increase in the use of registered bills of sale, and in many cases, according to general opinion, inappropriate use. The bill of sale had become a tool of exploitation and the desperation of borrowers and indignation of those who championed their cause began to be felt within Parliament. The concern for the borrower, taking second place in the late 1870s, now in the 1880s enjoyed prime position in the reformers' minds. Only three years later, under a Liberal Government, the 1881 Select Committee was set up to consider the Bills of Sale Act (1878) Amendment Bill.⁴⁷ The Bill was introduced with the aim of not only restoring the supremacy of the Order and Disposition clause of the Bankruptcy Act and the trustee in bankruptcy, but also of protecting borrowers from the oppression of the unscrupulous money-lender. Now the major concern was for the borrower and protection against unfair and fraudulent practices, rather than general protection of creditors.

This indicated a marked shift in gear within Parliament towards the provision of credit to the individual, a development at least partly due to outside pressures. There is no doubt that there was already a head of steam behind the drive for reform

⁴⁵ Parl Debs (series 3) vol CXXXIII col 474 (17 May 1854) per Mr Mullings (Conservative).

⁴⁶ Bills of Sale Act (41 & 42 Vict c 31) s 20.

⁴⁷ 1881 Select Committee (n 14).

in favour of the borrower from forums other than Parliament—the existing state of affairs had already been condemned by the judiciary in replies to a circular sent out to judges in 1881.⁴⁸ Indeed the judiciary had been fighting against money-lenders for some time. According to one MP, the Judge of Bradford County Court had described the evils produced by the Act as ‘ruinous’ to borrowers and that bills of sale provided a vehicle for defeating the claims of bona fide unsecured creditors⁴⁹ i.e. everyone was a loser apart from the money-lender. This momentum gathered pace in Parliament with language verging on the emotive and reverting to the sinister image of the usurer. The Attorney General, for instance, admits

that he was waging a war against a class of men—the usurers...he regarded these men as absolute enemies of the poor men—they were perfect pests of society...they chiefly directed their efforts at those who could not protect themselves, but who would be protected by the legislation now proposed.⁵⁰

To add to the highly charged atmosphere surrounding the proposed reform, the money-lenders in their turn complained to the Select Committee that the judges were biased against them and that it was difficult for them to assert their rights in the courts.⁵¹

Whether there was bias or not, the line of questioning employed by the Committee demonstrates an awareness that all was not right with the combination of money-lending and bills of sale. Even the money-lenders had to admit action was required. One money-lender, Mr Henry Buer admits that even though it would affect his business, borrowers would be better off if they were not able to borrow on the basis of such a device.⁵² It would appear then, that the reform of the provision of credit at this time was driven by the desire to protect borrowers. However this was not protection through the regulation of general credit provision, but rather control of the methods of one particular class of credit provision, namely the bill of sale granted to the money-lender. This pre-occupation with the money-lender, by the time of the consideration of the Moneylending Bill in the late 1890s, had become the essential

⁴⁸ Lord Chancellor Circular Letter to the Judges and Registrars (n 36).

⁴⁹ Parl Debs (series 3) vol CCLXVII col 396 (8 March 1882).

⁵⁰ Parl Debs (series 3) vol CCLXVII col 1401 (20 March 1882).

⁵¹ 1881 Select Committee (n 14) q 750 Mr Usher.

⁵² Ibid q 32. Another admitted the misery caused to borrowers by small bills of sale q 130.

driving force behind reform. Indeed it would be tempting to describe the reaction of Parliament by this time as verging on persecutory, if it were not for the fact that malpractice was common.

During the course of debates surrounding the amendments proposed by the Select Committee, a number of issues were raised which show an awakening to other issues relating to credit provision such as had already started to emerge in the consideration of pawnbroking. Visibility of information and comprehension of the terms of the loan, for example, feature once more. In the Bill there was the requirement for the terms of the bill of sale to be explained to the borrower 'so that there might be some security that the people who gave them really understood what they were doing'.⁵³ Now recognised, this issue of information as a tool of protection never really leaves the arguments surrounding the provision of credit to the individual. Small loans and the practice of using bills of sale for such loans were also addressed. This was an issue the Committee particularly concentrated on, these small loan bills causing some of the greatest hardship to poorer borrowers, who would find all their belongings swept away by the money-lender on non-payment of an instalment. However it was not only non-payment that might lead to this unfortunate event. Many money-lenders included a long list of scenarios whereby they would be entitled to enter the borrower's property and seize the chattels subject to the bill. Lord Coleridge explains the object of the Bill to the House of Lords, describing the injustices of the system:

the smaller bills of sale given to moneylenders were undoubtedly very oppressive and the interest exacted was often outrageous. He held in his hand a copy of a bill of sale, which contained no less than 21 conditions of forfeiture⁵⁴

As far as small bills were concerned

The accommodation furnished by such bills was small, it was granted on ruinous terms and consequently the whole of the property was often swept away⁵⁵

⁵³ Parl Debs (series 3) vol CCLXVII col 396 (8 Mar 1882) per Mr Monk.

⁵⁴ Parl Debs (series 3) vol CCLXX col 1546 (19 June 1882) Lord Coleridge was a Liberal MP.

⁵⁵ Parl Debs (series 3) vol CCLXX col 1547 (19 June 1882).

Small loans per se were not the problem; small loans secured by bills of sale were. It was realised by now that those who required loans, particularly for small amounts, were often those who were the poorest and most in need.⁵⁶ Such people needed protection from those who would take advantage of their situation and the harshness of terms of the bill of sale could not in the view of many be justified.⁵⁷ Cost was again an issue with concerns about high interest rates being countered with arguments as to the expense of servicing small loans.⁵⁸

According to the White Paper 'Fair Clear and Competitive The Consumer Credit Market in the 21st Century' ("White Paper 2003"),⁵⁹ restricted credit availability to the vulnerable and the high cost of such credit is a factor that can cause over-indebtedness, and as such needs to be addressed. What is evident during the discussions surrounding money-lending is that the image of the vulnerable borrower needing protection, already starting to emerge with the regulation of pawnbroking, is a cause of concern. This is in comparison to other borrowers who were effectively seen as less deserving of protection, the presumption being that these other borrowers (both the rich and business) could look after themselves.⁶⁰ An illustration of this is perhaps the exclusion of debentures given by incorporated bodies from the restrictions contained in the Bills of Sale Act 1882.⁶¹ Again this emphasis is mirrored in the latest reforms being brought to bear on modern consumer credit legislation. Whilst protection of the consumer in general is important, it seems to be the fate of the vulnerable consumer more than any other that drives policy behind the amendments.⁶² This is perhaps emphasised by the fact that those borrowers perceived as being able to look after themselves, i.e. business borrowers

⁵⁶ This has already been shown by the attitudes to pawn demonstrated in the 1870s.

⁵⁷ Anon 'Bills of Sale under the new Act' *The Law Times* (30 September 1882) 396.

⁵⁸ Parl Debs (series 3) vol CCLXVII col 396 (8 Mar 1882); Parl Debs (series 3) vol CCLXVII col 399 (8 Mar 1882); Parl Debs (series 3) vol CCLXVII col 1402 (20 March 1882).

⁵⁹ Cm 6040 [5.46].

⁶⁰ 1881 Select Committee (n 14) q 550 Mr Abraham Collins.

⁶¹ Traders were seen as being able to gain protection through limited liability status. Once incorporated, when it came to borrowing they were to be treated differently by the law from private individuals. Cornish *Law and Society in England* (n 2) 262.

⁶² A detailed discussion of this observation can be found in chs 7 and 8 of this study.

and 'high net worth' borrowers are exempt, or are given the ability to exempt, themselves from the protection of the 1974 Act.⁶³

It was of course not just in a private capacity that the individual required the facility of credit. Small businesses as well as large also needed credit to function efficiently and credit was needed for efficient freedom of trade:

there was a large number of people carrying on a small trade, who by the fact that they were able to get small loans of £15 or £20 were able to go on from week to week, and in this way to get over their difficulties⁶⁴

They [the Committee] must take care not to interfere unduly with legitimate transactions between wholesale houses and small traders. A bill of sale given by a small dealer to a wholesale house in order to enable him to carry on his trade should be valid.⁶⁵

Very much like earlier arguments as to the control of credit and the commercial interest versus the private individual's interest, trying to find a balance still seemed an important consideration, freedom of trade and freedom of contract being regarded as essential to business concerns, although here the situation was different from the Usury Laws. The majority affected by the provision of credit was no longer the mercantile community but the growing consumer community and the private individual. As the Attorney General says 'for every bill of sale of a commercial nature there were 10 that were in no way connected with commerce'.⁶⁶ The struggle between business versus private interests also had another element to it. Initially the arguments were about creditors' interests (whether those of the money-lender or other creditors) versus borrowers' interests. The initial bills of sale legislation of 1854 was concerned with protection for those in the commercial community that gave the loans although it was creditors other than money-lenders that enjoyed the majority of sympathy. It was the commercial world that pushed for the amendments

⁶³ Ss 4–5 Consumer Credit Act 2006. These borrowers however will still have the protection of the unfair credit relationship provisions of ss 19–22.

⁶⁴ Parl Debs (series 3) vol CCLXVII col 1403 (20 March 1882) per Attorney-General Sir Henry James (Liberal).

⁶⁵ Ibid col 1404 per Mr Findlater.

⁶⁶ Ibid col 1410.

in the 1878 Act.⁶⁷ But as time went on, the discussions became less focussed on the creditor versus the borrower but rather centralised on borrowers' interests whether business or private; business borrowers needed complete freedom to obtain credit whereas the private borrower was perceived as needing protection.

By 1882 the private consumer and small time individual business borrower had emerged as the major concern. Whilst there was still disquiet about general creditors losing out to a creditor under a bill of sale (normally the money-lender), the anxiety had changed from being about fair traders losing out when debtors granted secret bills of sale, to the concern that bills of sale were being used to the ruin of borrowers, often the very traders the initial Bills of Sale Act was set up to assist.⁶⁸ There was, it is obvious, a great pressure for protection of the borrower. Whilst this support for the individual borrower itself was not entirely new, the strength of argument had changed. Rather than those advocating protection having to justify their stance as against the freedom of parties to contract with each other as they wished, and the importance of the unfettered ability to trade, now it was the advocates of these freedoms that appeared to be on the defence. The change was subtle at first but undeniable and became more evident in the later debates on money-lending. Freedoms of contract and trade did not enjoy the supremacy they once had, and the balance of power appeared to be shifting. Atiyah goes so far as to say the 1882 Act 'was one of the clearest examples of consumer protection legislation which interfered with the freedom of contract'⁶⁹ and was a clear example of a new trend for paternalistic legislation.⁷⁰ Cornish in contrast sees the 1882 legislation as merely an indication of a desire for borrower protection, which had already resisted deregulation of pawnbrokers and was, in practice, exercised by the courts.⁷¹ Whilst protection for the credit consumer could no longer be seen as something new, the 1882 legislation did raise the stakes. Protection of the borrower no longer required simply ensuring a degree of control over credit activity but also apparently justified the much stronger control over the agreement itself—the regulation did not so much

⁶⁷ Parl Debs (series 3) vol CCLXVII col 1410 (20 Mar 1882).

⁶⁸ Parl Debs (series 3) vol CXXXIII col 474 (17 May 1854) cf Parl Debs (series 3) vol CCLXVII col 1404 (20 March 1882).

⁶⁹ P S Atiyah *The Rise and Fall of the Freedom of Contract* (Clarendon Press, Oxford 1979) 710.

⁷⁰ *Ibid* 711.

⁷¹ Cornish *Law and Society in England* (n 2) 242.

refer to the content of the terms of the credit as to whether they could be enforced at all. This was explored further in the money-lending legislation, when compliance with the pure technicalities provided for by the Act was not necessarily enough to save the terms of an agreement. The limits of enforceability were no longer black and white but dictated by the discretion of individuals, namely judges.

The Bill presented before Parliament as a result of the Select Committee's findings as a whole met with very little real opposition and was passed as the 1882 Bills of Sale Act (1878) Amendment Act.⁷² It did indeed severely curtail the use of the bill of sale as a security, but it did not necessarily curtail the activities of the money-lender even though, on analysis, this seemed to be the underlying intent of the legislation. In some respects there is a similarity with those debates surrounding the repeal of the Usury Laws in the early part of the century, nowhere more evident than in the vilification of the person providing credit in the form of a loan of money.⁷³ Creditors other than professional money-lenders were referred to as 'legitimate lenders' and 'bona fide creditors' intimating that all money-lenders operated illicitly and in bad faith, which was not strictly true as not all money-lenders operated outside the law. However, unlike the debates over the Usury Laws (and more in line with the pawnbroking debate) the fate of the poorer class of individual borrower enjoyed far more attention. It was due to this ever increasing concern for the borrower as a consumer of credit, and his/her need for some form of protection, that the position of the money-lender became the focus of attention, the money-lender not only being the prime grantee in bills of sale transactions but the prime provider of credit.

The Select Committee had started to raise issues in relation to the general business of money-lending, but it was another twenty years before these issues were seriously addressed. Controls such as licensing and the curbing of interest rates were all mooted yet Parliament shied away from these restrictions. Controlling the activities of these individuals was left to the Bills of Sale Acts until the very end of the century, when finally legislation directly regulating the practice of money-lending was considered and passed.

⁷² 45 & 46 Vict c 43.

⁷³ This point is also made in *Cornish Law and Society in England* (n 2) 223.

3. MONEY-LENDING

(a) The Money-lenders Market

Money-lending practice seemed to operate at a number of levels. There was the professional money-lender who would lend money to the upper and middle classes and those with higher standing within the working classes. Loans to this group of borrowers might be of various amounts, perhaps secured through means of a bill of sale (although this means of security for personal loans lost its popularity after the harsh regime introduced by the Bills of Sale (1878) Amendment Act 1882). There was however another type of money-lender. This was the small time money-lender who dealt almost entirely in very small loans to the poorest borrowers.⁷⁴ This kind of money-lending, needless to say, often took place outside the realms of registration or regulation put in place over the course of the latter half of the 19th century, and was usually either secured by a bill of sale or granted under the terms (often harsh) of a promissory note.

As has already been indicated, concern as to the activities of money-lenders, illicit or otherwise, had already surfaced in the 1880s with regard to the use of bills of sale. After the Bills of Sale Acts had been passed, Parliament and the legislature seemed exhausted with the effort, and although there were occasional attempts to bring money-lenders to the fore again it took another 15 years before further regulation became a matter of discussion and it appears that the County Court judges were the ones that set the ball rolling. They witnessed the consequences of default on a loan from the money-lender, and they did not like what they saw. Without legislation to assist them in their wish to protect the individual they would use whatever means at their disposal to defeat the harsh terms that the money-lender attempted to enforce. One was by ordering repayment terms that ensured the creditor would never get the full amount he claimed.⁷⁵ The other was to set aside the bargain

⁷⁴ Often termed the 'street moneylender' eg Hansard HC (series 5) vol 194 col 1543 (23 April 1920). A discussion about street money-lenders in relation to the pawnbroking trade can be found in M Tebbutt *Making Ends Meet: Pawnbroking and Working Class Credit* (Leicester University Press, New York 1983).

⁷⁵ Parl Debs (series 4) vol LXXXIV col 685 (21 June 1900); Cornish *Law and Society in England* (n 2) 229–230.

by invoking the equitable requirement that a bargain should not be unconscionable. This latter remedy was usually only invoked in two particular cases, namely with regard to post obit bonds⁷⁶ and persons expecting to inherit a reversionary interest,⁷⁷ although it appears the principle was occasionally adopted in other credit cases as well.⁷⁸

As far as the courts were concerned freedom of contract was all very well, but the unfairness of the terms they were being asked to enforce could not be justified—even under a maxim as established as this.⁷⁹ The harsh terms regularly employed by the money-lenders began to attract attention, whether under bills of sale, promissory notes or other documents, and the money-lenders were doing a pretty efficient job of advertising their activities themselves. One particular complaint aired⁸⁰ and one of the major reasons for the later Moneylenders Act of 1927 was the proliferation of money-lenders' circulars advertising credit, indiscriminately sent to individuals through the post—an early “junk mail” problem. As the parliamentary debates illustrate this annoyed recipient MPs⁸¹ no end and with the money-lenders drawing attention to themselves in this way it was perhaps inevitable that the question of regulation would arise again.

(b) The 1898 Select Committee

By 1897 the pressure for change was too strong to resist and a Select Committee was set up, this time during a Conservative administration, to investigate the practices of money-lenders. Time ran out before the Committee could complete its deliberations

⁷⁶ These relied on repayment at some appointed time in the future, normally the date upon which the borrower was due to come into an inheritance.

⁷⁷ Cornish *Law and Society in England* (n 2) 219–220.

⁷⁸ *Neville v. Snelling* (1880) LR 15 Ch D 705 (Ch). This case was used, with others, as support for the proposition that the doctrine of unconscionability should be embodied in statute—HH Bellot and RJ Willis *The Law Relating to Unconscionable Bargains with Money-lenders* (Stevens and Haynes, London 1897).

⁷⁹ HC Select Committee on Money-lending ‘Report of the Select Committee on Money-lending HC (1898) 260 iv cf His Honour Judge Collier’s evidence to the Committee q 303.

⁸⁰ *Ibid* iii.

⁸¹ Eg Hansard HL (series 5) vol XIV cols 691, 694 (30 June 1911).

and another similar Committee was set up the following year to finish the job.⁸² One thing is clear from the outset—impartiality was never going to be its strong point. The title alone of the 1898 Committee indicates as much:

THE SELECT COMMITTEE appointed to inquire into the alleged evils attendant upon the system of Money Lending by Professional Money-lenders, at high rates of Interest or under oppressive conditions as to Repayment

The tone of the language speaks volumes and complaints were made in the House of Commons about bias apparently permeating the entire proceedings. As the MP for West Fifeshire complains:

This Committee had a very great deal of very good evidence and sound sense put before them in the course of their proceedings, but they would not listen to it...the Committee seemed bent not only not to hear evidence showing the legitimacy of a great deal of money-lending, but to put almost a kind of pressure on every witness who came before them to speak of the horrors of the practice.⁸³

Certainly when the suggested preamble to the new Act is considered, such complaints are understandable. It has a tone and emotive language of the old moralistic arguments about usurers referring to ‘harsh and unconscionable bargains’, ‘deceptive methods’ and ‘the great injury’ inflicted on borrowers.⁸⁴ In fact Mr Birrell, MP for West Fifeshire describes it as inflammatory.⁸⁵ In their defence the chairman of the Committee, Mr T.W. Russell, Secretary to the Local Government Board, offers only the fact that the Committee’s remit was not to investigate money-lending as a whole, but only its abuses.⁸⁶ With all this in mind, the rather draconian recommendations of the Committee are hardly surprising. That is not to say that the abuses did not need attention; advertisements were often misleading or false, terms could be confusing or incomprehensible, default provisions were often

⁸² HC Select Committee on Money-lending ‘Report of the Select Committee on Money-lending’ HC (1897) 364; 1898 Report of the Select Committee on Money-lenders HC (1898) 260.

⁸³ Parl Debs (series 4) vol LXXXIV cols 690–691 (21 June 1900) Mr Birrell.

⁸⁴ The preamble was not adopted.

⁸⁵ Parl Debs (series 4) vol LXXXIV col 690 (21 June 1900).

⁸⁶ Ibid.

extraordinarily harsh and interest rates extortionate. Many borrowers were suffering real hardship due to patently unfair yet strictly legal practices of some money-lenders and there was a general recognition that some form of action was required.

The first matter that the Committee decided was that there was to be no precise definition of money-lender. They came to the conclusion that a definitive description of the term might cause confusion and that as “money-lender” was understood by the trade and its customers, it would merely be sufficient to refer to ‘transactions with persons carrying on the business of a money-lender in the course of such business’⁸⁷ The lack of a definition was later recognised as a mistake and various trades that would have been caught in the net, for example pawnbrokers and bona fide bankers were excluded,⁸⁸ the idea being that these lenders did not need to be regulated by the Act. The Committee in 1898 however had confidence that the courts would be able to identify the transactions the Act was intended to regulate, through the suggested (and less than clinically worded) preamble.⁸⁹

The powers of the courts were certainly seen as a useful tool. Nowhere is this more obvious than in the most dramatic of the recommendations in the Report, namely the discretionary ability of the courts to re-open legitimate bargains. What makes the recommendation even more striking is that such a power was to be wielded without any automatic right of appeal; this proposal, perhaps predictably, seems to have had its origin in the suggestions of various judicial witnesses to the Committee.⁹⁰ As has been already stated the judges had begun to tire of the unfairness that freedom of contract could bring in cases of borrowing and some, although not all judges that were witnesses to the 1898 Select Committee felt that some interference was advisable.⁹¹ The Committee seemed to agree, providing control through the means of empowering courts to re-open bargains, yet it retreated from laying down specific criteria as to what would constitute justification for re-

⁸⁷ 1898 Report of the Select Committee on Money-lenders (n 82) v.

⁸⁸ Moneylenders Act 1900 (63 & 64 Vict c 51) s 6. This exemption was with the caveat that the primary object of their business was not to lend money.

⁸⁹ 1898 Report of the Select Committee on Money-lenders (n 82) v.

⁹⁰ *Ibid* vi.

⁹¹ *Ibid* Mr Justice Hawkins q 450–451, Judge Lumley qq 4657–4664 cf Mr Justice Collier q 303.

opening a transaction's agreed terms, leaving it entirely to the judges' discretion. It was may be felt a stated rule could be too rigid, vague guidelines being sufficient.

However these carried their own dangers of inconsistency as MPs themselves argued in the debates surrounding the subsequent Bill. This leaves a suspicion that the Committee were not perhaps quite courageous enough to define the limits of contractual freedoms for loans, fearing a knock on effect in the marketplace as a whole. Indeed the Report confirms there was a desire to ensure non-interruption of legitimate trade and a re-introduction of an interest rate ceiling was ruled out, being seen as inadaptable and therefore inappropriate to loan transactions. There was also an attempt to differentiate between the transactions of professional money-lenders and what they termed "ordinary commercial transactions" showing signs of an effort to separate business from private lending, a distinction already being made in the earlier Bills of Sale legislation with the pro borrower provisions of the Bills of Sale Act (1878) Amendment Act 1898⁹² and the exemption of incorporated borrowers under section 17 of the same Act. Having made this distinction between commercial and non-commercial credit, the former being credit that should remain unhampered, the Committee concerned itself with credit offered and provided to the individual, concentrating on the terms of the agreement and its availability and comprehensibility, copies of documents, irresponsible lending through indiscriminate and misleading advertising and the protection of vulnerable consumers.

There were also practical measures that were considered and recommended by the Committee. These included a registration system—the Committee shied away from complete licensing—keeping of accounts and places of court action. These too attracted discussion in Parliament, but the suggestions were by no means as far-reaching as the provisions referred to above. The Committee also made further recommendations as to bills of sale, proceedings on bankruptcy of the borrower and the extension of the Wages Attachment Abolition Act 1870, none of which were implemented in the Moneylenders Act 1900. What the legislation did enact was the ability for the courts, upon proceedings for enforcement, to re-open a money-lending transaction if the cost was excessive and the transaction was harsh and

⁹² Atiyah *The Rise and Fall* (n 69) 709–710.

unconscionable, or indeed if ‘the court of equity would give relief.’⁹³ The Act also provided for the mechanics of a registration system for money-lenders and established penalties for non-compliance with the registration provisions⁹⁴ or for fraudulent or misleading behaviour.⁹⁵

(c) Parliamentary Debates

As has been illustrated in the previous chapter, Parliament’s interest in pawnbroking could at best be described as intermittent. This would be an inappropriate description of the interest displayed in money-lending. Although there was a lull between the Bills of Sale legislation and the Moneylenders Acts the debates surrounding these pieces of legislation were often lengthy and frequently lively. As has been the case in the other areas of credit investigated so far, it was often the same Members of Parliament that contributed most vociferously to the debate, whether advocates for or against regulation. Even so the debates, particularly in the Commons, seemed to be well attended and the issue of money-lenders had definitely caught the imagination of the House.

A number of issues were raised as a result of this renewed interest in the activities of the money-lender. Some of them were the old favourites relating to freedom of trade and freedom of contract (this ended up actually dominating the debate) and the balance between commercial and consumer interests as had been indicated by the Select Committee itself. Others related to more modern concerns about vulnerable borrowers and the extent of their need for protection. The priority of protecting the more vulnerable was also present in areas other than the law. By the late 1800s the new direction of redistributive thinking of economists such as Alfred Marshall had taken hold, and the efficiency of the laissez-faire doctrine was being seriously questioned. As data and statistics became more freely available, so the economists used this information to help form their policies. It became clear to them, as the realities of the market place were observed, that the doctrine of laissez-faire and complete freedom of contract did not always produce results that were of

⁹³ Moneylenders Act 1900 s 1.

⁹⁴ Ibid ss 2–3.

⁹⁵ Ibid s 4.

maximum benefit to the public, especially where the initial distribution of wealth was unbalanced.⁹⁶

These ideas must have had some influence in Parliament and whilst they may not have had a direct effect on the construction of the money-lending legislation there is no doubt that the idea of advantage to the public and those within the public requiring protection were of paramount importance, as opposed to being a factor that merely needed to be considered. This new emphasis on protective legislation had already made its mark with the Bills of Sale legislation passed in 1882 during the premiership of William Gladstone . As Atiyah describes it, the prohibition of bills for under £30 ‘was an illustration of the new type of paternalist legislation which deprived some members of the community of a valuable freedom in order to protect others from their own folly’.⁹⁷ This paternalist legislation was not to everyone’s taste. One MP, Colonel Wedgewood, was to complain to the House of Commons in 1926 when discussing the Moneylenders Bill (which would eventually become the Act of 1927):

We have too much of this well-intentioned grandmotherly legislation designed to make people moral by Act of Parliament, or designed, as in this case, to prevent a fool being parted from his money⁹⁸

He took this interference as a mixture of high-mindedness and a desire for economic efficiency:

I detest this habit of superior people trying to make the workers moral, industrious, virtuous and dry, in order to secure more efficient labour in the markets of the world⁹⁹

When the first direct money-lending legislation was being considered in the late 1800s, during a Conservative regime that regarded professional money-lending as a trade that produced far more disadvantage than benefit, there were numerous elements to the arguments for and against regulation. The most taxing question for

⁹⁶ Atiyah *The Rise and Fall* (n 69) 605–615.

⁹⁷ *Ibid* 710.

⁹⁸ Hansard HC (series 5) vol 194 col 1598 (23 April 1926).

⁹⁹ *Ibid*. Colonel Josiah Wedgewood was a Labour MP.

Parliament however seemed to be whether interference in the contract itself was justified and if so to what extent. As the chairman of the Select Committee said, there were two real issues: should there be legislative interference? If so should the courts be allowed to review and revise these contracts? He and the Committee felt these courses of action were justified,¹⁰⁰ but they came up against some tough opposition, essentially from those who still held dear the premise of complete freedom of contract. Fraud, it was acknowledged was undesirable and it had no place in contractual relationships, but there was a point at which legislation could become too inhibiting.¹⁰¹

The whole question of at what point freedom of contract became untenable, like the arguments that concerned economic theorists was a question that frequently occupied parliamentarians. As the Duke of Argyll pointed out in one debate, there should be no interference with freedom of contract unless it was for public necessity, although he conceded in the case of money-lenders, it seemed that swindling transactions were effectively facilitated by the law¹⁰² and this could not be allowed to continue. And yet there was resistance even in the face of this argument. The basis of such reluctance may well have been concern for commerce and fear about where such a deviation from the accepted norm might lead. As was stated by one MP:

He was astonished that the Government should, with such a light heart, have imported into a measure of such small utility a principle so dangerous in its essence and so liable to be extended in unexpected directions...Everyone connected with business knew that the sanctity of contract was the mainstay of commerce and were bargains to be revised simply because they turned out to be unprofitable, and were they to be made to appear harsh for one party to enforce because values had fallen? They were now imposing on the judge of the land the duty of revising contracts apart altogether from fraud or deceit. That was a very serious and a very dangerous departure¹⁰³

And yet the legislature had effectively interfered in the terms of contracts before, for example pawnbroking transactions, which were subject to a maximum interest rate.

¹⁰⁰ Parl Debs (series 4) vol LXXXIV col 683 (21 June 1900).

¹⁰¹ Parl Debs (series 4) vol LXX cols 928–930 (1 May 1899).

¹⁰² Ibid col 932.

¹⁰³ Parl Debs (series 4) vol LXXXVII col 267 (31 July 1900) per Mr HS Forster.

The argument voiced in Parliament ran that it was too late to say now that there could not be such legislation and in this situation, more than any other, interference was justified as a protection of the weak whose necessities might lead them to be victimised by those in a position of strength.¹⁰⁴ How could there be freedom of contract where there was weakness on one side taken advantage of by the other?¹⁰⁵ Indeed to apply freedom of contract in some cases was ‘absurd’.¹⁰⁶

With regard to the related argument of the propriety of setting a limit to interest rates, the Select Committee openly rejected the legislative control of interest rates as such, refusing to fix a maximum statutory rate. Their reasoning for this was twofold—not only was it difficult to calculate an appropriate rate but also in practice experience had shown that it was relatively easy to evade a ceiling, as had been proved by the ineffectiveness of the Usury Laws. Yet there appeared to be some contradiction in the Committee’s policy. The Bill as drafted, suggested an interest rate above which there was a presumption the rate was *prima facie* unreasonable¹⁰⁷ (although this was removed from the Bill before it became law). Objectors took this as tantamount to an interest rate ceiling and a return to the Usury Laws although this was dismissed as paranoia by the Bill’s protagonists. As Lord James of Hereford points out, the Bill did not fix the rate of interest at which loans could be made but rather gave power to the courts to revise contracts only when, in their opinion they were harsh and unconscionable. Below a certain rate the court could not interfere at all and above that only if the bargain was judged to be hard and unconscionable.¹⁰⁸ The Chairman of the Committee confirmed the rate was only to be a gauge, beyond which the court had the power to re-open the transaction¹⁰⁹ and was not an attempt to re-introduce the Usury Laws. Nevertheless, the Committee still introduced an element of interest rate control and this made many MPs uneasy. It was providing a benchmark of reasonability for interest rates, which did not take into account the individual nature of money-lending bargains such as security or lack of it, the elements of risk, and the expense of servicing small loans even though such issues

¹⁰⁴ Parl Debs (series 4) vol LXX col 932 (1 May 1899).

¹⁰⁵ Parl Debs (series 4) vol LXXXIV col 1189 (26 June 1900).

¹⁰⁶ *Ibid* col 1195.

¹⁰⁷ The details were contained in the Schedule to the Bill and were as follows—not exceeding 40s–25% pa, between 40s and £10–20% pa, over £10–15% pa.

¹⁰⁸ Parl Debs (series 4) vol LXX col 931 (1 May 1899).

¹⁰⁹ Parl Debs (series 4) vol LXXXIV col 685 (21 June 1900).

were stated as part of the Committee's reason for not introducing a statutory maximum.¹¹⁰

There was also another anxiety felt by some relating to the judges' ability to re-open contracts, as proposed by the Bill, and that was the extent of their discretion. To what extent should equitable principles be relevant to contract and how far should the courts' powers extend? As has been mentioned the courts were, in reality, already wielding some power in the domain of loan contracts, equitable principles already being exercised by the Courts of Chancery in relation to post obit bonds and expectant heirs.¹¹¹ Furthermore, as far as the county courts were concerned, in matters of default, protections were already being exercised, with the widest discretion. What concerned some was the extension of this power and whether it was appropriate, preferring a reliance on the common law principles of fraud and duress.¹¹² There were also concerns about the ability of County Court judges to be impartial, especially when they had been given no real guidelines as to how to exercise this discretion. One MP describes the provision as 'a mild extension of an equitable doctrine, hampered with an insufficient definition of money-lenders and haunted by the uneasy ghost of the usury laws'¹¹³ and to add insult to injury, such powers would effectively make the Bill retroactive.¹¹⁴

These then were the most important but not the only dilemmas facing Parliament during the course of the Bill. Social reform was also very much on the minds of many parliamentarians during this time and to some the question of regulation of credit provision itself could be seen as a means of social reform,¹¹⁵ controlling the behaviour not only of creditors but borrowers.¹¹⁶

The Bill was introduced...for the purpose of checking abuses which undoubtedly existed in connection with that business [money-lending] and the need of a measure in the interests of

¹¹⁰ Parl Debs (series 4) vol LXXXIV col 696 706, 1190 (21 June 1900).

¹¹¹ Text to n 76.

¹¹² Parl Debs (series 4) vol LXXXIV col 1194 (26 June 1900).

¹¹³ Parl Debs (series 4) vol LXXXIV col 712 (21 June 1900).

¹¹⁴ Parl Debs (series 4) vol LXXXIV col 187 (26 June 1900).

¹¹⁵ Parl Debs (series 4) vol LXXXIV col 710 (21 June 1900).

¹¹⁶ Like complaints relating to pawnbroking, money-lending was seen as a cause of poverty and drunkenness Parl Debs (series 4) vol LXXXIV col 708 (21 June 1900).

borrowers as against moneylenders was one which had forced itself on the moral sense of the community.¹¹⁷

Money-lending, associated as much with those on low incomes as those that enjoyed a better standard of living had gained a tarnished and often seedy image, money-lenders being seen as the antithesis of bona fide creditors, 'the enemy of the respectable'.¹¹⁸ With the Victorians seemingly overwhelming desire for respectability there appears to be a wish to eliminate this vulgar element of society, quite apart from any philanthropic desire to protect the weaker customer of the money-lender; the 1898 Select Committee actually rejected the idea of licensing on the basis that a money-lender's licence would imply a guarantee of respectability and fair dealing.¹¹⁹ AV Dicey considered the Act to be nothing more than the intended restriction of one particular Jewish money-lender, Isaac Gordon;¹²⁰ this is may be too extreme a statement, as it does seem clear that there were a number of money-lenders who abused the system and Dicey's approach has been questioned.¹²¹ It is interesting however that one money-lender in particular should have attracted attention. This was probably because he had the greatest number of victims or because he employed the most heinous practices. It does perhaps also raise the question as to whether anti-semitism could have had a part to play in the approach taken to money-lending. It is, of course, difficult to answer this without detailed examination of the issue, but there is some evidence in the debate of a connection made between the Jewish community and money-lending. The typical money-lender is referred in one debate in the early 1900s as a 'Semitic plebeian'.¹²² However whilst the occasional reference is made and it has been established the Jewish community did suffer some stigma in the late 1800s,¹²³ on the surface at least a connection to money-lending is not immediately obvious. In any event it appears Jews were rarely involved in the money-lending

¹¹⁷ Parl Debs (series 4) vol LXXXVII col 288 (31 July 1900) Sir Robert Finlay (Liberal).

¹¹⁸ Cornish *Law and Society in England* (n 2).

¹¹⁹ 1898 Report of the Select Committee on Money-lenders (n 82) xi.

¹²⁰ AV Dicey *Lectures on the Relation between Law and Public Opinion in England During the Nineteenth Century* (2nd edn Reissue Macmillan & Co Ltd, London 1962).

¹²¹ GR Rubin 'The County Courts and the Tally Trade 1846–1914' 336 in GR Rubin and D Sugarman (eds) *Law Economy and Society, Essays in the History of English Law 1750–1914* (Professional Books Ltd, Abingdon, 1984).

¹²² Hansard HC (series 5) vol XIV col 691 (30 June 1913).

¹²³ Due to the sudden influx of Jewish immigrants, escaping from persecution in Russia, G Lebzelter *Political Anti-Semitism in England 1918–1939* (Macmillan, London 1978) 7–8.

business unless to the rich and aristocratic;¹²⁴ rather they were more involved in peddling and the second hand trade.¹²⁵

Finally, there were also issues that everyone agreed on, such as registration and other areas now familiar to the provision of credit, for example the control of advertisements and circulars, although these were not dealt with until legislation was passed in 1927. Other matters, once themselves central to arguments with regard to credit were now accepted without question: the need for money loans,¹²⁶ the fact that small loans cost more¹²⁷ and the importance of knowledge for the customer both in regard to the identity of the lender and the terms of the loan¹²⁸—all now familiar issues.

After the Act was passed there was a lull in the provision of regulation of money-lenders. A decade passed before the next flurry of activity, which kicked off in 1911, whilst the Liberals were in power, with the introduction of a Bill introduced in the name of preventing fraud.¹²⁹ This related to the names that money-lenders used and underlined the differentiation that was already present between professional money-lenders and other loan providers, such as building societies and pawnbrokers. The Bill, which became law the same year,¹³⁰ prohibited money-lenders from registering themselves or providing literature intimating they carried on business as bankers, further isolating them from the rest of the financial business community. Furthermore the Bill also provided protection for innocent parties who entered into agreements with money-lenders operating other than under their registered name. There was another attempt to bring further regulation a couple of years later, with a Bill being presented which introduced three new restrictions on money-lenders. These related again to the ways in which money-lenders described themselves and the prevention of fraud, but it also introduced a prohibition on the sending of circulars unless they had already been requested. This last provision created a different angle to restriction, namely the regulation, bordering on prohibition, of

¹²⁴ DS Katz *Jews in the History of England 1485–1850* (Clarendon Press, Oxford 1994) 360.

¹²⁵ TM Endelman *The Jews of Britain* (University of California Press, Los Angeles 2002) 82.

¹²⁶ Eg Parl Debs (series 4) vol LXXXIV col 702 (21 June 1900).

¹²⁷ Parl Debs (series 4) vol LXXXIV cols 696–697 (21 June 1900).

¹²⁸ Ibid cols 709, 1194.

¹²⁹ Hansard HL (series 5) vol X col 424 (29 November 1911).

¹³⁰ Moneylenders Act 1911 (1 & 2 Geo 5 c 38).

advertising. The inconvenience of unwanted circulars, and the effect these advertisements had on potential borrowers was the basis of such restrictions, concern being raised for the ‘man who is in temporary difficulty and who is of weak will’¹³¹ and the increased likelihood of irresponsible borrowing. Such people needed protection,¹³² and the majority of speakers during the debate were very much in favour of this with only the Marquess of Lansdowne being left to wonder how far the protection should really go.¹³³

This later Bill, however, did not become law and money-lending did not become an important item on the agenda again until after the First World War. There had been the occasional concern raised by MPs as to the rates of interest and the lack of clarity relating to interest rate information¹³⁴ but detailed consideration of remaining problems relating to money-lenders did not re-emerge until the mid 1920s, with the Joint Select Committee appointed to consider two Bills that had been presented to Parliament, one by the Conservative Government and one a private member’s Bill.¹³⁵ The big issue this time was licensing, with the arguments mainly centred around the practicalities involved; everyone seemed to concur with the basic principle that licensing was needed. The Moneylenders Act that followed in 1927 put in place a licensing system that had a two-tiered requirement—a money-lender had to obtain a certificate from the petty sessional court before even being able to apply for a licence. Indeed studying the parliamentary debates surrounding the passing of this legislation it is clear the 1927 Act was all about visibility and information, clarity of information being so important with knowledge being a key to helping borrowers.¹³⁶ Copies of the agreement,¹³⁷ clear information¹³⁸ and plain language of terms¹³⁹ and education of the ignorant¹⁴⁰ would all help in the prevention of exploitation. The 1927 Act provided for all of this laying down stringent

¹³¹ Hansard HL (series 5) vol XIV col 694 (30 June 1913).

¹³² *Ibid* col 691–694.

¹³³ *Ibid* col 696.

¹³⁴ Hansard HC (series 5) vol 43 col 1835 (27 June 1921 WA).

¹³⁵ Joint Select Committee of the House of Lords and the House of Commons on the Moneylenders Bill and the Moneylenders (Amendment) Bill on the Moneylenders Bill HL/HC (1924/25) 153.

¹³⁶ Hansard HL (series 5) vol 63 col 486 (9 March 1926).

¹³⁷ Hansard HC (series 5) vol 208 col 814–815 (1 July 1927).

¹³⁸ *Ibid* cols 815, 837, 842.

¹³⁹ Hansard HC (series 5) vol 194 col 1546 (23 April 1926).

¹⁴⁰ Hansard HC (series 5) vol 194 cols 1551, 1553 (23 April 1926).

requirements as to the identity of money-lenders.¹⁴¹ Advertisements could only be sent to those who had requested them and copies of the agreement had to be provided¹⁴² together with information during the course of the loan.¹⁴³

It was recognised that many of the predictions relating to the consistency of the courts and the question of the reasonableness of interest rates, for the purpose of determining whether a bargain was unconscionable, had come true. Great differences had surfaced in the interpretation of this provision, and it was suggested that there should be the introduction of a rate above which the contract would be prima facie unconscionable. The suggestion was 48% per annum, although it was stressed this was only a guideline, shifting the burden of proof onto the money-lender to show the loan did not come within the presumption of unconscionability. The question of interest rates also included some disquiet about the practice of charging compound interest on defaulted debts, which often led to astronomical levels of sums due. Whilst interest itself was not necessarily seen as undesirable, compound interest on default was.¹⁴⁴ The spectre of a ceiling on interest rates again rose to the surface. This time the legislature did not shy away from providing the certainty of a figure. It provided in section 10 for a 48% per annum rate above which it was presumed the agreement was harsh and unconscionable and restrictions as to the charging of compound interest under section 7. Upon bankruptcy of the borrower, under section 9, a money-lender could only prove his debt on the basis of a 5% interest rate. With the passing of this legislation money-lenders were truly restricted, not only in what they did but how they did it. The restrictions they were subject to in some areas were obvious fore-runners to the provisions of the Consumer Credit Act 1974. A comprehensive licensing system, advertising regulations and the power to re-open extortionate credit bargains were all mirrored in the 1974 Act and whilst the ethos surrounding these two sets of provisions may have been different, at least in some

¹⁴¹ Licences and certificates had to show the names and address and these details also had to be shown on other documents such as advertisements. Moneylenders Act 1927 (17 & 18 Geo 5 c 21) s 1.

¹⁴² *Ibid* s 6.

¹⁴³ *Ibid* s 8.

¹⁴⁴ The result of compound interest being charged on default interest was recently held as constituting extortionate credit under ss137–140 of the Consumer Credit Act 1974—*London North Securities Ltd v Meadows* (Southport County Court, 28 October 2004, Lawtel AC 0107408). The Consumer Credit Act 2006 s 13 will only allow simple interest to be charged on default sums.

respects, it seems the money-lending legislation provided a basis for the modern day statutory framework.

4. CONCLUSION

The debates on the bills of sale and money-lending legislation were extensive and provide, for the first time, a detailed idea of parliamentary attitudes to the question of credit provision to the individual. The most noticeable feature of these parliamentary debates is the changing nature of the legislature's attitude to consumer credit, demonstrated by an adjustment in emphasis in terms of approach. Arguments that initially centred around the desirability of credit and the cost of its provision, as in the discussions surrounding usury and to a lesser extent pawnbroking, whilst still present, no longer feature as of central importance. Credit was now seen as a recognised fact of life and credit to the individual could be respectable.

This however, appeared to depend on the source of the loan, as is demonstrated not only by the unfavourable comparisons made between professional money-lending and pawnbroking (the latter being seen as still having a valid position and use in society) but also the legislature's treatment of banks and building societies, exempted from the harsh regulation of the money-lending legislation.¹⁴⁵ Respectability seemed to be the key. Money-lending had gained an unfavourable reputation and was associated with exploitation, particularly with regard to the more vulnerable borrower—there is a sense that money-lenders were singled out for treatment. The legislation itself was also extreme and the general atmosphere surrounding the reforms raises questions as to the objectivity of those who created and passed the law. Certainly the money-lender was vilified by speakers in Parliament, and even in later debates in the 1920s, those who spoke against detailed regulation denied vigorously any suggested connection with money-lenders as such.¹⁴⁶

¹⁴⁵ Building societies together with Friendly Societies and Loan Societies were exempt under Moneylenders Act 1900 s 6(b). Banks were exempt under s 6(d) with the caveat that the exemption only applied where their main business was not money-lending.

¹⁴⁶ Hansard HC (series 5) vol 208 col 765 (1 July 1927).

Another conspicuous element to the debate over money-lending was that it was not just about the provision of money. The disapproval of money-lending demonstrated a desire to change a particular element of society, i.e. the power of the money-lender. Some regarded this as constituting not so much a reform of credit but rather as a social reform.¹⁴⁷ This in its turn must have put Parliament under pressure, more particularly political pressure to restrict the behaviour, often scandalous, of money-lenders. This stimulus for reform was further intensified by the availability of details of these issues, now made freely available to the public through newspapers. Information was in the public domain and as a visible issue needed attention. Certainly there is a suspicion by some MPs that the legislation was produced from political motives and a desire to be seen as doing the right thing, as much as from general benevolent rationale.¹⁴⁸ This feeling was one that was echoed throughout the development of money-lending legislation, there being complaints subsequently in the 1920s about the money-lending legislation being ‘well-intentioned shop-window stuff’.¹⁴⁹

This observation has some application to the modern reform of the consumer credit legislation, with the concerns about the undesirable elements of the consumer credit market, namely loan sharks, over-indebtedness and its social consequences; the Consumer Credit Review commenced in 2001 was itself entitled ‘Tackling Loan Sharks—and More’. The question of over-indebtedness however has further relevance to the examination of money-lending legislative reform. Whilst over-indebtedness was not considered directly, it being a modern term, the issues surrounding over-indebtedness were, as was demonstrated with regard to pawnbroking. Borrowers vulnerable to over-commitment and information for consumers to prevent irresponsible or undesirable levels of borrowing are not only issues considered in relation to money-lending legislation, but are also questions raised in response to the over-indebtedness problem.¹⁵⁰ With the underlying current of dislike for the money-lender and philanthropic concerns for his customers, there is

¹⁴⁷ Eg Parl Debs (series 4) vol LXXXIV col 710 (21 June 1900); Hansard HL (series 5) vol 63 col 123 (11 Feb 1926).

¹⁴⁸ Parl Debs (series 4) vol LXXI col 928 (1 May 1899); Parl Debs (series 4) vol LXXXIV cols 698, 724 (21 June 1900).

¹⁴⁹ Hansard HC (series 5) vol 194 col 1598 (23 April 1926).

¹⁵⁰ DTI, DWP ‘Tackling Over-indebtedness Action Plan 2004’ (2004) [10] [59]–[61].

an impression that credit reform in the 1800s had an agenda that included more than the control of credit provision. It was also a means of social reform through the control of a particular member of society and his/her influence over it. This impression is also to some extent created by the current reforms: whilst protection is provided for all consumers, it is the unfair practices of those who provide credit to the vulnerable and the consequences of such credit, namely over-indebtedness, that receive particular attention.¹⁵¹

There was another major factor that influenced Parliament and consequently the legislature's attitude to credit. The discussion surrounding credit provision whilst initially being one of protection, originally for the creditor and latterly for the borrower, as highlighted by the Bills of Sale legislation, was hijacked towards the end of the 19th century by the more philosophical polemic surrounding freedom of contract. Freedom in dealings, as part of the general laissez-faire creed, up until the late 1800s had been the pre-eminent doctrine underlying the law of contract,¹⁵² with judicial attitudes upholding these principles,¹⁵³ the ideology behind the freedom of contract being of particular importance in the development of company law and commercial contracts.¹⁵⁴

This however could not be said to be the position in relation to private debt. There is an indication that judicial opinion deviated from the general trend of approval of freedom of contract principles in relation to their approach to credit, or at least that provided to the individual by the professional money-lender. This,

¹⁵¹ In the consultation paper 'Tackling Loan Sharks—and more' priority areas are identified as including changing the licensing regime to deal with rogue traders, amending the extortionate credit provisions to increase their efficiency and putting in place the recommendations of the Task Force on Tackling over-indebtedness. DTI 'Tackling Loan Sharks—and more:—Consultation Document on Modernising The Consumer Credit Act 1974' 2001 [1.5].

¹⁵² D Sugarman and GR Rubin 'Towards a New History of Law and Material Society in England 1750–1914' in GR Rubin and D Sugarman (eds) *Law Economy and Society 1750–1914: Essays in the History of English Law* (Professional Books Limited, Abingdon 1984); R Stevens *Law and Politics, The House of Lords as a Judicial Body 1800–1976* (Weidenfield and Nicolson, London 1979) 139.

¹⁵³ Sugarman 'Towards a New History of Law and Material Society in England 1750–1914' (n 152) 55

¹⁵⁴ *Ibid* 44. For a discussion as to the relevance of freedom of contract in modern commercial contracts see L Sealy 'Ties that Bind; Security in Contract in England at the End of the Twentieth Century' (2000) 16 *Journal of Contract Law* 47.

interestingly, is only evident in the lower courts, the House of Lords still being very much pro laissez-faire and in favour of the supremacy of free will.¹⁵⁵ Many county court judges however were not so formalistic in their approach to the law of contract. Initially they attempted indirect control through the derisory amounts they judged to be paid on overdue debts.¹⁵⁶ This may simply have been because judges were not keen to see the county courts being used as an easy enforcement tool by money-lenders, but there is evidence the argument runs deeper than that. Indeed there is no clearer evidence of county court judges' views than in the replies to the circular sent to county court judges in 1881,¹⁵⁷ asking for their opinion about the Bills of Sale legislation. It was obvious from the various judges' submissions that many of the contributors disapproved not only of the money-lenders' tactics but also of many of the terms incorporated in the agreements. The only way to regulate this, they felt, was to restrict freedom of contract in relation to money-lending transactions.¹⁵⁸ Some advocated a return to the Usury Laws, others suggested abolishing bills of sale altogether or those for small amounts. Freedom of contract had little relevance where two parties were so obviously unequal in terms of bargaining power¹⁵⁹ and the underlying assumption advocated by freedom of contract that the borrower and lender were on equal terms was clearly regarded as inappropriate.¹⁶⁰

It could be said the Pawnbrokers Act of 1872 was the first indication of the move away from the belief in complete freedom in credit contracts, with the Committee's refusal to completely abolish the interest rate restrictions. The Bills of Sale Act 1882 furthered this trend, not through interest rate restrictions, but by abolishing bills for amounts under £30. However it was the Moneylenders Act 1900 which brought the dramatic invasion of the rights to freedom of contract, by allowing power to the courts to re-open agreed bargains on a discretionary basis. There is no doubt that this provision scandalised the 'old school' who still held freedom of

¹⁵⁵ Eg Parl Debs (Series 4) Vol LXXI cols 930 (1 May 1899) Stevens *Law and Politics* (n 156) 139–143.

¹⁵⁶ A fact recognised by Rubin in 'The County Courts and the Tally Trade 1846–1914' in Rubin *Law, Economy and Society* (n 121) 336.

¹⁵⁷ Lord Chancellor Circular Letter to the Judges and Registrars (n 36).

¹⁵⁸ Although only two judges, judge WTS Daniel and Thomas Wheeler Serjeant-at-law, specifically tackle the doctrine head on.

¹⁵⁹ Lord Chancellor 'Circular Letter to the Judges and Registrars' (n 36) 10.

¹⁶⁰ Ibid 59.

contract close to their hearts, but by this time a large proportion of Parliament and the judiciary supported the idea of being able to restrain money-lenders by means of discretion over the enforceability of agreed contract terms. The idea that freedom of contract was not always justified had already gained some momentum, especially in economic circles. The approach of economists such as Alfred Marshall encompassed the idea that freedom of contract was not always the answer to the search for the position that gave maximum advantage to the public.¹⁶¹ How could freedom of contract really be freedom of contract when parties' positions were so unequal not only in relation to the desirability of the terms but as to information as to the terms of the contract?

The imbalance with regard to money-lending transactions had become so great there was no longer any real free choice: a question of autonomy, an issue that continues to vex commentators and theorists today.¹⁶² This idea of equality of bargaining power and proper consumer choice was further developed by the Crowther Committee in their Report published in 1971. The Committee believed in consumer protection provided by ensuring knowledgeable consumers, able to make a free and informed choice.¹⁶³ Yet whilst freedom of consumer choice had a place in consumer credit transactions, according to the Crowther Committee freedom of contract, as such, did not.¹⁶⁴ There was a greater awareness in the latter stages of the 19th century, according to Atiyah, as to 'the reality of much that went on in the name of freedom of contract'¹⁶⁵ as this study itself confirms and the change in legislative attitude was perhaps inevitable. In the end the real attack on freedom of contract came from Parliament, in part brought about by a change in its composition, as more

¹⁶¹ Atiyah *Rise and Fall* (n 69) 615.

¹⁶² For example M J Trebilcock *The Limits of the Freedom of Contract* (Harvard University Press, Cambridge Massachusetts 1993). In his book Trebilcock considers the 'private ordering paradigm' ie control based on individual rather than collective values will promote social welfare and individual autonomy. He examines the arguments that question this theory, views that advocate limits on the freedom of contract, together with the complicated issues that these arguments themselves raise. One such issue is at what point agreements can no longer be described as a result of free choice or for the good of a party to that agreement, for example if that party has incomplete information, or the inability to understand information. He comes to the conclusion that it is very difficult to find a point at which to draw the line.

¹⁶³ Crowther (n 3)[3.9.1.]

¹⁶⁴ *Ibid* [6.1.12].

¹⁶⁵ Atiyah *Rise and Fall* (n 69) 614.

“consumers” became MPs but also because of the pressures felt from various forces, not least the new trends of economic thinking.¹⁶⁶

By the time the First World War had ended society had changed and laissez-faire was seen as no longer sustainable as a fundamental doctrine.¹⁶⁷ It is obvious from the debates surrounding the money-lending legislation of the 1920s that the application of freedom of contract to consumer credit was much less of an issue, it having been accepted perhaps that freedom of contract was no longer a legislative option for credit transactions that involved individuals. The discussion returned to the provision of the credit itself, control being implemented through licensing and the provision of information. This latter issue co-incidentally provided the basis of one of the main arguments of economists as a reason for questioning the laissez-faire doctrine, namely consumer ignorance,¹⁶⁸ which concerned them not only from the point of view of consumer unawareness but also consumer irrationality.¹⁶⁹ Consumer irrationality would occur when consumers could consume too much in the present at the expense of what they could have in the future, a ‘high discount rate for future wants.’¹⁷⁰ This could affect market efficiency; at this point it would be justified to control consumer decisions as to contract terms. Furthermore the fact that bargains could be re-opened no longer seemed to offend the sensibilities of many MPs, the only question now being how best to enforce the provisions. This latter problem was solved by the provision of a 48% guideline as an extortionate rate of interest. The interest rate ceiling had, although a shadow of its former self, returned.

The legislature’s attitude then was of the opinion that freedom of contract could not be the maxim upon which consumer credit transactions were based. The retention of interest rate control for pawnbroking and the later bills of sale regulation had set the trend but it was the money-lending legislation that caused Parliament to face the issue head on allowing the legislature to come to its conclusions. From the

¹⁶⁶ Neo-classical economic theory and its relationship with freedom of contract is explored in some depth by Atiyah in *Rise and Fall* (n 69) c 18.

¹⁶⁷ O Kahn-Freund ‘Introduction’ in K Renner *Institutions of Private Law and Their Social Functions* (Routledge and Kegan, London 1949) 37.

¹⁶⁸ Atiyah *Rise and Fall* (n 69) 616. Atiyah specifies three particular areas that the economists concentrated on—monopolies, market failures and consumer ignorance.

¹⁶⁹ *Ibid* 621–625.

¹⁷⁰ *Ibid* 622.

initial bills of sale legislation, which had as its aim the protection of creditors, concern evolved into one for the borrower. In the name of the protection of the borrower the money-lending legislation of 1900 was introduced, but as has been shown there is some question as to how extensively issues of credit regulation were considered of prime importance, the real discussions at this time relating to the more far-reaching consequences of restricting the freedom of contract and a desire to stamp out anti-social practices. Only once these arguments had been aired did Parliament return to the more direct issue of credit provision, providing a licensing system and beefing up various other provisions of the original 1900 Act.

The statutory framework eventually in place by 1927 sets the grounding for today's legislation, picking up where pawnbroking left off and in fact with regard to licensing the Crowther Committee was happy to take the lead from the money-lending legislation, recommending that the latter's approach should be retained.¹⁷¹ Many of the issues that had been raised with regard to credit were now familiar, and still are, such as the provision of control through licensing, the regulation of extortionate credit, restrictions in advertising and the clear provision of information, all of which are not only contained in the Consumer Credit Act 1974, but are targeted as important tools for borrower protection in the White Paper 2003.¹⁷² As far as freedom of contract is concerned, the accepted position in relation to consumer credit has not significantly changed since the turn of the century. The Crowther Committee accepted that freedom of contract sat uncomfortably with consumer transactions and recommended retaining the power to re-open extortionate credit bargains (including the presumption of the 48% interest rate although this was not provided for in the resultant Act). There is a difference however in that Crowther extended these provisions to the whole credit market, the specific aim to consolidate the requirements rather than targeting individual lenders.

In 2003 the White Paper went further. Rather than retaining the extortionate credit provisions, the recommendation was to replace them with the concept of 'an

¹⁷¹ Crowther (n 3) [6.2.15].

¹⁷² Secretary of State for Trade 'Fair Clear and Competitive, The Consumer Credit Market in the 21st Century.' (Cm 6040, 2003).

unfair credit transaction' to make agreements 'easier for consumers to challenge'.¹⁷³ The proposals do not just relate to unacceptably high interest rates. The White Paper 2003 sees various unfair practices such as 'misleading, harassing, coercing or otherwise unduly influencing the borrower'¹⁷⁴ as relevant. It seems the inference here is that the law of contract does not deal adequately with these issues, in much the same way as those who wished to increase the judge's discretionary power in 1900 in relation to money-lenders seemed to believe that the existing remedies of fraud and duress were not enough. This perhaps also raises the more general question of the extent of restrictive regulation. The Consumer Credit Act 2006, the result of the White Paper 2003 will toughen up the licensing regime, impose further requirements as to the provision of information, remove the limit above which the Consumer Credit Act 1974 does not apply¹⁷⁵ and, as has been noted, will create more scope for opening credit agreements. These are all reforms designed to increase protection for the consumer, in particular the vulnerable consumer. Could such strengthening of the regulatory regime end up being counter-productive? Certainly compliance costs for creditors will increase and there is a risk that these costs will be passed on to the borrower, with the danger of subsequently squeezing compliant creditors out of the market. This is recognised as a possibility by the White Paper,¹⁷⁶ but such a risk is seen as outweighed by the consumer benefit that will be gained from the new measures.

In 1900 it was suggested in Parliament that it was the method of enforcement of the terms of loan agreements rather than the terms themselves that were the problem.¹⁷⁷ This may be a partial answer to the issues faced by reformers today. Rather than creating further restrictions and requirements with regard to licensing and giving more scope for re-opening credit contracts, perhaps effective protection could be provided by concentrating on ensuring balanced methods of enforcement by

¹⁷³ White Paper 2003 (n 172) [3.32] [3.35].

¹⁷⁴ Ibid [3.37]. The Consumer Credit Act 2006 introduces the concept of unfair relationship test by which, if a relationship which is unfair to the debtor is found to exist, the court has powers to vary the agreement or order the creditor to take certain action, ss 19–20. However particular unfair practices as envisaged by the White Paper 2003 are not specifically identified.

¹⁷⁵ At present £25,000.

¹⁷⁶ White Paper (n 172) Annex B Draft Regulatory Impact Assessment 125–126.

¹⁷⁷ Parl Debs (series 4) Vol LXXXIV col 1192 (26 June 1900).

creditors, an effective complaints mechanism for borrowers with legitimate complaints and non-regulatory safeguards as a means of preventing potential problems. These concepts are also addressed by the White Paper. The setting up of free debt advice from providers such as the Citizens Advice Bureau and National Debtline has been judged useful and the Government wishes to develop this into a 'joined-up' debt advisory service to try and address some of the practical problems being experienced by the current agencies, mainly capacity and funding.¹⁷⁸ The White Paper also explores issues of enforcement, such as encouraging a trade code of practice, consumer/ borrower dialogue, use of time order provisions¹⁷⁹ and insolvency procedure. The Consumer Credit Act 2006 provides further information requirements for consumers when they fall into arrears and will establish, a free¹⁸⁰ alternative dispute resolution scheme. These matters are, however, considered in addition to rather than instead of more restrictive regulation in other areas. Whether this provides the 'efficient, fair and free market' envisaged by the White Paper remains to be seen.

In conclusion, the passage of the money-lending legislation through Parliament shows a fluctuation in emphasis as far as the attitude to credit provision to the individual was concerned, the legislature's reaction to changing philosophical attitudes being a fine illustration of the growing disillusionment with laissez-faire and freedom of contract principles. Credit for the individual was now to all intents and purposes consumer credit, regarded as an accepted element of living in a developing consumer society and in effect a form of credit in its own right. In addition the control of credit itself was becoming less of an issue, desire for the control of credit provision becoming rather a desire to control the providers of such credit and the devices they employed. What is also clear is that concern for the borrower was now guiding the approach taken by Parliament to legislative reform. Many of the issues important to Parliament, primarily with regard to the borrower are similar to those that retain Parliament's interest today, indicating the increasing

¹⁷⁸ [5.32].

¹⁷⁹ Power of the court to give the debtor additional time to pay the debt. The availability of time orders will be widened under s 16 of the Consumer Credit Act 2006 once the Act is implemented.

¹⁸⁰ To consumers—the funding to come from the industry s 60 Consumer Credit Act 2006.

dominance of consumer protection as the primary motivation behind legislative action.

CHAPTER 5

ENFORCEMENT AND DEFAULT : BANKRUPTCY INSOLVENCY AND THE SMALL DEBT LAWS

1. INTRODUCTION

Integral to the study of parliamentary attitudes to current reforms of consumer credit legislation, is Parliament's approach to over-indebtedness. Over-indebtedness appears to be inextricably linked with the idea of excessive borrowing and over-commitment with the resultant possible effect of default, all of which is facilitated by consumer credit. In order to look at attitudes to over-indebtedness, it is not only the approach to borrowing that is relevant but also the approach to these possible consequences. The development of consumer credit law is the primary concern of this study. However dedicated legislation, namely the Consumer Credit Act 1974, provides only initial procedure and remedies for lenders with regard to enforcement of an agreement, such as the provision of notice before resort can be made to the court.¹ It goes no further in terms of the consequences of the inability to pay a debt. Furthermore the Consumer Credit Act will only apply to credit agreements regulated by it. For a study that includes over-indebtedness in its scope, this is not quite enough.

The legislative framework that guides the recovery of debt procedures, such as court actions for payment of debt and more particularly the bankruptcy/insolvency procedure is relevant, as those debtors who are over-indebted may well become subject to one or more of these forms of administration. Therefore, whilst it is not proposed to provide a detailed analysis of debt enforcement or bankruptcy law, personal bankruptcy and other debt recovery mechanisms cannot be ignored, being procedures that may become applicable to those borrowers who can no longer manage their debt. A positive approach to the connection between debt enforcement

¹ Consumer Credit Act 1974 c 39 s 87. This has to be in a prescribed form and must include a period of at least seven days within which if the breach is remedied, the breach itself will be treated as not having occurred ss 88–89. The Act also allows the court to make time orders providing for a timetable within which remedy of a breach/payment must be made s 129. On implementation of s 16 the Consumer Credit Act 2006 will widen their availability.

and credit is also one adopted by the White Paper 'Fair Clear and Competitive The Consumer Credit Market in the 21st Century' ("White Paper 2003")² which contains the proposals behind the current changes to consumer credit law. Whilst insolvency law (which has undergone its own review) is recognised as separate from consumer credit as such, its relevance to over-indebtedness is recognised.³ The connection between over-indebtedness and debt collection generally is also acknowledged, as is underlined by the recent consultation paper 'A Choice of Paths: better options to manage over-indebtedness and multiple debt' published by the DCA in July 2004.

Our starting point is recognised as the early 1800s. There is one important point that should be made here. The bankruptcy procedures of England and Wales differed from those of Scotland and Ireland and to this day the bankruptcy procedure in Scotland and Ireland is at least in part regulated by separate legislation.⁴ It is not proposed however to compare the three different sets of procedure but rather to concentrate on the system in England, as this is the area concentrated on by Parliament itself. Frequent comparisons between the Scottish and English procedures were made in debate, the former being widely admired, (unlike the latter) as a success. Indeed as was commented on in 1881 in the House of Commons, although the English Bankruptcy Act of 1869⁵ was modelled on the Scottish system yet 'the Scotch system differed from the Act of 1869 in many important particulars, and it accordingly had not given rise to anything like the scandals which prevailed under the English system.'⁶

Enforcement of personal debt at this time broadly fell into one of three categories, either recovery of small debts, imprisonment through the insolvency procedure or bankruptcy. There have been a number of analyses of the law surrounding these procedures: Lester conducts a detailed study of Victorian insolvency, which provides both a comprehensive guide to the development of the

² Cm 6040, 2003.

³ White Paper 2003 (n 2) [5.68]–[5.80]. The relevance to over-indebtedness is also highlighted in the White Paper 'Effective Enforcement, Improved methods of recovery for civil court debt and commercial rent and a single regulatory regime for warrant enforcement agents (Cm 5744, 2003).

⁴ Eg Bankruptcy (Scotland) Act 1985 c 66.

⁵ Bankruptcy Act 1869 (32 & 33 Vict c 71).

⁶ Parl Debs (series 3) col 1065 vol 260 (8 April 1881).

law in this area and an analysis of the developing ethos behind the various reforms;⁷ Rubin provides analyses of the debt recovery system in the county courts, the judges' reaction to creditors⁸ and, separately, issues surrounding imprisonment for debt⁹ and Duffy examines the legal and institutional framework that defined and regulated the financial collapse during the Industrial Revolution, primarily in the London area.¹⁰ These authors provide commentaries on the development of the procedures relating to the enforcement of debt, particularly in the Victorian era, when the most influential reforms, albeit slowly, took place. Authors of studies on modern debt enforcement, such as Huls¹¹ and Parker¹² also consider credit and its connection with default. Parker analyses the nature of the creditor/debtor relationship and the relationship the parties have with the State;¹³ Huls examines the relationship between

⁷ VM Lester *Victorian Insolvency Bankruptcy, Imprisonment for Debt and Company Winding-up in Nineteenth Century England* (Clarendon Press, Oxford 1995) He particularly concentrates on the reforms of bankruptcy law, his conclusion being that the basic legal framework of bankruptcy law had been put in place by 1800 developing from the practical problems caused by business failure rather than from any particular political philosophy.

⁸ Including the hostility of the courts towards creditors of the poorer borrowers, such as the tallymen and money-lenders. Rubin comes to the conclusion that the court, predominantly grounded in a market ideology, had a dilemma. Consumer credit enabled the poorer borrower to buy life's essentials. As long as the court enabled creditors to recover debt, this tap would not be turned off. The problem however was the moral and domestic mischief wrought by the "undesirable" creditors. This created a tension between what the judges knew they should do strictly according to the law and what they wanted to do to retain respectability. 'The County Courts and the Tally Trade' in GR Rubin and D Sugarman (eds) *Law Economy and Society 1750–1914: Essays in the History of English Law* (Professional Books Limited, Abingdon 1984).

⁹ Inter alia social issues surrounding imprisonment for debt, questioning the general claim made at the time that the Debtors Act 1869 abolished imprisonment for debt. Rubin maintains that the remedy was effectively being retained for the poor debtor through the power of committal for small debts. GR Rubin 'Law Poverty and Imprisonment for Debt 1869–1914' in GR Rubin and D Sugarman (eds) *Law Economy and Society 1750–1914* (Professional Books Limited, Abingdon 1984).

¹⁰ His work examines in detail the procedures relating to default, the growth of reform in this area and attitudes to this and to the connection between law and the economy, touching on attitudes to credit during the Industrial Revolution, particularly in relation to the legislative regulation of debt and default. Duffy finds that the legislature had problems dealing with the consequences of the rapid economic growth of the period, but regardless of this the late 1820s did show a growth in political awareness of the general issues applicable to the laws of credit. IPH Duffy *Bankruptcy and Insolvency in London during the Industrial Revolution* (Garland Publishing Inc, New York and London, 1985).

¹¹ N Huls 'Overindebtedness and Overlegalization: Consumer Bankruptcy as a Field for Alternative Dispute Resolution' (1997) *Journal of Consumer Policy* 20, 143.

¹² G Parker *Getting and Spending Credit and Debt in Britain* (Avebury Gower Publishing Company Ltd, Aldershot 1990).

¹³ Parker's examination includes a study of debt and social policy, a history of consumer credit, credit and debt as they particularly affect the consumer and causes of indebtedness.

over-indebtedness and debt enforcement procedures and the possibilities for expanding the role of debt counsellors in mitigating the consequences of debt.¹⁴

However, with the exception of Rubin's short consideration of the issue in terms of county court debt recovery,¹⁵ these authors do not, whilst considering credit and debt enforcement, look at these procedures primarily in terms of attitudes to consumer credit displayed by Parliament and the legislature. In this chapter a consideration is made of the various debt enforcement procedures that were available in the early 1800s, namely bankruptcy, imprisonment and the recovery of small debts and the reforms that have taken place since that time. Parliamentary attitudes are examined by considering the debates and proceedings of Select Committees that surrounded the reforms of these procedures and illustrate them as a medium through which parliamentary and legislative attitudes not only to insolvency and debt enforcement, but also to consumer credit, can be demonstrated.

2. MECHANICS OF DEBT ENFORCEMENT

(a) Overview

At the beginning of the 19th century the method by which a creditor could enforce a debt was dictated by a number of factors. The two most important were the amount of the debt and the status of the debtor, for these would determine whether bankruptcy or alternatively imprisonment of the debtor under the insolvency laws were available options. Debts that were too small to qualify for the arrest and imprisonment provisions¹⁶ or bankruptcy were, on the whole, dealt with by the local inferior courts, e.g. borough courts, the old style county courts or hundred courts (some of which had limited jurisdiction)¹⁷ or courts of request (courts requested by a

Her conclusion is that changes to social policies and the legal and administrative system are needed to cope with the ever-increasing levels of credit and debt in society.

¹⁴ Huls sees the answer to the problems of debt enforcement as a combination of legal and social supports together with professional and independent debt counselling to avoid the necessity of court procedure for recovery.

¹⁵ Rubin 'County Courts and the Tally Trade' (n 8) 341–344.

¹⁶ Arrest on mesne process—£15 from 1811, raised to £20 in 1827, until finally abolished in 1838; on final process debts under £20 by the Act of 1844, with qualifications as to the conduct of the debtor.

¹⁷ Duffy *Bankruptcy and Insolvency in London* (n 10) 110.

community and established by an act of parliament, set up in response to the expense of the superior courts).¹⁸ There were a number of problems with the system: bankruptcy was available only to traders on what seemed to be arbitrary criteria¹⁹ and the system was openly abused. Imprisonment for debt was filling the prisons, questionable as to its effectiveness and also open to abuse.²⁰ In addition the small debt procedure left a gap between the maximum amount upon which the court could judge and the minimum debt for which arrest of the debtor could be employed, leaving the creditor in a jurisdictional no man's land.²¹

It was against this background that serious reform of the whole system for the enforcement of debt took place, which by the end of the century had to at least some extent abolished imprisonment for debt and had made bankruptcy a more available and effective system for the individual. This system would in fact endure until the reforms in the 1980s, prompted by the report of a committee set up to conduct a complete review of the insolvency procedure ("the Cork Committee Report").²² The most recent amendments have been introduced by the Enterprise Act 2002,²³ amendments which reflect and underline the ethos of "fresh start", something that had in fact started showing signs of life in the Victorian era. As will be shown movement from the idea that bankruptcy was a crime gathered pace during the 1800s evolving into the idea that a bankrupt should be allowed to re-enter the community and start anew. This however was rehabilitation only for "honest" debtors, those who had been reckless or fraudulent not being allowed to walk away from the consequences of their actions. This idea pervaded all debt enforcement as shown by the retention of imprisonment of small debtors who were deemed to be able but simply unwilling to pay. The ethos of culpability endures today—proposed debt relief and management schemes are based on whether the debtor has in reality the

¹⁸ Ibid 112. There is a detailed discussion of the courts and small debts during this period at 108–118.

¹⁹ As evidenced by complaints in the Houses of Parliament and Committee Reports eg Royal Commission 'Report from the Commissioners for the Inquiry into Bankruptcy and Insolvency' (C (1st series) 274, 1840) Parl Debs (series 3) vol 65 col 232 (18 July 1841).

²⁰ As evidenced by the debates in Parliament eg Parl Debs (series 1) vol 40 cols 587–590 (20 May 1819), Parl Debs (series 2) vol 8 cols 540–541 (13 March 1823).

²¹ Duffy *Bankruptcy and Insolvency in London* (n 10) 116–117.

²² Department of Trade 'Insolvency Law and Practice Report of the Review Committee' (Cm 8558, 1982).

²³ C 40.

ability and/or willingness to pay and the whilst the basis of the Enterprise Act 2002 is to facilitate entrepreneurship, tougher penalties are imposed for irresponsibility or recklessness.²⁴ The initial journey towards “fresh start” however was not easy. The balance between the debtor’s and creditor’s interests was a fine one and the legislature struggled to find the right emphasis. However by the end of the 1800s the system had settled down putting in place to all intents and purposes the legal framework of debt recovery for the next century.

(b) Recovery of Small Debts

The inadequacy of the procedure for the recovery of small debts was recognised early on in the 19th century and a Select Committee was set up in 1823 to consider the problem,²⁵ small debts being anything up to £15.²⁶ Its recommendations however did not become law and it was not until Lord Brougham, an ardent supporter of reform in many areas, became involved that the pressure for reform gathered momentum.²⁷ The matter was considered again, this time by the Common Law Commissioners, in 1833²⁸ and they agreed that the legal framework for recovering small debts was inadequate. Their recommendations included an extension of the jurisdiction of the courts and the creation of a court framework that would provide easier access geographically to the judicial system.²⁹ The most significant result of the drive for reform of the court structure was the establishment of the county court network by the County Courts Act 1846,³⁰ a system which grew to have extensive jurisdiction in debt recovery procedure.³¹ The courts effectively came to be treated as

²⁴ Enterprise Act 2002 Sch 20.

²⁵ House of Commons Select Committee ‘Report from the Select Committee appointed to inquire into the mode in which Debts amounting to less than £15 are recovered in England and Wales’ HC (1823) 386.

²⁶ The limit of £25 was established by An Act to further extend and render more effectual certain provisions of an Act passed in the Twelfth Year of the Reign of His Late Majesty King George the First 1811 (51 Geo III c 124); Duffy *Bankruptcy and Insolvency in London* (n 10) 107.

²⁷ Duffy *Bankruptcy and Insolvency in London* (n 10) 118–119.

²⁸ Royal Commission ‘Fifth Report of the Commissioners appointed to enquire into the Practice and Proceedings of the Courts of Common Law’ HC (1833) 247.

²⁹ *Ibid* 28.

³⁰ An Act for the More Easy Recovery of Small Debts and Demands in England 1846 (9 & 10 Vict c 95).

³¹ Duffy provides a detailed description of the development of the legislation relating to small debt recovery in ch 3 of *Bankruptcy and Insolvency in London* (n 10).

a debt recovery service by creditors³² 'administering consumer credit as it affected, in the main, the working-class debtor.'³³

The recovery of small debts however was not just about being sued for payment in a county court. Whilst there was a minimum under which one could not be arrested on mesne process, imprisonment on final process for debt was still a risk of non-payment in certain circumstances, for example fraud or debt taken in the knowledge it could not be repaid,³⁴ or if it was shown the debtor had means to pay but would not.³⁵ Under section 122 of the Bankruptcy Act 1883 the county court was also empowered to make Administration Orders in relation to judgment debtors who owed less than £50, the idea being that the procedure would provide cheap relief for the small debtor.³⁶ Regulation of the procedure was eventually included under the umbrella of the County Courts (Amendment) Act of 1934³⁷ although as there was no increase in the maximum limit, as time went by the procedure became of little use.³⁸ After an intermediate step up the ceiling was raised in 1977 to £2000. There were weaknesses in the system and in 1982 the Cork Committee Report recommended its replacement. Administration Orders have nonetheless remained an option for the court for those indebted up to the County Court limit of £5000.³⁹

The county court remains as relevant today to creditors and debtors as the forum for collecting unpaid debts. The Court has various enforcement procedures it can employ, for example Attachment of Earnings Orders or Third Party Debt Orders⁴⁰ and as far as small debts are concerned the small claims system is designed to provide a vehicle for faster and more efficient recovery of and/or dispute relating

³² Rubin 'County Courts and the Tally Trade' (n 8).

³³ WR Cornish and G de N Clark *Law and Society in England 1750–1950* (Sweet and Maxwell, London, 1989) 229–230.

³⁴ An Act for the better securing the payment of small debts 1845 (8 & 9 Vict c 127).

³⁵ Debtors Act 1869 (32 & 33 Vict c 62). This has led some commentators to conclude that the small debtor was in effect discriminated against even after imprisonment for debt was supposedly abolished in 1869. Cornish *Law and Society in England* (n 33) 229, Rubin 'Law Poverty and Imprisonment for Debt' (n 9).

³⁶ Cork Committee Report (n 22) [68]–[70].

³⁷ 24 & 25 Geo 5 c 17.

³⁸ Cork Committee Report (n 22) [73].

³⁹ County Courts Act 1984 c 28 s 112(1).

⁴⁰ These replaced garnishee orders—Civil Procedure (Amendment No 4) Rules 2001 SI 2001/2792.

to debt. Most relevant of all, the county court provides the means by which claims can be made with regard to consumer credit disputes under the Consumer Credit Act 1974.⁴¹ The methods of enforcement for civil court debt are now however under review by the DCA. This review has culminated in the White Paper 'Effective Enforcement'⁴² which looks to improve recovery procedures and the regulatory regime for warrant enforcement, in order to ensure debt liabilities are met whilst protecting vulnerable debtors from oppressive recovery practices. The DCA has also published a consultation paper on the management of debt for those who are over-indebted or have large commitments,⁴³ which introduces a three pronged scheme dependant upon the ability of the debtor to pay. It is envisaged that the Administration Order will become defunct, more efficient debt relief and repayment schemes taking its place.⁴⁴

(c) Imprisonment for debt

There were two forms of arrest for debt, namely arrest on mesne process and arrest on final process. The former allowed the creditor to arrest the debtor upon issue of a writ, the idea being to ensure that he would attend court at the appropriate time, the latter was a remedy for enforcement of a judgment debt. The processes were not satisfactory however—if nothing else they stopped the debtor from earning any money to help pay off the very debts that had put him in jail and the provisions for allowing bail were subject to abuse.⁴⁵ Furthermore the prisons, where conditions were overcrowded and squalid for the majority of prisoners, became so full that a mechanism was put in place whereby the prisons would be periodically emptied and debtors discharged.⁴⁶ The Common Law Commissioners took a long hard look at the

⁴¹ CPR 7, CPR PD 7.9 (Consumer Credit Act claims).

⁴² Lord Chancellor's Department 'Effective Enforcement: Improved methods of recovery for civil court debt and commercial rent and a single regulatory regime for warrant enforcement agents' (Cm 5744, 2003).

⁴³ DCA 'A Choice of Paths better options to manage over-indebtedness and multiple debt.' (CP 23/04, 2004).

⁴⁴ The No Income No Assets Scheme for debtors who cannot pay, Enforcement Restriction Orders for those who could pay and long term debt management schemes for those who can pay.

⁴⁵ Commissioners of Inquiry 'Fourth Report of the Common Law Commissioners' HC (1831–1832) 239.

⁴⁶ Under the provisions of the Insolvent Debtors Act that were passed from time to time.

system in their Report in 1832⁴⁷ and they recommended restrictions to the grounds available for the imprisonment of debtors.

The process of abolition of this particular sanction however was very slow. In 1838 arrest on mesne process was abolished⁴⁸ and in 1844 imprisonment for debt was abolished for debts under £20 unless non-payment was due to fraud or misconduct.⁴⁹ This was reversed slightly the following year due to creditors' objections and imprisonment for debts under £20 was allowed in certain circumstances besides fraud, such as a debtor taking on debt knowing that he would be unable to repay it. In 1869 imprisonment for debt was supposedly completely abolished. This however was not quite the case as the legislation still contained exceptions in certain circumstances for debts under £50 i.e where the debtor was deemed to have the means to pay but did not. This however was not called imprisonment for debt but rather was explained as imprisonment for contempt of court,⁵⁰ the argument being that those who refused to pay were defying the court order rather than the agreed terms with the creditor. The 'logic' behind this explanation was not accepted by abolitionists and, as Rubin comments, the exceptions provided by the 1869 Act constituted discrimination against the 'poor consumer debtor'; if a ground for imprisonment was that a debtor had taken on a debt without any reasonable prospect of being able to pay then the poor debtor must have constantly run the risk of committing the offence. It was in effect a means of social control.⁵¹

There were two Select Committees, one in 1873⁵² and one in 1909,⁵³ both of which favoured either abolition or restriction of the remedy of imprisonment for

⁴⁷ Fourth Report of the Common Law Commissioners (n 45).

⁴⁸ An Act for abolishing Arrest on Mesne Process in Civil Actions except in certain cases (1 & 2 Vict c 110).

⁴⁹ An Act to amend the Law of Insolvency, Bankruptcy and Execution 1844 (7 & 8 Vict c 96).

⁵⁰ Parl Debs (series 3) vol 197 col 575 (25 June 1869).

⁵¹ Rubin 'Law, Poverty and Imprisonment for Debt' (n 9) 241–242, 288. In effect by controlling the behaviour (essentially of the working classes) and encouraging sensible budgeting.

⁵² House of Commons Select Committee 'Report from the Select Committee appointed to inquire into the subject of Imprisonment for Debt by County Court Judges' HC (1873) 348.

⁵³ House of Commons Select Committee 'Report from the Select Committee appointed to enquire into the existing law relating to Imprisonment of Debtors' HC (1909) 239.

contract debt and there was a further report in 1933 relating to imprisonment for fines and default on maintenance and affiliation orders.⁵⁴ It was not however until the recommendations of the Committee on the Enforcement of Judgment Debts, (“the Payne Committee”), in 1969⁵⁵ and the subsequent Administration of Justice Act 1970⁵⁶ that the final vestiges of imprisonment for debt were buried with the abolition of the judgment summons. And yet even now this statement is not completely accurate, as imprisonment has been retained for the non-payment of maintenance orders and certain debts owed to the Crown.⁵⁷

(d) Bankruptcy

At the beginning of the 19th century bankruptcy was a mechanism only available to those who were traders and owed more than £100 on any one debt.⁵⁸ The status of trader caused much difficulty in the application of the law, arguments over the definition causing delay and expense before the procedure had even been commenced. Furthermore, for bankruptcy to be available, the trader had to be shown as having committed one of any number of prescribed acts of bankruptcy, for example making a fraudulent conveyance of land or absconding.⁵⁹ An established act of bankruptcy led to ‘examination’ of the debtor whose assets would then be seized and distributed amongst the creditors, the examination being conducted by commissioners (of which in 1800 there were 700)⁶⁰ the distribution being conducted by assignees and the bankrupt being issued with a certificate of discharge upon the consent of the majority of the creditors.⁶¹ Needless to say the system was open to abuse and was less than efficient. Some creditors appointed to distribute the assets of the bankrupt would disappear with the entire estate without ensuring other creditors received a share, other creditors would insist the bankrupt paid their outstanding sum before other creditors in return for their signature on the certificate of discharge.

⁵⁴ Departmental Committee ‘Imprisonment by Courts of Summary Jurisdiction in Default of Payment of Fines and Other Sums of Money Report of the Committee’ (Cmd 4649, 1933).

⁵⁵ Committee ‘Report of the Committee for the Enforcement of Judgment Debts’ (Cmnd 3909, 1969).

⁵⁶ C 31 s 11 Sch 4.

⁵⁷ *Ibid.*

⁵⁸ *Duffy Bankruptcy and Insolvency in London* (n 10) describes the procedure 15–17.

⁵⁹ *Cornish Law and Society in England* (n 33) 231.

⁶⁰ *Ibid* 232.

⁶¹ 4/5ths in value and number *Duffy Bankruptcy and Insolvency in London* (n 10) 16.

Even the debtors themselves found ways of abusing the system in order to avoid paying all their debts.⁶² Whilst the law was amended in 1824 to allow a trader to place himself in bankruptcy⁶³ rather than being purely at the mercy of creditors it was only in the 1830s that real efforts were made to reform the framework of the law governing the administration of bankruptcy proceedings, for example with the establishment of the bankruptcy court.⁶⁴

One particular tension in the system was the continued differentiation between insolvency and bankruptcy and the distinction made between traders and non-traders. Even though bankruptcy was intended for traders, many small traders found themselves imprisoned for debt under the insolvency laws due to the fact they did not owe enough to come under the bankruptcy legislation. By the same token, individuals who owed large debts in a private capacity could not be made subject to or seek bankruptcy, and in effect creditors were denied a means of being able to look to the debtor's estate for payment of their debts, imprisonment being their only option as a sanction. The change to the system finally came in 1861 when the separate system of insolvency was abandoned and private individuals and their creditors were given access to bankruptcy proceedings,⁶⁵ the distinction between traders and non-traders being abolished.

The 1860s in general saw a major shift in the emphasis behind the procedure of bankruptcy. Whereas officials, often the greatest perpetrators of corrupt activity, had dominated proceedings up until the mid 1800s the Acts of 1861 and 1869 put the administration of bankruptcy firmly in the hands of the creditors themselves. The experiment however proved to be a disaster. Most creditors were not interested in administering a system unless there was a good chance their debts would be paid and proceedings would be dominated by unscrupulous creditors or even the bankrupt himself.⁶⁶ In 1883 after loud protests about the state of bankruptcy proceedings,

⁶² Cornish *Law and Society in England* n (33) 232–233. There is a detailed description of the processes of bankruptcy in the early 1800s and the abuses that occurred in Duffy *Bankruptcy and Insolvency in London* (n 10) 15–55.

⁶³ Act to consolidate and amend the Bankruptcy Laws 1824 (5 Geo IV c 98).

⁶⁴ Act to Establish a Court of Bankruptcy 1831 (1 & 2 Will IV c 56).

⁶⁵ Act to amend the law relating to Bankruptcy and Insolvency in England 1861 (24 & 25 Vict c 134).

⁶⁶ Cornish *Law and Society in England* (n 33) 235.

particularly from the mercantile community, the Bankruptcy Act re-introduced officials into the procedure in the form of Official Receivers, with the court becoming more involved in the circumstances surrounding the discharge of the bankrupt.⁶⁷ This Act, to all intents and purposes remained the basis of the bankruptcy law⁶⁸ until the Insolvency Acts of 1985⁶⁹ and 1986.⁷⁰ These Acts simplified and clarified the insolvency system both with regard to personal and corporate insolvency abolishing the need for an act of bankruptcy and providing a more coherent and unified system, with the aim of adapting the law to the modern world of financial failure. As has already been mentioned these Acts have themselves been refined in favour of the personal insolvent deserving of a 'fresh start', through the amendments of the Enterprise Act 2002.⁷¹

3. PARLIAMENTARY ATTITUDES

(a) Debates

(i) Bankruptcy

The original ethos behind the bankruptcy law has been described in Parliament as one of criminality; punishments for the bankrupt included being 'liable to be placed in the pillory and have one of his ears cut off'.⁷² By the early 19th century, however, it is evident the underlying philosophy of the legislation was being questioned, there being a recognised tension between the needs of creditors and the protection of debtors,⁷³ a desire to make a distinction between the honest and fraudulent bankrupt⁷⁴

⁶⁷ There is a detailed examination of the merchant's influence and interest in the bankruptcy reforms throughout Lester *Victorian Insolvency* (n 7)

⁶⁸ Lester *Victorian Insolvency* (n 7) 2, an observation is also made in parliamentary debate in the 1980s.

⁶⁹ Insolvency Act 1985 c 65.

⁷⁰ Insolvency Act 1986 c 45.

⁷¹ An example is the allowance of a discretionary rather than mandatory investigation of a bankrupt's affairs s 258. Commentary on the insolvency provisions of the Enterprise Act can be found in S Davies *Insolvency and the Enterprise Act 2002* (Jordans, Bristol, 2003).

⁷² Parl Debs (series 3) vol 248 col 566 (16 July 1879).

⁷³ Parl Debs (series 1) vol 36 cols 818–821 (22 May 1817).

⁷⁴ Parl Debs (series 1) vol 37 cols 981–987 (27 May 1818) at the presentation of the Bankrupt Laws Amendment Bill although not everyone agreed with this distinction. Parl Debs (series 1) vol 37 col 88 (28 Jan 1818).

and recognition of the need to regularise and consolidate the bankruptcy law.⁷⁵ Objections were being made as to the criminality of bankruptcy⁷⁶ and the abuses and expense of the system were drawing comment.⁷⁷ Furthermore as the century progressed there was disquiet voiced at the distinction made between traders and non-traders only the former, not the latter, as has been described, having access to the bankruptcy system. As Lord Cottenham, a Whig, said in 1842

It appeared to him strange that the remedial process against a man in trade should be entirely different from the process against a man who was not in trade.⁷⁸

This concern, together with the distaste that many felt for imprisonment for debt, was an important element in the argument for the merger of bankruptcy and insolvency law. Whilst it was recognised that individuals whether in a private capacity or in business used credit and contracted debts, there seemed to be a growing acceptance that traders and non-traders alike might, as a result of misfortune or through no fault of their own, have found they were unable to pay their debts. The accepted parameter of excuse for non-payment was widening. This must have been at least in part due to the growing admission that as credit for private purposes for the individual was becoming a way of life, it was also no longer regarded as the evil it had once been and that debt itself was excusable.

Much of the debate that took place in the Houses of Parliament throughout the 19th century was dominated by questions of cost, procedural inefficiency and irregularity. As has already been noted, in 1861 the Bankruptcy Act⁷⁹ was passed finally eliminating the trader/non-trader distinction for the purposes of access to the bankruptcy procedure, seen by Parliament as inconvenient, anachronistic and unfair. The Act also removed the final vestiges of the separation of the systems of insolvency and bankruptcy by transferring the functions of the Insolvent Debtors

⁷⁵ Parl Debs (series 2) vol 10 cols 213–215 (18 Feb 1824).

⁷⁶ Ibid col 215.

⁷⁷ Parl Debs (series 3) vol 2 cols 779–780 (21 Feb 1831); Parl Debs (series 3) vol 3 cols 691–692 (14 March 1831).

⁷⁸ Parl Debs (series 3) vol 65 col 232 (18 July 1841).

⁷⁹ (24 & 25 Vict c 134).

Court to the Bankruptcy Court and county courts.⁸⁰ The debate surrounding the first of the Bills introduced in 1860 was dominated by the arguments for and against the extension of the jurisdiction of the county courts. Similar to the later debates on the county court judges' ability to set aside unconscionable bargains under the Moneylenders Act 1900, the courts' capability to undertake administration of the bankruptcy law was questioned. County court judges were 'totally unqualified to administer the estates of insolvent debtors',⁸¹ 'not adequately versed in mercantile law'⁸² and did not have 'sufficient experience in that branch of the law'.⁸³ They 'had not the proper machinery to secure the due performance of the duties of official assignee'⁸⁴ and their efficiency would be affected.⁸⁵ These arguments however were defeated by practical considerations as much as in defence of the reputation of the county court judges. As other MPs including the Attorney General, with strong backing from the mercantile community⁸⁶ pointed out, the proposed change would make access to justice cheaper and easier.

The debates surrounding the next Act passed in 1869 were extensive. This time the drive was not for piecemeal reform but a complete overhaul of the law⁸⁷ and the debates illustrate real discussion about the policy underlying the bankruptcy legislation and what Parliament wished to achieve. Bankruptcy law was underpinned by one simple principle—to distribute the estate of the bankrupt amongst his creditors 'fairly, cheaply and speedily'.⁸⁸ What about the debtor himself? If he was an honest debtor then the primary aim was to ensure his creditors were paid, if he were dishonest then he should be dealt with by the criminal law.⁸⁹ The Government believed the best way to achieve the principle of fair distribution was to leave the

⁸⁰ Duffy *Bankruptcy and Insolvency in London* (n 10) 103–104, a detailed history of the events that surrounded the Bills in 1860 and 1861, which resulted in this Act, can be found in Lester *Victorian Insolvency* (n 7) 123–146.

⁸¹ Parl Debs (series 3) vol 158 col 1581 (21 May 1860).

⁸² Ibid col 1582.

⁸³ Ibid col 1565.

⁸⁴ Ibid col 1583.

⁸⁵ Ibid col 1579.

⁸⁶ Parl Debs (series 3) vol 158 cols 1564–1565 (21 May 1860).

⁸⁷ 'They must now go to the very root of the matter and reform the system altogether' Parl Debs (series 3) vol 194 col 776 (5 March 1869).

⁸⁸ Parl Debs (series 3) vol 194 col 778 (5 March 1869); Parl Debs (series 3) vol 195 col 157 (5 April 1869).

⁸⁹ Parl Debs (series 3) vol 195 col 143 (5 April 1869).

administration of the bankruptcy in the hands of those they perceived cared the most, namely the creditors, but this faith in the creditors to efficiently administer the bankruptcy regime proved to be misplaced. As was complained of at length in the late 1870s, the failings of the Act of 1869 was largely the fault of the apathetic creditor who, as the Attorney General put it, would give

vent to his feelings in a few passionate exclamations and some strong language; but having done this he takes his ledger, writes off the amount owing as a bad debt and pays no further attention to the matter⁹⁰

This left the system wide open to abuse, providing an open arena for the dishonest.⁹¹ Yet even though the debtor was often seen as the villain of the piece, there was recognition that not all debtors milked the system or benefited from it, but rather the reverse. Another element to the principle underlying the bankruptcy law began to emerge, in the form of protection not for the creditor but for the debtor—but only the honest debtor—with the development of ideas of rehabilitation starting to emerge by the time of the 1869 legislation:

They had here only two principles to look to—first to secure that the property of the debtor was fairly divided among his creditors; and second, to protect the debtor in his endeavours to re-instate himself in the community, and obtain future property with the view of satisfying his creditors⁹²

It should be noted that the protection of the debtor at this stage had a sting in the tail. Rehabilitation was not to be at the expense of the creditor. The argument was that future acquired property of the debtor should be liable for payment of the creditors and the debtor only had hope of acquiring such property if he was able to continue in the community. If a debtor was allowed to work but in effect to pay off his debts this would not only satisfy obligations to creditors but would also have the highly desirable advantage of making ‘people less reckless in their expenditure and more honest in their dealings.’⁹³ This position was not however universally accepted. Some felt that if after acquired property was saddled with previous debt then this

⁹⁰ Parl Debs (series 3) vol 248 cols 556–557 (16 July 1879).

⁹¹ Parl Debs (series 3) vol 233 col 7 (16 March 1877).

⁹² Parl Debs (series 3) vol 195 col 145 (5 April 1869) per Mr Jessel.

⁹³ Parl Debs (series 3) vol 195 col 148 (5 April 1869).

would have the adverse effect of reducing the debtor's chance of obtaining fresh credit in order to do business.

A decade later the idea behind the treatment of the debtor now lay firmly in the tenor of his own conduct before and during the onset of insolvency. In the Bill introduced in 1876 by the Lord Chancellor, it was proposed that upon the application for ultimate discharge from bankruptcy by the debtor, he should be released from all liabilities, except those which were incurred 'by fraud or breach of trust'.⁹⁴ By this time the bankruptcy law was seen as being

justified on two grounds, the first of which consisted of an affirmation that it was necessary in order to secure equal distribution amongst creditors. The second...was, that all legislation on the subject must protect debtors in so far as they were entitled to protection⁹⁵

In other words the personal position of the debtor as long as he was honest had far more significance and by 1881 the phrase 'rehabilitation of the bankrupt' was being readily uttered in Parliament, although it was still seen as a reward for blameless conduct, or a means of relief for misfortune.⁹⁶ Yet whilst maybe it did not hold the same dread it once had, bankruptcy appeared to still have some stigma and this blight would be unhelpful to any restoration of an essentially honest person into the community. Parliament seemed keen to remove shame from business failure that was not self-induced.

But were there any indications as to attitudes to credit generally, apart from the fact fair and easy access to justice for debt issues was important? The most open discussion of credit and illustration of attitudes to it appear in the consideration of what was honest, honourable or without fault. In Parliament dishonesty was regarded as not just the criminal or fraudulent actions of a debtor, but might stretch to something short of that, for example reckless speculation or more significantly the careless taking of credit without necessarily the means to pay. According to one MP,

⁹⁴ Parl Debs (series 3) vol 229 col 1506 (1 June 1876).

⁹⁵ Parl Debs (series 3) vol 248 col 582–583 (16 July 1879) per Mr Osborne Morgan (Liberal).

⁹⁶ Parl Debs (series 3) vol 240 col 1072 (8 April 1881).

blameworthy conduct would, rather drastically, even include insufficiency of income—‘That ought never for a moment to be allowed to appear in a schedule as the cause of a man’s running into debt and avoiding the payment of his creditors’⁹⁷ thankfully an excuse more acceptable today. In essence if the credit was acceptable then so was the debt. A degree of responsibility on the part of the debtor was important, as was re-iterated in Parliament in 1881—independent examination into the conduct of the debtor was paramount and fraud, negligence, rash or unjustifiable speculation or extravagance should all be punishable.⁹⁸ This was illustrated not only by the idea that credit should be taken on solely in a responsible manner but also by the re-introduction of the debtor being allowed to declare himself bankrupt⁹⁹ with the view that it was better for the debtor to confess he was in trouble early on and provide as best he could for his creditors, than leave him to trade whilst insolvent until a creditor decided to take action.¹⁰⁰

This responsibility was not just about commercial sense however but about commercial morality as well, a question itself often cropping up in debate. Debt was not just the result of a commercial transaction; there was a moral as well as a contractual duty to meet the liability. MPs commented in 1869 that it was only sound morality that the debtor’s future property should still be liable to pay his debts¹⁰¹ and that the 1869 Bill should be tested on the basis of what was ‘morally right and just’.¹⁰² Again as Mr Chamberlain was to state over ten years later ‘public morality ... had suffered by these bankruptcy scandals.’¹⁰³ A Bankruptcy Bill was introduced in 1881 the purpose of which was to control fraudulent trading and raise the ‘tone of commercial morality’ whilst encouraging responsibility in ‘honest traders ...to look after their own interests’.¹⁰⁴ It is interesting that only a few years later this same morality was used as an argument against money-lenders—creditors who after all only wished to enforce the terms of their contracts. The money-lenders however were

⁹⁷ Parl Debs (series 3) vol 195 col 162 (5 April 1869).

⁹⁸ Parl Debs (series 3) vol 240 col 1067 (8 April 1881).

⁹⁹ Ibid col 1068.

¹⁰⁰ Parl Debs (series 3) vol 244 col 7 (3 March 1879); Parl Debs (series 3) vol 240 col 1068 (8 April 1881).

¹⁰¹ Parl Debs (series 3) vol 195 col 145 (5 April 1869).

¹⁰² Ibid col 158.

¹⁰³ Parl Debs (series 3) vol 240 col 1067 (8 April 1881) Mr Chamberlain was a Liberal and at this point President of the Board of Trade.

¹⁰⁴ Parl Debs (series 3) vol 240 col 1075 (8 April 1881).

seen as an evil of the system, supporting ‘failing traders by lending money at enormous interest, and thus help[ing] the trader to postpone the evil day to the ruin of creditors’.¹⁰⁵

Commercial morality is a concept that seems to have had great significance throughout Parliament’s approach to credit and debt in the 19th century. This pre-occupation may be attributable at least in part to the predominance of laissez-faire during this period, which, according to Epstein, had a view that common commercial morality should reduce the ‘reliance on legal mechanisms’.¹⁰⁶ As the century progressed however, as has been illustrated, social morality also became more significant as excuses for non-performance such as bankruptcy by misfortune became to some degree acceptable, in that rehabilitation and protection from harsher measures became a desirable objective. It was in the latter stages of the 1800s that the money-lenders’ activities also started to attract attention, their lending practices offending social morals by not only being seen as encouraging profligacy but also creating hardship upon enforcement of the debt.¹⁰⁷ Furthermore moral behaviour in terms of the ‘consumer’ in the 19th century was intimately involved with the purpose and amount of the credit provision and its social consequences. Money-lending was seen as a means to improvidence for unwise borrowers and the often harsh terms were seen as compounding the misery already suffered by the lower-income and poor borrower. The money-lender was effectively open to attack from a number of angles. Not only was he perceived to indulge in immoral action by exacerbating unwanted side effects of credit, he was also seen as encouraging immoral behaviour in the borrower.

¹⁰⁵ Royal Commission on Bankruptcy ‘Report of Her Majesty’s Commissioners appointed to inquire into the fees, funds and establishment of the Court of Bankruptcy and the operation of the Bankrupt Consolidation Act 1849’ HC (1770) 1854, 224.

¹⁰⁶ RA Epstein ‘Contracts Small and Contracts Large: Contract Law through the lens of Laissez-Faire’ in FH Buckley (ed) *The Fall and Rise of Freedom of Contract* (Duke University Press, Durham, 1999) 57.

¹⁰⁷ Money-lenders and the regulation put in place to control them is analysed in c 4 of this study.

After the Bankruptcy Act 1883,¹⁰⁸ the law, as far as personal bankruptcies were concerned in most respects remained the same until the Insolvency Acts of 1985 and 1986 although there was an Act passed in 1914 governing deeds of arrangement, a device by which a debtor could come to an arrangement with his creditors so negating the need for legal intervention. This vehicle for private arrangement of the repayment of debts however was not a popular device, the requirements being somewhat cumbersome.¹⁰⁹ By the time of the Insolvency Acts in the 1980s however it was not personal insolvencies and the conduct of those involved that were the main focus of concern, but the insolvencies of companies and the conduct of the individuals that ran them. By this point, the commercial world, having always been at the very least an important element in insolvency issues¹¹⁰ dominated the agenda. The rehabilitation of the personal bankrupt was seemingly not the top priority but rather the punishment of fraudulent and negligent behaviour of company officers, who compromised their creditors and escaped punishment. Indeed in written answers to a question on the reform of the bankruptcy law in 1980 the Conservative Government stated that the Official Receiver needed to be relieved of personal bankruptcies so that there could be a concentration on company winding up.¹¹¹

As far as personal bankruptcy reform was concerned the emphasis was on simplification¹¹² and there was no longer any need for the 'costly public structure for the administration of the civil process for personal bankruptcy'.¹¹³ What is clear from the debates at this time is that the idea of punishment for wrongful conduct, but rehabilitation after misfortune were principles that still held strong. Furthermore the stigma of bankruptcy was obviously something that was still to be avoided if possible. As one MP described it during debate in 1985 individual bankruptcy in

¹⁰⁸ Bankruptcy Act 1883 (46 & 47 Vict c 52). See text to nn 68–69. There were three further Acts that either consolidated the law or made minor amendments—Bankruptcy Act 1914(4 & 5 Geo 5 c59) Bankruptcy (Amendment) Act 1926 (16 & 17 Geo 5 c 7) Insolvency Act 29 1976 (c 60)

¹⁰⁹ Cork Committee Report (n 22) [358].

¹¹⁰ As can be concluded from Lester *Victorian Insolvency* (n 7) in the 19th century reforms the mercantile influence with regard to bankruptcy procedure was indeed strong.

¹¹¹ Hansard HC (series 5) vol 989 col 317 (24 July 1980) WA .

¹¹² Hansard HC (series 6) vol 78 col 142 (30 April 1985) Parliamentary Under Secretary for State.

¹¹³ Hansard HC (series 5) vol 989 col 318 (24 July 1980).

most cases was amongst other things ‘humiliating’, ‘punitive’ and ‘almost byzantine’.¹¹⁴ As another MP recognised, unlike the United States ‘the stigma still remains’¹¹⁵ and that not all insolvency was blameworthy,¹¹⁶ another states that a modern society should put emphasis on the rehabilitation of bankrupts.¹¹⁷ Although the arguments now related in the main to directors of failed companies (but often small businesses, like the bankrupt traders of the 1800s), the need for rehabilitation was openly recognised—people who had the courage to build businesses should be given help when in difficulty.¹¹⁸ Indeed financial failure was no longer a misfortune but merely a fact of life, although it was accepted the public should be protected from ‘incompetence and impropriety’.¹¹⁹ The principle behind the Conservative Government legislation was clearly stated in the House of Lords:

The new bankruptcy provisions have been designed to establish a humane but efficient system for dealing with those who cannot pay their debts with an emphasis on allowing the debtor the opportunity of continuing to make a living so as to provide for himself and his family and to make a contribution from future income towards the payment of his creditors.¹²⁰

Credit was seen as a fact of life, something upon which both business and individuals were dependent, although the purpose for which the credit was taken still made a difference to acceptability.¹²¹ One of the most debilitating factors of bankruptcy was the restriction on obtaining credit and a justification for the restriction was seen as prevention of credit for pure consumerism i.e. credit for non-essential purposes.¹²² Creditors themselves were still important of course, particularly individuals. One of the concerns of Parliament was the position of the consumer who had paid money up front for an item or services but the business had then “gone under”. Changes in society now meant that the consumer was just as

¹¹⁴ Hansard HC (series 6) vol 78 col 175 (30 April 1985).

¹¹⁵ Hansard HC (series 6) vol 78 col 178–179 (30 April 1985).

¹¹⁶ *Ibid* col 189.

¹¹⁷ Hansard HL (series 5) vol 459 col 1257 (7 Feb 1985).

¹¹⁸ Hansard HC (series 6) vol 78 col 199 (30 April 1985).

¹¹⁹ *Ibid* col 219.

¹²⁰ Hansard HL (series 5) vol 458 col 881 (15 January 1985) per The Lord Advocate, Lord Cameron of Lochbroom.

¹²¹ *Ibid* col 914.

¹²² Hansard HL (series 5) vol 462 col 183 (2 April 1985).

likely to suffer as creditor as a debtor.¹²³ Another change in emphasis was the idea that those involved in big business should be less entitled to the advantages of bankruptcy law. As Lord Lucas of Chilworth observed in 1985 with regard to the consumer debtor and small businessman

Government accepts such persons will normally deserve an earlier chance of rehabilitation in the form of the removal of the disabilities of bankruptcy¹²⁴

The idea of a fresh start was well and truly rooted in policy with regard to the small time debtor¹²⁵ and indeed by the time of the latest reforms introduced by the Enterprise Bill, which became the Enterprise Act 2002 ‘fresh start’ was the accepted philosophy. Today it is an enterprise economy that is seen as the goal of legislation and risk taking in such an environment is inevitable and indeed to some extent to be encouraged, although this still comes with the caveat that reckless or irresponsible behaviour will not be treated leniently.¹²⁶ Whilst in Parliament there have been complaints that the insolvency provisions of the Enterprise Act provided an easy option, considerations of commercial vitality were the driving force behind the legislation, but still, it was hoped, providing a balance between the interest of creditors, debtors, companies and the public.¹²⁷

(ii) Recovery of debt other than bankruptcy

The difficulty in recovering debts, especially small debts, was something that had long troubled Parliament. In the early 1800s the reformer Sir Samuel Romilly, no stranger to reform of the law relating to credit and debt, brought the subject up, claiming the available legislation for debt recovery was open to abuse, especially so with regard to creditors of small sums.¹²⁸ From the beginning Romilly was keen to

¹²³ Eg Hansard HL (series 5) vol 458 col 887 (15 Jan 1985).

¹²⁴ Hansard HL (series 5) vol 462 col 145 (2 April 1985) Lord Lucas was Parliamentary Under Secretary of State for Trade and Industry for the Conservative Government at this time.

¹²⁵ Ibid col 146.

¹²⁶ Secretary of State for Trade and Industry ‘Productivity and Enterprise: Insolvency—A Second Chance’ (Cm 5234, 2001) [1.1].

¹²⁷ Hansard HL (series 5) vol 637 col 138 (2 July 2002).

¹²⁸ Parl Debs (series 1) vol 36 col 25–26 (28 April 1817).

find excuses for the débtor, blaming legal advisers¹²⁹ and callous, inconsiderate lenders.¹³⁰ It was clear however that not everyone was so inclined to support the debtor, especially when it came to the insolvent debtor's legislation (which periodically released debtors from prison and discharged them from their debts)¹³¹ and there was a feeling that the creditor was at a distinct disadvantage 'for every instance in which justice had been done to a debtor—much more injustice had been done to creditors'.¹³²

The perceived ease with which the law treated the debtor gives a fair indication that the feeling toward credit in this first quarter of the 19th century contained an element of distrust. The Insolvent Debtor's Acts, which allowed prisoners in certain circumstances to be released and discharged from their debts and which were conceived as an answer to the practical problem of overcrowded prisons rather than as an answer to the general problem of debt,¹³³ gave 'birth to an extravagant spirit of adventure and gambling.'¹³⁴ To allow debtors to continue 'spending until no property remained to satisfy their creditors'¹³⁵ was 'not only injurious to credit but destructive of the whole morality of the trade.'¹³⁶ Yet credit, at least for trade, was indispensable¹³⁷ and although there was still disapproval of individuals taking on credit for personal purposes¹³⁸ and some suspicion that creditors brought trouble on themselves by granting credit too easily,¹³⁹ there was already a sign that, as in bankruptcy, returning the honest debtor to the community was regarded as a good thing, as it allowed him to recover his life.¹⁴⁰

¹²⁹ Parl Debs (series 1) vol 36 col 25–26 (28 April 1817)..

¹³⁰ Parl Debs (series 1) vol 36 col 820–821 (22 May 1817) although this remark was made with regard to bankruptcy.

¹³¹ Both temporary and permanent Acts were passed. One such Act in 1813—Act for the Relief of Insolvent Debtors (53 Geo III c 102) also established the Insolvent Debtor's Court.

¹³² Parl Debs (series 1) vol 39 col 182–183 (1 Feb 1819).

¹³³ Duffy *Bankruptcy and Insolvency in London* (n 10) 77–78.

¹³⁴ Parl Debs (series 1) vol 39 col 518 (19 Feb 1819).

¹³⁵ Ibid.

¹³⁶ Ibid col 519.

¹³⁷ Ibid.

¹³⁸ Eg Sir J Newport 'it was from the facility of giving credit that most of the evils arose' Parl Debs (series 2) vol 8 col 614 (18 May 1823).

¹³⁹ Parl Debs (series 2) vol 9 col 377 (21 May 1823) 'He denied...the truth of the representations that they thrust their credit upon customers.'

¹⁴⁰ Parl Debs (series 1) vol 39 col 520 (19 Feb 1819).

By 1820 it was being argued that imprisonment for debt, certainly imprisonment of a debtor who had not committed fraud, was inappropriate.¹⁴¹ As Lord Althorp explained in Parliament in 1819, the object of the 1813 Insolvent Debtor Law was to promote the principle that the property, not the body, of the debtor should be looked to for the satisfaction of a debt.¹⁴² The law however was still plagued with abuses, mainly arising from the haphazard nature of the procedure. The idea of merging with or at least mirroring the bankruptcy procedure was becoming an attractive option. The recovery of small debts also received some attention there being a Small Debts Recovery Bill introduced to simplify the process and increasing the jurisdiction of the courts up to debts of £10.¹⁴³ One of the identified advantages was that reduced expense for court procedure would be of benefit to the poor i.e. those who were most likely to only have small debts. But would this lead to irresponsible lending? Lord Ellenborough thought so in 1824—tradesmen would give credit too easily and those in need would jump at the chance to take it.¹⁴⁴ The newly appointed county courts indeed became something of a debt collection service,¹⁴⁵ with the judges waging their own private war against creditors of whom they disapproved.

As well as a desired simplification of the law relating to debtors a clear distinction between the honest unfortunate debtor and the fraudulent debtor¹⁴⁶ became an issue. This was something, as has been explained, also seen as relevant to bankruptcy procedure and as the discussions continued as to the wisdom of abolishing the Insolvency Acts, the fraudulent debtor became the visible target for any regulation.¹⁴⁷ Paying debt was more than a contractual obligation, it was seen by Parliament as a moral duty.¹⁴⁸ This can perhaps be illustrated most vividly by Lord Wynford's comment when discussing the Fraud on Creditors Bill in 1830 'While it

¹⁴¹ Parl Debs (series 2) vol 1 col 104 (3 May 1820).

¹⁴² Parl Debs (series 1) vol 40 cols 587–590 (20 May 1819).

¹⁴³ Parl Debs (series 2) vol 1 col 742–744 (1 June 1820).

¹⁴⁴ Parl Debs (series 2) vol 9 col 1315 (14 June 1824).

¹⁴⁵ Rubin 'County Court and the Tally Trade' (n 8).

¹⁴⁶ Eg Parl Debs (series 2) vol 1 col 609 (26 May 1820).

¹⁴⁷ Eg Parl Debs (series 2) vol 8 col 540–541 (13 March 1823); Parl Debs (series 2) vol 8 cols 612 (18 May 1823), Parl Debs (series 2) vol 8 col 749 (presentation of petition from merchants bankers and traders of the city of London) (27 Mar 1823).

¹⁴⁸ Parl Debs (series 1) vol 29 cols 182–183 (1 Feb 1819), Mr Brougham concurred, cols 183–184.

was quite right that those who had got into debt should suffer, he did not mean to extend the law so as to affect their heirs'¹⁴⁹—to this MP the mere act of getting into debt and not paying one's creditors was worthy of some form of punishment but it was an individual responsibility requiring individual penalisation. He was not alone. In a discussion in the House of Commons the same year relating to imprisonment for debt, Mr Alderman Waithman, a prolific speaker on this subject claimed that debtors 'were not confined by the hard heartedness of creditors but only as a means of enforcing payment of debts due'.¹⁵⁰ Taking goods on credit without the means of paying was seen as the same as 'robbing' the tradesmen 'for in the moral guilt there was no difference.'¹⁵¹

There were however many MPs against imprisonment for debt, although all qualified their discontent with imprisonment with the acceptance that fraud and misconduct of a debtor should not go unpunished. This theme follows the discussions on imprisonment for debt throughout the debates in the 1860s and beyond.¹⁵² There were many references to the plight of the 'honest debtor', the 'innocent and unfortunate' and comparisons drawn between those debtors and the 'fraudulent debtor'. Thirty years earlier, the Whig Government were already of this opinion. The Lord Chancellor stated categorically that imprisonment for debt should be abolished and that such punishment should be confined to 'contumacy or criminality',¹⁵³ such criminality including buying goods with an intent to cheat, secreting property or absconding.¹⁵⁴ Of course the arguments as to what constituted contumacy and criminality continued after imprisonment for debt was supposedly abolished in 1869, for as has been explained, imprisonment effectively remained for those who would not pay the debts.¹⁵⁵ It was thought actual fraud should be dealt with by the criminal law since it was a criminal act.¹⁵⁶ Refusal to pay was not enough to warrant the badge of criminality as such but many, including the now Liberal Government and the county courts themselves, felt imprisonment, as a sanction should remain.

¹⁴⁹ Parl Debs (series 3) vol 2 col 1–4 (21 Dec 1830).

¹⁵⁰ Parl Debs (series 3) vol 2 col 310 (8 Feb 1830).

¹⁵¹ Parl Debs (series 3) vol 76 col 1399 (25 July 1844).

¹⁵² Eg Parl Debs (series 3) vol 194 col 780 (5 March 1869).

¹⁵³ Parl Debs (series 3) vol 16 col 1190–1196 (28 March 1833).

¹⁵⁴ Parl Debs (series 3) vol 18 col 785–788 (13 June 1833).

¹⁵⁵ Parl Debs (series 3) vol 197 col 765 (29 June 1869).

¹⁵⁶ Parl Debs (series 3) vol 197 col 422 (22 June 1869).

The basis of the question however was not so much one of a jurisprudential concern for the propriety of debt as a crime but rather the practical nature of the effect the sanction had on the availability of credit. The possibility of removing what was regarded as a useful tool of enforcement made Parliament consider the provision and purpose of credit for those usually subject to imprisonment i.e. the working classes and poorer sections of society. Threat of imprisonment was a form of security, without which the poor would find it hard to gain credit. The argument was that whilst there were harsh sanctions available to the creditor, certainty of payment meant credit was assured and it was recognised credit was now essential, not just for individuals as a means of getting through hard times but also for the business world. In essence it was recognised credit was fundamental to the economy, without which trade would struggle to operate:

An argument in favour of the Act was stated to be that it would prevent credit from being given...A strange doctrine to broach in a country which avowedly depends on her mercantile credit for her commercial prosperity. What credit was to commerce so it must be to trade in all its branches; it is essential to the merchant and tradesmen whether wholesale or retail, and ramified down to the customer—yet what had the Government done? It had protected the credit of the rich and denied it to the poor¹⁵⁷

This idea of allowing harsher consequences for higher risk debtors to ensure availability of credit has some correlation with modern discussions surrounding the wisdom of preventing harsher terms, within consumer credit agreements, for low-income or higher risk borrowers. The arguments surrounding the imposition of an interest rate ceiling is a good example. “Weighted” terms such as extreme default measures or higher charges may seem excessive, undesirable or unfair. Yet at the lower ends of the credit market, where such terms are more likely to arise, it has been said the providers of such financial accommodation offer a service for the needs of

¹⁵⁷ Parl Debs (series 3) vol 80 cols 1011–1019 (29 May 1845) per Mr Berkeley (Liberal). This attitude is certainly true today. It has been commented that modern consumer credit is not only integral to the machinery of the economy but also provides a form of welfare, providing financial support during life-changing events such as unemployment and thus reducing reliance on the social welfare system—I Ramsay ‘Consumer Credit Society and Consumer Bankruptcy: Reflections on Credit Cards and Bankruptcy in the Informational Economy’ in J Niemi-Kieselainen, I Ramsay and W Whitford (eds) *Consumer Bankruptcy in Global Perspective* (Oxford, Hart 2003).

those unable to borrow elsewhere.¹⁵⁸ Indeed it has been pointed out that it is dangerous to remove these methods of self-protection for the creditor, as it may cause the dynamics of the market to change by effectively excluding those debtors who most need protection from the regulated market place.¹⁵⁹ This continues to be a dilemma for the Labour Government today. The desire, in the fight against over-indebtedness, is *inter alia*, to provide the option of affordable credit to vulnerable consumers and to protect such individuals against unfair practices.¹⁶⁰ An interest rate ceiling, perhaps the most obvious answer, has however been dismissed as ineffective and a manoeuvre that may in fact exclude from the market those it seeks to assist.¹⁶¹ It is accepted that higher prices, if a true reflection of risk, may be acceptable.¹⁶²

In the 1800s, as far as the effect on credit for the individual was concerned, any control was seen by some as a good thing. There was disagreement however with the argument that no credit available to the working classes would be for their benefit. Indeed non-existent availability would be deeply disadvantageous and it was stated that even at this early stage (by now the mid 1840s) 7/10ths of the country anticipated their income.¹⁶³ It seems clear that by the middle of the 1800s individuals were already using credit to utilise future income for present wants; maybe not for luxury consumer items but for consumer purposes all the same. Many MPs felt the key was not to deny credit to the poor but ensure it was given responsibly, through creditor enquiries¹⁶⁴ and consideration of the debtor's character and means, in other words a crude form of credit scoring. As was observed during a discussion on abolition, if the tradesmen lost their threat of imprisonment as means of payment then

if they should become a little more cautious in inquiring into the circumstances and character of those to whom they give credit,

¹⁵⁸ D Cayne and M Trebilcock 'Market Considerations in the Formulation of Consumer Protection Policy' (1973) *University of Toronto Law Journal* 396, 402.

¹⁵⁹ *Ibid* 408–409.

¹⁶⁰ DTI DWP 'Tackling Over-indebtedness Action Plan 2004' [10]–[12].

¹⁶¹ Consumer Minister 'No Interest Rate Ceiling For Now' Press Release 2004/315.

¹⁶² White Paper 2003 (n 2) [3.37].

¹⁶³ *Parl Debs* (series 3) vol 80 cols 1011–1019 (29 May 1845).

¹⁶⁴ *Parl Debs* (series 3) vol 76 col 1706 (2 August 1844), *Parl Debs* (series 3) vol 76 col 1893–1894 (7 August 1844).

perhaps it may be nothing the worse for the community or themselves.¹⁶⁵

By the late 1840s the push to merge the two procedures for insolvency and bankruptcy was strong especially through the sponsorship of Lord Brougham and the view that trader's commercial morals somehow guaranteed a higher standard of person¹⁶⁶ was becoming old fashioned. It still took another 15 years however before the distinction was removed. As far as imprisonment for debt was concerned, the remaining regulation stayed in place for another century. It was accepted by the 1930s that the provisions for imprisonment for debt merely punished the poor who could not pay and set back any hopes of being able to rehabilitate such people into the community.¹⁶⁷ However the interests of creditors remained a potent factor and the provisions remained. A small amount of debate continued for a period in the early 1930s revisiting the same arguments that had already been aired at length in the previous century. It was only in 1970 that imprisonment for private debt was more-or-less abolished,¹⁶⁸ with very little further parliamentary concern.

(b) Select committees and other parliamentary proceedings

(i) 1800s

From the early 1800s through to the present day there have been no less than 13 Committees appointed to consider various aspects of bankruptcy law and at least nine on debt recovery and imprisonment. The main concern with regard to the bankruptcy laws in the majority of these inquiries related to fraud and the inefficiency of the whole system's operation. This however was not to the exclusion of other factors. As early as 1817 some witnesses to the Select Committee appointed to consider the Bankrupt Laws¹⁶⁹ were already addressing the problem of treating bankruptcy as a crime, the fact there may be a difference between an honest and dishonest bankrupt¹⁷⁰ and how bad bankruptcy law could affect credit. A year later¹⁷¹

¹⁶⁵ Parl Debs (series 3) vol 18 col 788 (13 June 1833).

¹⁶⁶ Parl Debs (series 3) vol 91 col 261 (16 March 1847).

¹⁶⁷ Hansard HC (series 5) vol 86 col 224 (6 Dec 1932).

¹⁶⁸ See text to n 57.

¹⁶⁹ Select Committee 'Report from the Select Committee appointed to consider the Bankrupt Laws and the operation thereof' HC (1817) 486.

¹⁷⁰ Ibid per William Stevens 47.

it was obvious is that there was already a real concern being expressed for the welfare of those who fell into unmanageable debt through misfortune, a strict comparison being made between these debtors and those who simply could not be bothered, or refused to pay their debts

As in parliamentary debate, the general approach at committee level was starting to demonstrate a desire for those who truly could not pay to be discharged (and effectively rehabilitated) leaving those who could but chose not to pay to be punished. The 1818 Select Committee on the Bankrupt Laws was scathing of the regulatory system as it stood. The Bankruptcy Code was a “vicious system”,¹⁷² the prominent evils of bankruptcy procedure being, amongst other things, want of care in securing bankrupts’ property, the defective management of bankrupts’ estate, the insufficient means for investigating bankrupts’ conduct, total absence of discrimination between culpability and misfortune, and the use of capital punishment which was so repugnant it was effectively redundant.

The insolvency legislation seemed to be suffering similar problems. In the Select Committee set up at about the same time ‘to consider the state of the Law respecting the discharge of Insolvent Debtors’¹⁷³ (a similar committee having been set up a couple of years before)¹⁷⁴ there was express approbation for the principles upon which legislation was founded

a Debtor ought to be released from custody on making a bona fide division of his property amongst his Creditors, except in cases where the conduct of the Debtor appears to have been fraudulent¹⁷⁵

¹⁷¹ Select Committee ‘Report from the Select Committee on the Operation of the Bankrupt Laws’ HC (1818) 276.

¹⁷² Select Committee on the Operation of the Bankrupt Laws (1818) (n 172) 3.

¹⁷³ Select Committee ‘Report from the Select Committee appointed to take into consideration the state of the law respecting the discharge of insolvent debtors’ HC (1819) 287.

¹⁷⁴ Select Committee ‘Report from the Select Committee on the Effects of Acts for the Relief of Insolvent Debtors in England’ HC (1816) 472—with regard to the discharge of debtors the view was courts should be able to refuse where the prisoner was shown to be ‘grossly unjust in contracting debts or entering into engagements without the probable means of satisfying or fulfilling them, or squandering his property to the prejudice of his creditors’ 4.

¹⁷⁵ Report from the Select Committee appointed to take into consideration the state of the law respecting the discharge of insolvent debtors (n 173) 3.

but in practice as with bankruptcy the legislation fell far short of its target. The problems were these: there was no effectual examination into the veracity of a debtors' statement of his property previous to discharge, the debtor did not have any interest in the fact that the creditor should receive as large a dividend in any available property as was possible to give them, whilst in prison the debtor could get rid of the estate and the costs of the commissioners were excessive.

As far as small debts were concerned, in 1823 there was a 'Report of The Select Committee on the Recovery of Small Debts'.¹⁷⁶ Here the complaints were that for all debts under £15, the proceedings were very expensive, bearing no resemblance to the actual debt. This, together with the fact witnesses and parties often had to travel long distances, amounted to a denial of justice to the creditor and/or a means of harassing the poor to pay up. In some areas courts of requests with commissioners were set up (usually for debts up to 40s) and they were successful but not suitable for country-wide expansion. The Committee suggested regulating the county court so as to render it more efficient and equitable, by establishing periodical circuits in principal towns to reduce claimants' need to travel large distances. It was also felt proceedings should be simplified. Credit, or at least credit for small amounts to individuals was disliked but recognised as necessary 'an evil of considerable importance'¹⁷⁷ and there had to be a balance between the debtor's and creditor's interests.

As has already been mentioned, the whole working of the courts and legal system became the subject of a massive inquiry in the early 1830s by the Common Law Commissioners. The fourth of these reports¹⁷⁸ considered at some length the provisions for the arrest of debt, the Commissioners dislike of this remedy being clear. As far as they were concerned the debtor was deprived, through imprisonment, of the ability to work in order to diminish debt and/or support the family. Arrest, particularly for small debt caused injury not only to debtor but also to those who were 'entitled to the fruits of his labour.' Arrest on mesne process was prejudicial to other creditors and prevented fair distribution of assets, the result being

¹⁷⁶ Select Committee 'Report from the Select Committee on the recovery of small debts in England and Wales' HC (1823) 386.

¹⁷⁷ Report from the Select Committee on the recovery of small debts (n 176) 9.

¹⁷⁸ Fourth Report of the Common Law Commissioners (n 45).

that the debtor who could not take advantage of bankruptcy laws was often placed in a distressing situation. They were dismissive of the popular argument that arrest provided creditors with security for the credit, without which they would be reluctant to lend money. The Commissioners felt that such a security was not an adequate substitute for the exercise of 'proper caution and inquiry', and within this argument they recognised that credit and debt were inextricably linked

We believe that the extent to which debts are incurred will always depend on the facility of obtaining credit and that it will be restricted not by fear or apprehension on the part of those who can obtain but by the caution and prudence of those who give credit¹⁷⁹

Responsible lending was seen as the key to a healthy credit system, using knowledge of the debtor's character and degree of responsibility he possessed with less of a reliance on the facilities available when things went wrong—in other words prevention was better than cure.¹⁸⁰

The reality of how little advantage imprisonment for debt actually brought the community, from both business and personal viewpoints was also recognised in the later 1840 'Report of the Commissioners for the Inquiry Into Bankruptcy and Insolvency'.¹⁸¹ Imprisonment for debt was a concept regarded as having little advantage—the dishonest liked it, and it created an avenue for the honest to be led into immoral behaviour and a despairing situation with no prospects and no means of caring for family.¹⁸² This was also a huge inquiry with over 500 pages of evidence and the finding of the Commissioners, not surprisingly bearing in mind the earlier Select Committee Reports, was that both branches of the law were inadequate. The bankruptcy law was efficient in its discovery of property and the detection of frauds but defective with regard to punishment of dishonesty. In contrast the law dictating the relief for insolvent debtors afforded no efficient means for the discovery of property or the detection of frauds but did afford indirect power of punishment for

¹⁷⁹ Fourth Report of the Common Law Commissioners (n 45) 17–18.

¹⁸⁰ Ibid 44.

¹⁸¹ Royal Commission Report into Bankruptcy and Insolvency (n 19).

¹⁸² The Commission also suggests one court should deal with bankruptcy and that such a court should have districts.

dishonesty and fraud, by imprisonment. Additionally the distinction by which small traders could not avail themselves of the bankruptcy law and therefore faced imprisonment was unjust.

The Commissioners believed the problem of the policy which underpinned the system was the assumption that those who took credit for personal reasons and fell within the ambit of the Insolvency Laws were improvident and at fault, whilst those who took loans for business purposes within the ambit of the bankruptcy laws were not.¹⁸³ However although a smaller trader was within the ethic of the bankrupt laws he often found himself in the debtors' court instead, either because his debts were below the minimum or because he did not come within the specific legislative description of trader. Furthermore a debtor who came under the auspices of the Insolvency Laws had no means of voluntarily dividing property between creditors and obtaining a discharge from debts. The result was that often only a few creditors would receive payment with the debtor being left liable for the remaining debt yet with nothing with which to support himself or any family.¹⁸⁴ The Commission recommended one law for all insolvent debtors and speedier and cheaper process of equitable division of debtor's property. This would also encompass an inexpensive and efficient remedy for creditors to compel debtors to pay, providing an opportunity for the debtor to 're-establish himself in the world with a creditable character.'¹⁸⁵

The debt enforcement legislation was again attacked in a Committee set up nine years later to consider the Bankrupt Consolidation Bill,¹⁸⁶ only this time, in contrast, the creditor was the immediate concern. Lord Brougham stated that up to this point all the reforms had been in favour of the debtor, which had resulted in an undesirable imbalance in the system. The principle of this latest proposed legislation, was the initial presumption that in fact the debtor was in the wrong and ultimately the creditor must be right. The business of credit could only be improved by reducing fraud, a continual *bête noire* of the system. Reduction of fraud, according to the

¹⁸³ Report of the Royal Commission of Inquiry into Bankruptcy and Insolvency (n 19) viii.

¹⁸⁴ *Ibid* ix.

¹⁸⁵ *Ibid* xi.

¹⁸⁶ House of Commons Select Committee 'Report from the Select Committee on the Bankrupt Law Consolidation Bill' HC (1849) 551.

House of Lords Select Committee set up the same year,¹⁸⁷ could be at least partly achieved by gaining information on the borrower, which was vital for creditors and for this reason publicity of the failure of a dishonest bankrupt was needed.

As in the parliamentary debates, morality was also another factor often referred to in relation to debt. By 1853 it was clear in evidence given to a Select Committee on the Bankruptcy Bill¹⁸⁸ that it was felt there should be a high moral feeling among traders. This was because the prosperity of commerce depended upon it and this morality should be present in all credit taking. Morality however did not just have a part to play in the taking of credit, but in its provision as well. There should be an understanding that circumstances could affect the ability of the debtor to meet his obligations, whether this duty was contractual or moral. It was understood misfortune could come through no fault of the debtor,¹⁸⁹ but the debtor had to show his inability to pay was through unforeseeable circumstances rather than through recklessness or carelessness¹⁹⁰

In 1864 yet another Select Committee, this time on the Working of the Bankruptcy Act 1861¹⁹¹ was set up to try and sort out the system, because the much heralded 1861 Act had already run into problems. It shows how little progress the system had really made; the recommendations from the Committee mirrored issues of previous inquiries, such as the abolition of imprisonment for debt, discharge of the bankrupt, and the wilful injury of creditors' interests. After this Report the Bankruptcy Act 1869 was passed, itself subject to an inquiry a few years later.¹⁹² It was found that public opinion was dissatisfied because the debtor could relieve himself of his liabilities and yet at the same time the stigma of bankruptcy was something to be avoided for the honest. Small debts were now back on the agenda

¹⁸⁷ House of Lords Select Committee 'Report from the Select Committee appointed to inquire into the subject of Bankruptcy and Insolvency' HL (1849) 372.

¹⁸⁸ House of Lords Select Committee 'Report from the Select Committee on the Bankruptcy Bill' HL (1852-1853) 659.

¹⁸⁹ Ibid Mr John Howell q 284.

¹⁹⁰ Ibid Mr John Howell q 308.

¹⁹¹ Which reported twice—House of Commons Select Committee 'Report from the Select Committee on the Working of the Bankruptcy Act' HC (1864) 512, House of Commons Select Committee 'Report from the Select Committee on the Bankruptcy Act' HC (1865) 144.

¹⁹² House of Commons Committee 'Report to the Lord Chancellor of a Committee appointed to consider the working of the Bankruptcy Act 1869' HC (1877) 152.

and it was suggested the minimum amount above which the seizure and sale of traders' goods would amount to an act of bankruptcy should be abolished. After all 'The smaller the sum for which a trader allows an execution to be levied the stronger the evidence of insolvency.'¹⁹³ In the 1873 'Report on Imprisonment for Debt by County Court Judges'¹⁹⁴ there was evident sympathy for the plight of the smaller debtor and his lack of means for presenting his case as to whether he could not pay or would not pay. Summary of arguments against imprisonment were that it made creditors lazy, only larger debtors could resort to bankruptcy and smaller debtors should have the same ability, imprisonment was not a deterrent for the dishonest and was unduly severe for the honest.

Even after the Bankruptcy Act 1883 there was still some unease as to whether a complete solution to the various problems had been found. In 1887, during a Conservative Government, a Committee was appointed by the Lord Chancellor and the Board of Trade to inquire into the working of section 122 of the Bankruptcy Act 1883¹⁹⁵ and to investigate the problems encountered both by the creditor and the debtor in the recovery of small debts from the working classes. The Committee was of the opinion that the system under section 122, a system designed to make the debtor accountable yet not subject to imprisonment, did not work. Improvement was needed through bold innovation in relation to 'the question of credit and imprisonment for debt'. The Committee saw a difference between credit given by a trader and 'bad credit'—such as credit to an individual from money-lender—in other words cash loans; reckless credit taking as well as reckless credit giving was one root of the problem of bad debt. This particular issue was highlighted in evidence provided by the Inspector General in Bankruptcy, who gave rather damning evidence of what was actually occurring in practice

It is perfectly clear, from the experience gained from the working of the Bankruptcy Act, that insolvency does not,

¹⁹³ House of Commons Committee 'Report to the Lord Chancellor of a Committee appointed to consider the working of the Bankruptcy Act 1869' HC (1877) 7.

¹⁹⁴ House of Commons Select Committee 'Report of the Select Committee appointed to inquire into the subject of Imprisonment for Debt by County Court Judges' HC (1873) (348).

¹⁹⁵ Bankruptcy (Administration Orders) Committee 'Report of a Committee appointed by the Lord Chancellor and the Board of Trade to inquire into the working of s 122 of the Bankruptcy Act 1883' (C (2nd series) 5139, 1887).

as a rule, proceed from misfortune or from circumstances beyond the debtor's control, but is rather the result of the abuse of credit, and of the total indifference to obligations incurred, or to the possibility of discharging them.¹⁹⁶

This indicates an important element in the underlying approach to credit by the end of the 1800s as it applied to debt enforcement. Responsible lending was a key method by which creditors could not only protect themselves but also prevent debtors from over-committing themselves. It was being recognised that it was not so much the purpose of the credit that was good or bad but rather the care with which it was given or taken. This idea of responsible behaviour in fact went one step further—for the honest debtor who genuinely had fallen on hard times, rehabilitation was the answer; for the careless dishonest debtor far tougher treatment was justified. It was the circumstances of credit provision that required consideration rather than the credit itself.

It is clear from a fairly early stage in the 19th century, certainly by the time of the Common Law Commissioners Report of the 1830s, that credit, debt and the consequences of debt were seen as linked if not inseparable. Furthermore although the discussions surrounding debt did not initially directly address credit, the 1820s have been described as a watershed after which politicians finally began to understand about the issues that surrounded the legislation of credit.¹⁹⁷ Some modern writers also see default procedures such as bankruptcy being directly connected with and possibly affecting consumer credit,¹⁹⁸ for example such procedures in theory creating a legal right for a debtor to not pay his/her debts¹⁹⁹ and contributing to the 'ground rules of credit markets.'²⁰⁰ Not everyone would agree that debt is synonymous with credit, however, and it has been suggested that studying default is

¹⁹⁶ Bankruptcy Administration Orders Committee (n 196) Annex No 1; 'Report by the Inspector General in Bankruptcy on the general working of the Bankruptcy Act 1883 for the year ending 31st December 1886' 20.

¹⁹⁷ Duffy *Bankruptcy and Insolvency in London* (n 10) 127, 129–130, 139.

¹⁹⁸ J Ford *The Indebted Society Credit and Default in the 1980s* (Routledge, London 1988) 12—'Credit provides the framework for default'.

¹⁹⁹ Thus restructuring the relationship between creditor and debtor, M Shanker 'Debt Non-Payment as a Legal Consumer Right' in RM Goode (ed) *Consumer Credit* (AW Sijthoff, Boston 1978).

²⁰⁰ I Ramsay 'Consumer Credit Society and Consumer Bankruptcy: Reflections on Credit Cards and Bankruptcy in the Informational Economy' (n 157) 33.

not the same as studying credit. Shaoul claims consumer credit is seen as inextricably linked to consumerism and is something that has to be viewed not only from an economic viewpoint but from a position of social concern as well, and he seeks to separate consumer credit, as a social phenomenon, from its consequences.²⁰¹ Shaoul is not alone in making this distinction. In 'Psychological Factors in Consumer Debt: Money Management, Economic Socialisation and Credit Use'²⁰² the authors of the study make a distinction between 'debt', an inability to pay when the payee expects payment and 'credit use' which is an agreed postponement of payment. Yet whilst default could be described as a unilateral act of postponement and therefore to this extent different from credit, there is an element, namely a social element, which links the two. Social factors and the individual economic situation of borrowers affect not only the choice of the type of credit and its application but are also present in the reasons for and consequences of the failure to pay, whether temporary or complete.

Over-indebtedness is one possible consequence of credit, itself having undesirable social ramifications. The relationship between over-indebtedness and debt enforcement procedures (particularly bankruptcy) and credit are analysed by Huls in 'Overindebtedness and Overlegalization: Consumer Bankruptcy as a Field for Alternative Dispute Resolution'.²⁰³ The connection between credit and debt to Huls seems obvious, debt enforcement and bankruptcy being in effect the legal aspects of over-indebtedness. For a true solution credit cannot be treated in isolation, any solution has to address debt, all debt (including that not incurred through consumer credit) as well as credit. He, as many before him, recognises the social implications of financial failure and takes the view that as society encourages credit so it should support its casualties. His view, an attractive one, is that over-indebtedness should be approached within a framework encompassing both legal and social elements through the vehicles of debt counselling and negotiated settlements. The law should provide 'the basic requirements of a debt settlement' by means of procedural regulation that provides a mechanism for all parties that is fair.²⁰⁴ Combined with this should be the facility of professional debt counselling, the aim

²⁰¹ MD Shaoul 'On the significance of Consumer Credit: An Alternative to Common Sense Accounts' (PhD, Manchester UMIST 1992) ch 1.

²⁰² SEG Lea, P Webley and CM Walker (1995) *Journal of Economic Psychology* 16, 681.

²⁰³ n 11.

²⁰⁴ Huls 'Overindebtedness and Overlegalization (n 11) 147.

being that repayment of debt where possible should be handled without court intervention. Recent proposed reforms go some way towards these goals. Debt counselling is welcomed by the White Paper 2003 with new initiatives being set up for debt advice. An Alternative Dispute Resolution mechanism under the Financial Services Ombudsman will be provided for by the Consumer Credit Act 2006. Furthermore the new schemes proposed by the DCA for the management of debt envisage a greatly reduced role for the courts.

(ii) 1900 onwards

From the beginning of the 20th century, the default regime continued to be subject to scrutiny. In 1909 a Select Committee on Imprisonment for Debt was formed.²⁰⁵ In the subsequent Report credit was recognised as a way of life for the individual—it was even justified if taken in proportion to wages²⁰⁶ and to the Committee's mind even Parliament had sanctioned credit through County Courts Act 1846,²⁰⁷ section 5 of the Debtors Act 1869²⁰⁸ and the County Courts Act 1888.²⁰⁹ Yet whilst credit was now acceptable it appeared certain types of consumer credit was not. Cash loans from money-lenders and credit from vendors of luxuries such as jewellery etc was still not seen as worthy of the same protections for recovery. However it was not so much the credit but the irresponsible borrowing that the money-lenders encouraged that the Committee objected to:

The borrowing of money by impecunious persons is rarely advisable while the temptation held out by money-lender and their touts has grown to be enormous.²¹⁰

As these particular lenders relied on the power of committal it was felt that this power should be removed from them in order to diminish their influence. After the First World War bankruptcy was reviewed again (with reference to penal sanctions)

²⁰⁵ 'Report from the Select Committee appointed to enquire into the existing law relating to Imprisonment of Debtors' (n 53).

²⁰⁶ *Ibid* iv.

²⁰⁷ 9 & 10 Vict c 95.

²⁰⁸ 32 & 33 Vict c 62.

²⁰⁹ 51 & 52 Vict c 43.

²¹⁰ 'Report from the Select Committee appointed to enquire into the existing law relating to Imprisonment of Debtors' (n 53) ix.

by the Committee Report of 1924–1925,²¹¹ ten years later in the 1933–1934 Report investigating the courts of summary jurisdiction²¹² and again in a Report published in 1957.²¹³ In their deliberations these Committees further illustrate two principles that lay behind the treatment of debtors: the punishment of the dishonest and the provision of assistance for the honest and possibly unfortunate debtor.

In 1965, whilst the Labour party were in power, a committee was appointed to look in detail at the enforcement of judgment debts ('the Payne Committee').²¹⁴ The Payne Committee considered in detail the ability to imprison for debt, abolition being seen as a priority.²¹⁵ There was an air of resignation about the inevitability of credit and debt and for the first time a concrete proposal as to advice and assistance for the debtor (although at this stage with regard to post judgment debts rather than pre-contract credit advice). Sanctity of contract was considered as very important²¹⁶ as in the later Cork Committee Report²¹⁷ and it was made clear the basic assumption should be that contractual obligations must be honoured. The basis upon which the law should police a failure to meet these obligations should be where 'moral and social sanctions fail'.²¹⁸ However legal sanctions had to consider not only the rights of the creditor but the needs of the debtor as well. Recovery of debts should be cheap and easy and enforcement procedures should, whilst balancing creditor and debtor needs allow for the social needs of the debtor.²¹⁹ Protection for the debtor pre-contract was also advocated, particularly from unfair practices. The reasons stated for this, however was not so much to curb rogue lenders, (a particular target of the White Paper 2003) as to provide an aid to dilution of resentment of the law and assist enforcement of debts. Freedom of contract issues, so important in the discussions surrounding the issue of money-lending, whilst stated as outside the remit of the

²¹¹ Board of Trade 'Bankruptcy Committee Report' (Cmd 2326, 1925).

²¹² Departmental Committee 'Imprisonment by Courts of Summary Jurisdiction in Default of Payment of Fines and other Sums of Money; Report of the Committee' (Cmd 4649, 1934).

²¹³ Board of Trade Bankruptcy Law Amendment Committee 'Report of the Committee on Bankruptcy Law and Deeds of Arrangement Law Amendment' (Cmd 221, 1957).

²¹⁴ Committee 'Report of the Committee on Enforcement of Judgment Debts' (Cm 3909, 1969).

²¹⁵ *Ibid* [34].

²¹⁶ *Ibid* [46].

²¹⁷ Cork Committee Report (n 22) [21]. This Report underlined yet again the idea of commercial morality [191].

²¹⁸ Report of the Committee on Enforcement of Judgment Debt (n 214) [46].

²¹⁹ *Ibid* [76].

inquiry, were briefly addressed the Report urging the legislators to regulate against unfair and unconscionable terms that exploited consumers, who only had the option to take credit on terms they did not understand.²²⁰

The next full review of the whole of the bankruptcy system did not take place until nearly thirty years later with the Cork Committee Report set up during a Conservative Government. Society and credit provisions had changed enormously in the intervening years but the law was still embedded in the Bankruptcy Act 1883.²²¹ The Committee, which had not only personal but commercial insolvency to contemplate considered that the system, full of inconsistencies and deficient, should be replaced by a simple unified mechanism, with, where appropriate, alternative procedures. In this Report, more than any other credit was recognised as an intrinsic element of debt and default procedure with the whole of the first chapter being devoted to the facility of credit itself. As had been recognised before, credit was seen as essential to trade and industry and the individual consumer; it was ‘the lifeblood of the modern industrialised economy’.²²² Consumers more than ever before wanted to realise future income, buying goods on credit to improve their living standards. However this came at a price. With the availability of more credit facilities, such as credit cards, without strict budgeting individuals could find they had overreached themselves and with the increase in the use of consumer credit came the ‘consumer debtor’.²²³ A duty lay not just with the debtor however to budget sensibly—creditors should also lend responsibly. Easy access to credit, with an inability to budget was seen as the recipe for insolvency, a situation inadequately catered for by the law at that time.

The aim was to provide a ‘legal framework which gives the creditor confidence to extend credit’²²⁴ whilst not encouraging the debtor to act recklessly or irresponsibly. Education of the debtor was also now mooted but education of society as to how to manage debt rather than the obtainment of information relating to particular credit terms. Fair distribution of the assets for the creditors was important

²²⁰ Report of the Committee on Enforcement of Judgment Debt (n 214) [50].

²²¹ Cork Committee Report (n 22) [2]–[5].

²²² *Ibid* [10].

²²³ *Ibid* [13]–[16].

²²⁴ *Ibid* [25].

but the key was to deal compassionately with the unfortunate debtor and help the insolvent to extricate himself from hopeless debt as quickly as possible. The Committee's remarks referred to all borrowers whether commercial or individual but when the Conservative Government came to consider the Cork Committee's recommendations the emphasis in policy, as reflected in the parliamentary debates, was centred on corporate insolvency and its effect on the economy.²²⁵ Nevertheless the Committee's position shows a similarity of approach to that displayed recently in relation to many of the concerns surrounding consumer over-indebtedness. Minimising over-indebtedness is seen as being achievable through encouraging responsible lending and borrowing. This in itself is regarded as involving the improvement of financial education and awareness.²²⁶ As far as undesirable consequences of over-indebtedness are concerned, these can be reduced by improving support for those who do fall into debt.

The most recent review of the insolvency procedure was undertaken in 2000 with a consultation paper 'Bankruptcy A Fresh Start' and the later White Paper 'Productivity and Enterprise: Insolvency—A Second Chance'.²²⁷ The White Paper embraced the idea that failure could be honest and was an 'inevitable part of a dynamic market economy'.²²⁸ The basis of a new regime would be to encourage entrepreneurship but culpability was an essential factor in considering the fate of a bankrupt.²²⁹ Furthermore in relation to civil debt enforcement those who can pay should pay.²³⁰ Protection of the public was important but by the same token responsible risk taking 'could contribute to the creation of wealth and employment'.²³¹ The Enterprise Act 2002²³² has embraced this general direction, introducing inter alia automatic discharge after one year if no culpability under sections 256 and 257 and discretionary rather than mandatory investigation of the debtor's affairs by the Official Receiver. As one commentator says, it was recognised

²²⁵ Cm 9175, 1984, 5.

²²⁶ White Paper 2003 [5.26]–[5.28].

²²⁷ Secretary of State for Trade and Industry 'Productivity and Enterprise: Insolvency—A Second Chance' (Cm 5234, 2001).

²²⁸ Insolvency—A Second Chance (n 227) Foreword.

²²⁹ Ibid [1.1].

²³⁰ Ibid 4.

²³¹ Ibid [1.1].

²³² C 40.

that it was appropriate to make a distinction with regard to consumer debtors, being seen as not usually fraudulent and culpable individuals;²³³ they were victims not culprits.

It could be argued that pro debtor legislation results in reduced willingness of creditors to provide credit. This question was considered by a report in the *Quarterly Journal of Economics* 'Personal Bankruptcy and Credit Supply'.²³⁴ The article recounted a study conducted in America with the aim of trying to find out if personal bankruptcy and state bankruptcy exemptions affected the supply and demand for credit. They found that it did by redistributing availability of credit in favour of high-income households although interestingly it was not ease of bankruptcy itself that encouraged debt. Shanker also took this view in 'Debt Non-Payment as a Legal Consumer Right',²³⁵ believing most debtors would not in fact 'play the system' but would pay their debt if possible. However although the mechanisms may allow someone over burdened with debt to start again and be motivated to work and contribute to society, there may be a cost, ultimately in higher credit cost for other debt consumers.²³⁶ If these arguments are applied to the reviews of insolvency and consumer credit law, failure of the aims of a fair and free market that encourages true commercial enterprise may be a danger.

4. CONCLUSION

Bankruptcy has been described as 'the legal concept which perhaps most clearly registers the changing ideology of credit.'²³⁷ This statement should be refined. Bankruptcy is an illustration of changing ideology without doubt, but a changing ideology of one particular element of credit namely debt and enforcement of debt. It is a fact that in the 19th century bankruptcy was, as we have seen, bound up, certainly in terms of its philosophy, with the other procedures for the recovery of debt. Bankruptcy was to all intents and purposes a form of debt recovery, even when

²³³ S Davies *Insolvency and the Enterprise Act 2002* (Jordans, Bristol, 2003).

²³⁴ R Gropp JK Scholz and MJ White 'Personal Bankruptcy and Credit Supply and Demand' (1997) 112 *Quarterly Journal of Economics* 217.

²³⁵ RM Goode (ed) *Consumer Credit* (n199).

²³⁶ *Ibid* 123

²³⁷ *Cornish Law and Society in England* (n 33) 231.

issues of rehabilitation became fashionable and were incorporated into the bankruptcy legislation.

It is clear from the examination of parliamentary proceedings that credit and debt were seen as linked if not inseparable from the early 1800s. Arguments for and against the proposition that default procedures have connection with and even affect consumer credit are explored by modern commentators, such as Ford,²³⁸ Shaoul²³⁹ and Shanker.²⁴⁰ It certainly could easily be argued that the legislature supports the separation of default and credit. The provision of consumer credit, for example, is in the main regulated by one piece of legislation, the Consumer Credit Act 1974. Default is dealt with through the Insolvency Acts 1985–1986 and the Enterprise Act 2002 and the general procedural rules of the County Court, (the Civil Procedure Rules).²⁴¹ They are still linked, however, even if perhaps tenuously. The Consumer Credit Act 1974 sets down the means of enforcing agreements before recourse can be made to the courts for the initiation of default procedure. One such default procedure, perhaps the ultimate one is the mechanism of bankruptcy/insolvency. A connection of some description is hardly surprising when it is considered that, in the early stages of the development of default regulation, imprisonment for debt was seen as a means of credit control, even when the usury laws were still in force.

The same could be said of the bankruptcy laws, before and after the merger with the insolvency procedure. The fraudulent or reckless bankrupt was still to be punished as a means of curbing irresponsible credit taking and this theme is something echoed throughout the debates. Furthermore the connection is evident today with the White Paper 2003 making it clear that insolvency is an issue related to the provision of consumer credit, especially in the desire to combat over-indebtedness. This brings us to an important factor in this whole investigation into attitudes to consumer credit—consideration of consumer credit from the standpoint of over-indebtedness. Here there can be no argument as to the relevance of debt enforcement to consumer credit, an issue typically bound up with debt. This is

²³⁸ J Ford *The Indebted Society* (n 198) although Shaoul 'On the Significance of Consumer Credit' (n 201) intimates Ford merely treats credit as a pre-cursor to default.

²³⁹ Shaoul 'On the significance of Consumer Credit' (n 201) ch 1.

²⁴⁰ n 199.

²⁴¹ CPR 40 relates to the enforcement of judgment debts

underlined by the DCA's Enforcement Review. Both the White Paper 'Effective Enforcement'²⁴² and the Consultation Paper 'A Choice of Paths better options to manage over-indebtedness and multiple debt'²⁴³ assert the connection between enforcement of debt and over-indebtedness and the contributions the proposals' initiatives make 'to the over-indebtedness agenda.'²⁴⁴

A connection between credit and default being established, what conclusions can be drawn from the parliamentary attitudes surrounding the development of the debt recovery legislation? A dominant theme in earlier parliamentary attitudes to enforcement of debt is the obvious regard with which the sanctity of contract is regarded. Bankruptcy and the debt that caused it were seen invariably as a breach of a credit contract and something to be discouraged. Unwise borrowing could itself be seen as causing a violation of this principle. The recklessness of taking credit was seen as a direct cause of bankruptcy (i.e the breach of contract) and not just reckless credit but also credit where as a result of unforeseeable event the debtor found he could not pay.

As the 19th century progressed excuses for non-performance, such as bankruptcy by misfortune, became to some degree acceptable in that rehabilitation and protection from harsher measures became a desirable objective. Yet the non-payment of debt seemed to be bound in with 'commercial morality', morals being seen as an important element in the adherence to a contractual term, particularly one between parties in business relationships. To not pay a debt was under the insolvency procedure literally a crime for at least the first half of the 1800s. Whilst commercial morality was less of an issue for the 'consumer' during this period it did have some bearing on the law of default as a whole and indeed the idea of commercial morality, whilst perhaps seeming an old fashioned term was still evident underneath the surface of the debates surrounding the new insolvency law in the 1980s and the punishment of misbehaviour of company directors in insolvency. The moral obligation to honour contractual terms did retain importance, but as the 19th century progressed seemingly less so in the world of the consumer. As the enforcement

²⁴² n 3.

²⁴³ n 43.

²⁴⁴ Ibid [17].

legislation evolved, in business relationships morality was on the side of the creditor, in individual particularly consumer relationships, on the side of the debtor. One particular example of this is the attitude towards money-lenders who were, in many cases simply pursuing their rights under a contract. Commercial morality upheld the payment of debts yet curiously this did not seem to apply to cash loans from money-lenders. Whilst using the law as a means of oppression can never be justified, it was automatically assumed that creditors of money-lending contracts were not only not morally entitled to pursue their claim but further that it was immoral commercially and socially for them to do so.

The parliamentary attitudes to debt enforcement seem to show that credit attracts a mixture of moral and legal duty; the difficult part is getting the mix right. The debt recovery legislation did and does still condemn fraudulent and wilful refusal to pay debt and yet allows an escape from contractual liability for those deemed to be worthy of a second chance, the latest reforms making this option more attractive than ever before. Lester describes the legal framework of bankruptcy legislation as having developed from practical problems rather than from political philosophy²⁴⁵—it is doubtful this can be said of later legislative reform. What seems clear is that the legislature, in order to address the needs of society, is prepared to allow people to wipe the slate clean and turn their back on contractual credit obligations—if the credit cannot be stopped then the payment of the resultant debt can. And yet it is accepted by the Government that credit is desirable as long as it is provided and taken responsibly.²⁴⁶ Easier insolvency may lead the creditor to think twice but will it engender responsibility in the debtor? There is no doubt however that whilst in the earlier 1800s responsibility lay firmly with the borrower, as time has progressed duty to behave responsibly has increasingly been laid at the feet of the creditor.

Another element to default and therefore credit is cost, both social and economic, something that has shown itself foremost in the considerations of Parliament and the legislature. As has been illustrated, society's interests are seen as an integral part of any philosophy of bankruptcy legislation, that the public had an

²⁴⁵ Lester *Victorian Insolvency* (n 7).

²⁴⁶ White Paper 2003 (n 2) 6.

interest in the procedure is clear from debates from the early 19th century onwards. The issue was obviously high profile, which would explain the high level of Government involvement from an early stage. Again the connection (and its importance) between default and credit was recognised in the 1800s, it being accepted that the credit system that provided the basis of the British economy relied on the regulation of debt; insolvency was therefore seen as a national, not an individual cause for concern.²⁴⁷

In 'Insolvency—A Second Chance'²⁴⁸ and other government papers the concern as to the cost of insolvencies to the economy is openly admitted, although 'Insolvency—A Second Chance' mirrors the 19th century ethos behind the Bankruptcy Act of 1883, which allows for honest failure but provides a tough regime for irresponsible reckless or criminal behaviour. The emphasis now however is different in that the aim is to actively encourage risk taking, as long as it is responsible. This is of course aimed in general at the business community, but it must not be forgotten that the sole trader or unincorporated business-man is still a consumer for the purposes of his credit under the 1974 Act. One could see why creditors might feel aggrieved, with more regulation to allow the debtor to be discharged from his debt, yet proposed tighter regulation for those who provide the credit. These provisions are pro debtor without a doubt. Yet whilst any rise in personal bankruptcy levels is stated as not being due to the changes in the insolvency regime,²⁴⁹ the compatibility of the ethos behind the insolvency reform with that of the Consumer Credit Review is perhaps questionable when considered in light of the desire to combat over-indebtedness, a major aim of the White Paper 2003.

It has been shown that the parliamentary activity in relation to the bankruptcy and insolvency procedures during the Victorian period and beyond provides some evidence of parliamentary and legislative attitudes to credit. Bankrupts, of course, have commitments that are the result of unpaid bills or other financial accommodation not within the ambit of the consumer credit legislation but this does not detract from the relevance of attitudes towards bankruptcy as a general indication of attitudes towards credit as a whole. The approach taken towards bankruptcy and

²⁴⁷ Lester *Victorian Insolvency* (n 7) 2–3.

²⁴⁸ n 227.

²⁴⁹ Over-indebtedness Monitoring Paper Q3 2005.

other default procedures has more particularly illustrated parliamentary and legislative attitudes to one aspect of credit, namely debt. Belief in the importance of credit (including consumer credit) is well illustrated with default procedures being seen, at least initially as an avenue of control for undesirable credit provision. Parliamentary attitudes, as has been shown by the debate and development of the legislation, have vacillated between debtor and creditor interests. However by the 1880s it is clear that the interests of the debtor, particularly in a social context, had a firm grip on legislative policy, even though imprisonment for debt remained. Legislation in many respects remains in the debtor's favour and the impending consumer credit reform will take credit legislation further down this road. Whether the pendulum will ever swing back towards the creditor remains to be seen.

CHAPTER 6

HIRE PURCHASE AND MODERN CONSUMER CREDIT

1. INTRODUCTION

It has been illustrated, through the evidence examined so far, that from the early 1800s onwards consumer credit, as its form and nature developed became of increasing interest to Parliament. There is one category of credit, however, that emerged during the Industrial Revolution which more than any other came to typify consumer credit in its modern form; this was hire-purchase. Yet, whilst money-lenders for instance were regulated by the Moneylenders Acts,¹ as we have seen prompted by the concerns over bills of sale,² early hire-purchase slipped through the net of regulation, being neither money-lending for the purposes of the Moneylenders Act³ nor a bill of sale transaction.⁴

As the practice of hire-purchase developed it became the archetype for the instalment sale of consumer goods,⁵ although it was characterised by the law as a hiring with an option to purchase. This legal classification was primarily due to the House of Lords decision in *Helby v Matthews* [1895] AC 471⁶ which determined that a power of termination in an agreement precluded it from being a contract under

¹ 63 & 64 Vict c 51; 1 & 2 Geo 5 c 38; 17 & 18 Geo 5 c 21.

² Which were themselves subject to strict requirements under the Bills of Sale Acts 1878–1882 (41 & 42 Vict c 31); (45 & 46 Vict c 43).

³ *Beete v Bidgood* (1827) 7 B & C 453.

⁴ *McEntire v Crossley* [1895] AC 457—WR Cornish and G De N Clark *Law and Society in England 1750–1950* (Sweet and Maxwell, London 1989) 243. In that case the express provision in the agreement retaining property in the goods with the vendor was fatal to the contention by the appellants that the agreement was one of sale secured by mortgage.

⁵ Committee on Consumer Credit 'Consumer Credit: Report of the Committee' (Cmnd 4596, 1971) [2.1.37–2.1.50]; AL Diamond 'Instalment Credit: An Introductory Survey' in AL Diamond (ed) *Instalment credit* (Stevens and Sons, London 1970) 5.

⁶ The legislation also recognises hire-purchase in this form—Hire-Purchase Act 1938 (1 & 2 Geo 6 c 53) s 21(1); Hire-Purchase Act 1965 c 66 s1, Consumer Credit Act 1974 c 39 s 189(1).

which the hirer had “agreed to buy” the goods.⁷ It is said that as a result of this decision the ‘modern’ legal form of hire-purchase took shape,⁸ the ability to terminate allowing the courts to regard the agreement as one of hire with an option to purchase⁹ rather than a loan for the purchase of goods secured by those goods. In any event like any other unregulated business it ended up ‘running wild’ and as in other areas of consumer credit, complaints about rogue and unfair practices finally led to legislation.¹⁰

There are a number of writers who have looked at various aspects of the development of hire-purchase.¹¹ However in accordance with the theme of this thesis, the aim in this chapter is to focus on one particular area of the development of hire-purchase and subsequent legislation, namely parliamentary attitudes. Furthermore hire-purchase, with its easily available facility to allow purchase of a wide range of consumer goods on credit, is the appropriate place to begin an investigation into parliamentary attitudes to modern consumer credit. It should be pointed out at this stage that pure hire, although covered by the Hire-Purchase Act 1965 and Consumer Credit Act 1974 will not be considered, it not being within the ambit of consumer credit for the purposes of this thesis. It should also be clarified at this point that, as with the examination of bankruptcy and enforcement in the previous chapter, there will not be a detailed examination of the Scottish hire-purchase legislation.¹²

The purpose of this chapter is to explore parliamentary attitudes to hire-purchase and the approach to development of the legislation that led to the current

⁷ Which meant that the agreement was outside the ambit of s 9 of the Factors Act 1889 (52 & 53 Vict c 45)—the main contention of the appellants. This section, in certain circumstances, allows disposition of goods by a buyer in possession to a bona fide third party.

⁸ RM Goode *Hire-Purchase Law and Practice* (2nd edn Butterworths, London 1970) 5; Crowther (n 5) [2.1.40].

⁹ In its infancy hire-purchase often did literally take this form—Crowther (n 5) [2.1.37–38].

¹⁰ Cf one view that legislation was as much brought about by the traders themselves as consumers: JJ McManus ‘Law and Power: A Study of the Social and Economic Development of the Law relating to Consumer Credit’ (PhD Dundee 1985) 52, 60–61.

¹¹ For example RM Goode *Hire-Purchase Law and Practice* (n 8) and McManus ‘Law and Power’(n 10).

¹² The law in Scotland was merged with English law in 1964 with the passing of the Hire-Purchase Act of that year. There were some problems with this which had to be rectified by the Hire-Purchase (Scotland) Act 1965 c 67 but the law was fully amalgamated in any event by the Consumer Credit Act 1974 c39.

regulatory framework. Hire-purchase is considered first, illustrating the progression of consumer credit legislation through the earlier part of the 20th century, followed by a discussion of the parliamentary events that led to the passing of the Consumer Credit Act 1974. Both debate and specific committee proceedings surrounding reform are examined. There is however some emphasis on one particular committee set up in the late 1960s, chaired by Lord Crowther, which had as its remit a comprehensive review of the consumer credit legislation as it then existed (“the Crowther Committee”). This committee has particular significance in that its Report resulted in the Consumer Credit Act 1974, the primary basis of regulation for present day consumer credit. It is from this source, and other parliamentary activity as already detailed, that conclusions can be drawn as to the approach to consumer credit of Parliament and the legislature from the early 1900s to the present day.

2. HIRE-PURCHASE LEGISLATION

(a) The Development of Hire-Purchase Regulation

The development of hire-purchase law has been well documented.¹³ The practice emanated from the United States of America, arriving in this country in the mid 1800s, primarily to enable the purchase of sewing machines and pianos.¹⁴ Within a short period of time it was financing not only the purchase of other consumer items such as furniture but also commercial assets particularly railway rolling stock. Although the practice of hire-purchase had become commonplace by the latter stages of the 1800s, unlike other forms of consumer credit that had already attracted the attention of the legislature it was not until the 1930s that legislation was finally drafted to regulate the market, some time after complaints about abuses in the system had become commonplace.

Reasons given for the initial lack of interest in regulation have been that on the one hand as neither a basic loan nor a simple deferred payment for the sale of goods (the former and not the latter being regulated) hire-purchase existed in a no

¹³ Crowther (n 5) [2.1.37–2.1.50]; Goode *Hire-Purchase Law and Practice* (n 8) c 1–6; McManus ‘Law and Power’ (n 10) c 2–6.

¹⁴ Goode *Hire-Purchase Law and Practice* (n 8) 2; Crowther (n 5) [2.1.37–2.1.39].

man's land.¹⁵ Alternatively it has been suggested that as the traders themselves had no need of legislation, having developed a form of instalment sale of consumer durables that suited them,¹⁶ desire for legislative control was muted. Another reason however for the lengthy period before proposed legislation was probably that, as in other areas of consumer credit provision, only gradually was importance attached to complaints of abuses. The generation of interest in regulation of personal credit provision had up to this point been a slow affair, it taking decades for Parliament and the legislature to consider and implement adequate control over developing consumer credit issues. It should therefore come as no surprise that initially legislation on hire-purchase was not forthcoming.

At first, hire-purchase was seen rather more as a contract of sale than a contract for the provision of credit.¹⁷ The credit element of the contract was only something that began to concern Parliament once hire-purchase had taken a firm hold on the way consumers made their purchases and malpractice perpetrated by the more unscrupulous hire-purchase trader could no longer be ignored. There were other problems that were also recognised as needing attention, in particular the difficulty in ascertaining charges and cost of the agreement. Primarily as the result of the work of one MP, Ellen Wilkinson,¹⁸ the Hire-Purchase Act was passed in 1938¹⁹ following the example set by the Hire-Purchase (Scotland) Act 1932. The Act introduced, in certain circumstances, controls that included the right of determination by the hirer,²⁰ avoidance of certain onerous provisions²¹ and restriction of the owner's right to

¹⁵ Cornish *Law and Society in England* (n 4) 246.

¹⁶ Which, just as importantly, was acceptable to the courts. It has been contended the movement towards legislative control was only initiated by the traders when they themselves felt the need for regulation McManus 'Law and Power' (n 10) 91–93; the parliamentary debates however suggest, as in earlier credit legislation, traders' only interest was in containing regulation rather than encouraging it. Hansard HC (series 5) vol 330 col 738 (10 December 1937).

¹⁷ Hansard HC (series 5) vol 62 col 719 (11 May 1914); Goode *Hire-Purchase Law and Practice* (n 8) 6.

¹⁸ Ellen Wilkinson was the MP for Jarrow, known for her left wing views and support for the unemployed. In 1945 she became the first woman to be appointed Minister of Education, a position given to her by Clement Atlee.

¹⁹ 1 & 2 Geo 6 c 53. A subsequent Act was passed in 1954 raising the financial limit of the Act's control to £300, £1000 for the purchase of livestock. Hire-Purchase Act 1954 (2 & 3 Eliz 2 c 51) s 1.

²⁰ By notice, with liability to make up the difference between payments already made and up to half the total hire-purchase price—Hire-Purchase Act 1938 (1 & 2 Geo 6 c 53) s 4.

²¹ *Ibid* s 5.

recover possession of goods.²² The legislation also provided for disclosure requirements as to price and the provision of copy agreements (in the form of a note or memorandum of the agreement) with the sanction of possible non-enforcement of the agreement by the court.²³ Information as a tool of protection was something that was addressed further by the 1957 Advertisements (Hire-Purchase Act) Act.²⁴ Consumers were to be given adequate, intelligible information to enable informed decisions, extending disclosure requirements to the pre-contractual stage of the parties' relationship and further emphasising the role information was beginning to play in any policy of protection for the hire-purchaser.

By the late 1950s exploitation of the consumer in general was receiving a higher profile in Parliament. Hire-purchase, as a product often sold on the doorstep, was seen as a consumer protection issue²⁵ and in 1964 Parliament passed another Hire-Purchase Act.²⁶ This Act updated the previous legislation and introduced new measures which provided a further basis for many of the later provisions contained in the Consumer Credit Act 1974,²⁷ not only extending requirements as to copy agreements and the provision of information but also allowing the consumer to cancel the agreement in certain circumstances. The legislation was completed with consolidating Acts in 1965 and 1967,²⁸ but was subject to extensive review again within a couple of years as part of the investigation conducted by the Crowther Committee. In 1974 the regulation of hire-purchase, to all intents and purposes came under the umbrella of the Consumer Credit Act.²⁹

²² Hire-Purchase Act 1938 (n 20) ss11–13.

²³ *Ibid* s 2(1), (2). The court did have the power to enforce the agreement, even if the owner had breached the section's requirements if it was just and equitable to do so. This however did not extend to provision of the note/memorandum, only its contents. The court was entitled to impose other conditions in place of the dispensed requirement(s) s 2(2).

²⁴ 5 & 6 Eliz. c 41.

²⁵ Hansard HC (series 5) vol 678 (20 May 1963).

²⁶ Hire-Purchase Act 1964 c 53.

²⁷ For example excluding corporate bodies from the benefit of the Act, extending the requirements as to copy agreements and the provision of information, the requirement for default notices and introducing the cooling off provisions, whereby a buyer/hirer was given the opportunity to abrogate the agreement if signed off trade premises.

²⁸ Hire-Purchase Act 1965 c 66; Advertisements (Hire-Purchase) Act 1967 c 42.

²⁹ C 39. Pt III of the Hire-Purchase Act 1964 remains in force, retaining the protection of innocent third parties in relation to the purchase of motor vehicles. Statutorily implied conditions as to title, description and quality, originally contained in the Hire-Purchase Acts are now contained in the Supply of Goods (Implied Terms) Act 1973 c 13.

In the 30 years since that Act was passed the consumer credit market has developed rapidly. Hire-purchase, a major form of credit for consumer durable goods now faces competition from other forms of consumer finance. Once the most popular way to buy goods on credit,³⁰ other facilities such as the personal loan, mail order and particularly the credit card have instead found favour with the consumer. This trend was illustrated by the 2002 'Task Force Report—Over Indebtedness in Britain—A Report to the DTI'³¹ which found that in comparison with 1989 a higher proportion of households seemed to favour credit cards over other credit facilities, with current credit card commitments exceeding those of mail order, cash loans and hire-purchase/credit sale.³² Indeed by 2002 total transactions on credit cards amounted to £120 billion and by 2003 consumers owed £52 billion on credit card balances.³³ It is partly due to this changing nature of the consumer credit industry, together with the market's rapid expansion, that the current Consumer Credit Act Review was set up.

There was another form of control over hire-purchase besides the hire-purchase legislation which should also be considered briefly. This was the control of terms imposed by various governments from the second world war onwards,³⁴ implemented through various 'Control Orders' which continued sporadically up until the 1980s. These Orders were economic rather than protective in nature, being the result of macro-economic rather than consumer protection policies. They did not 'impose a physical control'³⁵ but rather provided

³⁰ In 1969 a survey undertaken by NOP Market Research Ltd as to types of credit used in the past found that 49% of the population had used hire-purchase at some time, a higher percentage than for other forms of regular consumer credit. Table 3.7 Crowther (n 5) [3.5].

³¹ E Kempson 'Task Force Report—Over Indebtedness in Britain—A Report to the DTI' (Personal Finance Research Centre 2002) [2.2].

³² The breakdown was as follows: current credit card commitments (19%) mail order (17%) cash loans (15%) hire-purchase/credit sale (13%)—Task Force Report (n 31) [2.2] Table 2.3. However the Report's figures did show that even though hire-purchase/credit sale commitment had decreased, the average amount owed by households in 2002 (£3,800) was higher than that owed to credit card companies (£ 1,570). The Report by D Cruickshank 'Competition in UK Banking : A Report to the Chancellor of the Exchequer' (2000) ('The Cruickshank Report') also found the credit card to be the preferred method of payment by many consumers.

³³ House of Commons Treasury Committee 'Transparency of Credit Card Charges' HC (2003) 125–1, 6–7.

³⁴ Crowther (n 5) contains a summary of the history of these controls in c 8, as does Goode *Hire-Purchase Law and Practice* (n 8) 17–18.

³⁵ Hansard HL (series 5) vol 503 col 763 (3 July 1952).

one of a number of monetary measures to restrict credit, and to prevent too much borrowed money using up materials and labour which would be better employed in producing goods for export and defence³⁶

These restrictions governed the terms of stipulated goods sold under the hire-purchase system,³⁷ including control of finance charges, the sum allowable as a deposit and the maximum periods of repayment. The Orders provided technical control of consumer credit, stipulating the precise content of particular terms of credit contracts. This was in contrast to the perhaps more peripheral nature of consumer protection provided by the Hire-Purchase Acts, which were as much concerned about the circumstances and consequences surrounding the credit provision as the detailed nature of the terms themselves. Whilst the hire-purchase legislation dealt with the circumstances surrounding sale and default by inter alia ensuring adequate information for the consumer, protection through the ability to cancel the agreement in certain circumstances and stipulations as to the recovery of goods, the Control Orders regulated the content of specific agreement terms, controlling the costs and basis upon which payments could be made. The Control Orders were therefore, in effect, concerned with the intimate control of individual provisions of consumer credit contracts. Interestingly, whilst Government was happy to impose these restrictions, it would not entertain the sanction of an imposed maximum interest rate.³⁸ Although this provided an obvious form of controlling the terms of credit provision, the preference was to leave the regulation of interest rates to market competition.³⁹ This was a position that was not to change and still stands firm today with the Government's latest announcement that interest rate caps will not be introduced.⁴⁰

The reluctance to establish this particular restriction can perhaps be explained by the reasons behind these various forms of control. Whilst the Control Orders had

³⁶ Hansard HL (series 5) vol 503 col 763 (3 July 1952) per Parliamentary Secretary to the Board of Trade, Henry Strauss.

³⁷ And credit sale agreements.

³⁸ Hansard HC (series 5) vol 537 col 257 (1 March 1955 WA); Hansard HC (series 5) vol 586 col 767 (22 April 1958 OA).

³⁹ Hansard HC (series 5) vol 544 cols 63–64 (21 July 1955 WA).

⁴⁰ Consumer Minister 'No Interest Rate Ceiling For Now' Press Release 2004/315.

the interests of the economy as their *raison d'être*, this was not so in the case of the suggested imposition of an allowed maximum interest rate. Unlike the Control Orders, this issue was and is one of consumer protection, through the prevention of harsh terms and establishing an element of fairness into the contract. Although Parliament was developing a predisposition towards the interests of the consumer there was resistance from the Government to this particular protective device. Whilst there has always been some support for an interest rate cap in Parliament,⁴¹ various theoretical arguments against such a restriction have been put forward. One hypothesis has been that maximum interest rates would in effect exclude poorer borrowers from the legitimate market.⁴² This position now has strength in empirical evidence, provided for example by the Policis Report 'The effect of interest rate controls in other countries',⁴³ commissioned by the DTI.⁴⁴ Primarily as a result of this research, which concluded that such controls did contribute to financial exclusion,⁴⁵ the Government has declared imposition of an interest rate cap unlikely in the immediate future,⁴⁶ the prevention of financial exclusion of the vulnerable being one of the Government's stated aims in its fight against over-indebtedness.⁴⁷

The issue of Credit Control Orders was also a controversial one. Their effectiveness was regularly challenged in Parliament⁴⁸ and indeed questions about Credit Control Orders was one of the reasons for the setting up of the Crowther

⁴¹ And to some extent from consumer protection groups, although the Citizens Advice Bureaux did support the DTI's recent decision not to impose a ceiling on rates, believing other factors contributed just as much to extortionate credit such as high pressure sales and unfair terms and conditions. Press release 2004/315 (n 40).

⁴² Eg D Cayne and MJ Trebilcock 'Market Considerations in the Formulation of Consumer Protection Policy' (1973) *University of Toronto Law Journal* 23, 396; ME Staten and RW Johnson 'The Case for Deregulating Interest Rates in Consumer Credit' (Credit Research Center, Purdue University, 1995).

⁴³ The Report was published in August 2004.

⁴⁴ The remit was to explore how interest rate controls impact in other countries and the likely consequences of introducing a similar system in the UK. Besides the UK the research covered the USA, France and Germany.

⁴⁵ Policis Report 'The effect of interest rate controls in other countries' (2004) [4.1].

⁴⁶ Although the matter is being kept under review Hansard HC Debs (series 6) vol 429 col 461 (13 January 2005)

⁴⁷ 'Fair Clear and Competitive The Consumer Credit Market in the 21st Century' (Cm 6040, 2003) c 5; Ministerial Group on Over-indebtedness 'Tackling Over-indebtedness Action Plan 2004' (DTI, DWP, 2004) 30.

⁴⁸ Hansard HC (series 5) vol 503 cols 756–762 (3 July 1952); Hansard HC (series 5) vol 724 col 32 (7 February 1966); Hansard HC (series 5) vol 780 col 1574 (25 March 1969).

Committee.⁴⁹ The Committee recommended their abolition, regarding them as ineffective and discriminatory against the poor (as against the better off) and old (as against the young)⁵⁰ similar arguments in fact to those presented against interest rate controls as a means of consumer protection.⁵¹ The final Order was abolished in 1983, thus placing all regulation of credit agreements within the general consumer credit legislation.

(b) Parliamentary Debates

As has been indicated there was little parliamentary interest in hire-purchase until the 1920s, with only one brief debate before this in 1893.⁵² The first major consideration of the subject arose in 1928 with the introduction of the Hire-Purchase System Bill and here there is no doubt Parliament's perceived problem of hire-purchase was how it affected the trader and connected businesses rather than the consumer.⁵³ During discussion the consumer market did not feature to any great extent in the minds of the debaters, although brief concern was expressed about the private individual and the cost of this type of credit⁵⁴ and there are indirect references to over-commitment in terms of 'thriftlessness and irresponsibility'.⁵⁵ The issue behind the debates on the 1928 Bill however was not so much about hire-purchase but rather about competing interests on the bankruptcy of a debtor. It was explained that the object of the Bill was 'to relieve the property of a hire-trader, held under a bona-fide agreement with a hire-purchaser, from liability for the debts of the hire-purchaser.'⁵⁶ Since this was in effect a bankruptcy matter and the problem of who owned what on bankruptcy or financial failure it is perhaps no wonder that the emphasis on the consumer was limited.

⁴⁹ Hansard HC (series 5) vol 780 col 1583 (25 March 1969).

⁵⁰ Crowther (n 5) [8.2].

⁵¹ Although interestingly Crowther recommended retaining the 48% interest rate marker as prima facie extortionate [6.6].

⁵² Parl Debs (series 4) vol 15 cols 100–101 (20 July 1893).

⁵³ Hansard HC (series 5) vol 216 cols 2073, 2082 (4 May 1928).

⁵⁴ Ibid col 2070.

⁵⁵ Hansard HC (series 5) vol 216 col 2079 (4 May 1928).

⁵⁶ Ibid col 2065.

By the 1930s it was becoming clear that all was not well with the hire-purchase system—not just in terms of general abuses but how these abuses could be so easily perpetrated. Attention turned to the fact that many customers simply did not understand or did not know the basis upon which they were buying the goods and the liabilities this involved. The ability to sign agreements without a witness for example was seen as creating ‘cases of hardship through misunderstanding of all the liabilities that [were] incurred.’⁵⁷ When in 1937 the Labour MP Miss Ellen Wilkinson presented her Hire-Purchase Bill to the House of Commons⁵⁸ (although detailed debate was reserved for the second reading of the Bill) Parliament had in front of it for the first time a Bill on hire-purchase which truly considered as its main motive the removal of trade abuses and protection of the customer. The general terms and format of the agreement received attention,⁵⁹ together with information for customers as to cost,⁶⁰ the need for easily accessible information to be contained in the agreement⁶¹ and availability of a copy of that agreement.⁶² Information therefore was integral to the new regulatory framework and the problem of the ignorant consumer (whether uneducated or uninformed) was a recurrent theme in debate on the Bill.⁶³

Interests of business were still important⁶⁴ and the concerns of creditors and the hire-purchase trade did continue to have some relevance throughout the years in the debates on hire-purchase reform.⁶⁵ However, as was becoming evident from the

⁵⁷ Hansard HC (series 5) vol 314 col 1392 (9 July 1936 OA).

⁵⁸ HC (1937–1938) 14.

⁵⁹ These issues received yet more attention in later debates, method of charges and interest rate calculation and rebate all being the subject of discussion. Hansard HC (series 5) vol 335 col 1199–1200 (6 May 1938); Hansard HC (series 5) vol 689, cols 1061, 1130, 1143 (18 February 1964); Hansard HC (series 5) vol 335 col 1199–1200 (6 May 1938).

⁶⁰ Hansard HC (series 5) vol 330 col 735 (10 December 1937).

⁶¹ *Ibid* col 747.

⁶² *Ibid* col 736.

⁶³ Hansard HL (series 5) vol 109 col 842, 847 (2 June 1938); Hansard HC (series 5) vol 335 col 1199–1200 (6 May 1938) and also in debates surrounding subsequent legislation introduced in the 1960s, with some emphasis on the form and medium in which that information should be provided—Hansard HC (series 5) vol 650 cols 1722, 1739–40, 1798, 1804, (8 December 1961); Hansard HL (series 5) vol 253 cols 1142, 1164, 1179–1180 (10 December 1963); Hansard HL (series 5) vol 254 col 724 (16 January 1964); Hansard HC (series 5) vol 689 col 1101, 1111 (18 February 1964).

⁶⁴ Hansard HL (series 5) vol 109 col 851 (2 June 1938); Hansard HC (series 5) vol 330 col 758 (10 December 1937).

⁶⁵ Hansard HC (series 5) vol 650 cols 1733–34, 1747–1748 (8 December 1961); Hansard HL (series 5) vol 246 col 435–436 (31 January 1963); Hansard HL (series 5) vol 253 col 1143–1144 (10 December 1963); Hansard HL (series 5) vol 255 col 71 (4 February 1964); Hansard

debates surrounding earlier legislation relating to pawnbrokers and money-lenders, the social consequences of credit to the individual were gaining more significance. The realisation that social problems might emanate from personal credit provision became a more prominent feature of debate as the results of abuse of the hire-purchase system gained a higher profile.⁶⁶ Whilst hire-purchase had become 'characteristic of the modern way of life',⁶⁷ so, it would appear, had certain undesirable consequences. One example of the unwanted results of credit was debt due to default. Default was briefly covered in the debates on hire-purchase, exploring the usefulness of the Citizens Advice Bureaux as a means of helping borrowers avoid and deal with the inability to meet debt, although over-commitment as such was not a subject dealt with in any great detail.⁶⁸ This aspect of credit, as has been shown in the previous chapter of this study, is also something that was discussed within the forum of insolvency and debt recovery procedures. These issues relating to credit provision continue to be, indeed have become of greater, relevance in the present climate of consumer credit provision, as concerns relating to over-indebtedness and the burden of debt have increased. In terms of the development of the hire-purchase legislation, however, Parliament was more interested in another aspect to credit which could bring unpleasant consequences: doorstep sales.

From the 1920s Parliament was formulating a clear idea as to who required protection in relation to the hire-purchase system. It was not now just the familiar candidates of the poor, destitute or uneducated but also the more recently recognisable general persona of the consumer. There was one particular consumer however who more than any other caught the attention of Parliament: 'the housewife'. Furthermore, she had to be protected against one particular type of creditor: the door-to-door salesman. In 1937 it was clear that the door-to-door salesman had become public enemy number one, usurping the money-lender from this dubious honour, the door-step canvasser being described as 'the scourge of the

HL (series 5) vol 255 col 356 (6 February 1964); Hansard HL (series 5) vol 259 col 826 (6 July 1964); Hansard HC (series 5) vol 689 col 1092, 1126, 1139 (18 February 1964).

⁶⁶ Hansard HL (series 5) vol 246 col 437, 445, 447, 455 (31 January 1963); Hansard HL (series 5) vol 253 col 1137 (10 December 1963); Hansard HC (series 5) vol 689 col 1085 (18 February 1964).

⁶⁷ Hansard HL (series 5) vol 109 col 842 (2 June 1938).

⁶⁸ Hansard HC (series 5) vol 689 1964 col 1112-1113 (18 February 1964).

hire-purchase business'.⁶⁹ Indeed, parts of the 1937 Hire-Purchase Bill were specifically aimed at these individuals as confirmed by the Bill's protagonist herself:

Then the agreement must be in writing...and...if the price is under £20 and the goods comprised in the agreement are not for use in connection with the trade, calling or professions of the hirer, it must be signed by the hirer personally. That is aimed at the door-to-door man.⁷⁰

By the 1960s the objections to the door-to-door salesman were prevalent in debate. A 48 hour cushion for customers was introduced in the Hire-Purchase Bill in 1961,⁷¹ increased to four days in the later bill introduced in 1963,⁷² primarily, it was suggested, to protect customers from the door-to-door salesman,⁷³ high pressure sales⁷⁴ and slick salesmen (although it did not escape the notice of at least one MP that slick salesmanship could occur in shops as well as on the doorstep).⁷⁵ Again in 1963 the Hire-Purchase (No 2) Bill⁷⁶ had as one of its objectives the restriction of the activities of door-to-door salesmen⁷⁷ with 'literally thousands of housewives subject to the menace of these door-to-door operators, using all the tricks of the trade'.⁷⁸ However it was not that door-to-door sales as a general practice was devoid of support; the objection lay more in the particular door-to-door sale of credit.⁷⁹

The dislike of the doorstep sale of hire-purchase seemed to be interconnected with a particular concern for 'the housewife', an individual focussed on as a vulnerable consumer in need of protection. Although some MPs saw this as verging on a form of sexual discrimination (which, it appeared, was exhibited at another level by some creditors in granting credit only to the husband)⁸⁰ the need for protection of

⁶⁹ Hansard HC (series 5) vol 330 col 743 (10 December 1937).

⁷⁰ Ibid col 735.

⁷¹ HC (1961-1962) 18.

⁷² HC (1963-1964) 16.

⁷³ Hansard HC (series 5) vol 650 col 1720 (8 December 1961).

⁷⁴ Ibid col 1722.

⁷⁵ Hansard HC (series 5) vol 650 col 1766 (8 December 1961).

⁷⁶ HL Paper (1963-64) 81.

⁷⁷ Hansard HL (series 5) vol 246 col 424 (31 January 1963).

⁷⁸ Ibid col 427.

⁷⁹ Ibid col 433. The particular problem of doorstep selling of credit led to a debate on this aspect of hire-purchase alone in 1967.

⁸⁰ One MP Mr Harris, was chairman of a company Rolls Razor Ltd, which advertised products for sale, a salesman visiting the customer once they had responded to the

this particular group of consumers was strongly felt, their welfare consistently coming up in debate.⁸¹ Indeed the housewife seemed to epitomise the perceived general vulnerability of credit consumers, vulnerability now reaching beyond poverty or ignorance. The idea of vulnerability it would appear had evolved from the idea of destitution and incapacity into merely being in an unequal bargaining position, a susceptibility based not on purely economic circumstances but on pressure due to factors surrounding the point of sale. This is not the vulnerability of a borrower in dire need with nowhere else to turn but the vulnerability of a consumer faced with beguiling sales techniques without adequate means of resisting the inherent dangers of purchase in such a situation.

This development was, no doubt, indicative of the general growing concern for the consumer in general.⁸² Another factor, however, which led to this attitude to the housewife was the increasing conviction that informational deficiency prevented a credit consumer from making a proper choice, leading to unwise borrowing on unfair terms:

Many of the customers are persons whose ignorance and social timidity make them an easy prey to sharp practices⁸³

One of the reasons why hire-purchase is one of the problems that perplex our constituents ...is that people sign agreements which

advertisement. He openly admits that his company operated a policy of only selling to a housewife if the husband was present. Upon being pressed, the reason given for this was apparently that they preferred the wage earner to sign the agreement. Hansard HC (series 5) vol 650 col 1794–1795 (8 December 1961).

⁸¹ Hansard HC (series 5) vol 330 cols 745, 747, 757 (10 December 1937); Hansard HC (series 5) vol 650 cols 1743, 1747, 1759, 1766, 1769, 1780, 1794, 1800, 1804 (8 December 1961); Hansard HL (series 5) vol 246 cols 427, 433, 454, 458 (31 Jan 1963); Hansard HL (series 5) vol 253 col 114 (10 December 1963); Hansard HL (series 5) vol 255 col 94, 99, 101 (4 Feb 1964); Hansard HC (series 5) vol 689 cols 1055, 1077, 1080 (18 February 1964); Hansard HC (series 5) vol 751 cols 1823, 1825, 1827 (25 October 1967).

⁸² In debates on consumer protection leading up to the appointment of the Molony Committee the housewife was effectively seen as the archetypal consumer Hansard HC (series 5) vol 588 cols 1700, 1703 (23 May 1958); Hansard HC (series 5) vol 591 col 408 (9 July 1958).

⁸³ Hansard HL (series 5) vol 109 col 842 (2 June 1938) per Lord Amulree (Labour); see in particular also Hansard HC (series 5) vol 330 col 747 (10 December 1937); Hansard HC (series 5) vol 650 cols 1740, 1804 (8 December 1961).

they do not understand...Individuals have undertaken commitments which are far beyond their resources⁸⁴

The object [of the cooling off period] is really to get at the slick salesman who, in effect traps the housewife at home ...into an agreement much more onerous than was known or realised at the time⁸⁵

That informational deficiency is itself linked to vulnerability is demonstrated in the recent review of consumer credit legislation. The idea of the 'vulnerable consumer' is of great significance in the current review of consumer credit legislation, particularly within the concept of extortionate credit and its contribution to over-indebtedness. It is the vulnerable consumer that is most at risk of making irresponsible lending decisions on unfair terms, because of a lack of information or the inability to understand information that is present. The contention is that this, together with financial exclusion and low income can ultimately lead to individuals becoming over-indebted.⁸⁶ These issues however are not seen purely in terms of over-committed consumers. Informational deficiencies are in fact seen as having a wider influence, causing consumer detriment as a whole.⁸⁷ A direct consideration of consumer vulnerability and consumer detriment within the financial services market was considered in an inquiry set up by the Director General of Fair Trading⁸⁸ in the 1990s. The Report, published in 1999⁸⁹ took as its basis that consumer difficulties were often caused by limited availability of goods and services and insufficient information or inadequate understanding of available information. Such difficulties in turn led to consumer detriment in terms of a loss of economic welfare.⁹⁰ The Report found that whilst low income was one of the primary causes of vulnerability and corresponding financial exclusion, the costs of gathering information and

⁸⁴ Hansard HC (series 5) vol 689 col 1111 (18 February 1964) per Mr John Stonehouse (Labour).

⁸⁵ Hansard HC (series 5) vol 689 col 1124 (18 February 1964) per Mr AJ Irvine (Labour).

⁸⁶ Usually precipitated by some unforeseen event. White Paper 2003 (n 47) [5.10–12].

⁸⁷ 'Consumer Detriment under Conditions of Imperfect Information' OFT Research Paper 11 (1997).

⁸⁸ The office of Director General of Fair Trading was established by the Fair Trading Act 1973 but was abolished by s 2 of the Enterprise Act 2002 c 40, all functions of the office being transferred to the OFT.

⁸⁹ 'Vulnerable Consumers and Financial Services: The Report of the Director General's Inquiry' (OFT 1999).

⁹⁰ Ibid 5.

difficulty experienced in then digesting and understanding it were also contributing factors.⁹¹

In the reform of the hire-purchase legislation in the 1950s, this issue of gathering and availability of information was addressed in relation to pre-contractual situations as well as content of the agreement. The original Hire-Purchase Acts were by the mid 1950s seen as inadequate in terms of dealing with misleading information contained in advertisements.⁹² In 1957 the Advertisements (Hire Purchase) Act⁹³ was passed, regulating the detail and format of information that had to be included in advertisements. Further regulation was passed by Parliament in 1964, which, *inter alia*, amended the 1957 Act by providing a formula for interest rate calculation, to prevent misleading reference to cost.⁹⁴ It was now being understood that educating the consumer and protecting the vulnerable could be assisted by transparency in the market place, recognised today as a key element in providing a truly competitive environment within which consumers can make an informed choice about credit.⁹⁵

The housewife received her protection in the Hire-Purchase Act 1964, repeated in the Hire-Purchase Act 1965, with the introduction of ability for customers to withdraw from agreements if they had been signed away from trade premises.⁹⁶ The provisions effectively allowed a hirer a cooling off period whereby he/she was entitled, within a prescribed amount of time,⁹⁷ to give notice to the owner/seller of a wish to cancel the agreement. Such a notice operated to rescind the contract if already entered into, or a withdrawal from any offer to enter into a hire-

⁹¹ Although the Report focussed on particular difficulties such as disability preventing the gathering of information and language problems as the reason for the lack of understanding—rather than simply due to sales pressure.

⁹² Hansard HC (series 5) vol 543 col 1719 (12 July 1955); Hansard HC (series 5) vol 545 col 1194 (3 Nov 1955).

⁹³ (5 & 6 Eliz 2 c 41).

⁹⁴ Hire-Purchase Act 1964 c 53 Sch 3. The provisions relating to advertisements contained in this Act together with the Advertisements (Hire Purchase) Act 1957 5 & 6 Eliz c 41 were later consolidated by the Advertisements (Hire Purchase) Act 1967 c 42.

⁹⁵ White Paper 2003 (n 47) [2.5–2.13]. New regulations designed to increase transparency have now been introduced—eg Consumer Credit (Advertisements) Regulations 2004 SI 2004/1484; The Consumer Credit (Disclosure of Information) Regulations 2004 SI 2004/1481.

⁹⁶ Hire-Purchase Act 1965 c 66 ss 11–15.

⁹⁷ Within four days of a second statutory notice having been received, such copy to have been posted within seven days of the agreement being entered into—*ibid* s 9(3).

purchase agreement, if that was the case.⁹⁸ Up until this point, courts could intervene in contracts should certain statutory requirements be breached⁹⁹—protection for consumers however was reliant on the contract coming to the court's attention in the first place.¹⁰⁰ The new ability of a customer to extricate him/herself from an agreement without recourse to the courts, however, introduced autonomous consumer power into the equation for the first time. The facility to cancel agreements signed away from trade premises was repeated in the Consumer Credit Act 1974 and extended by being applicable, in certain circumstances, to all regulated agreements.¹⁰¹

(c) The Molony Committee

There is one other piece of evidence besides debate that makes an important contribution to the examination of the earlier parliamentary approach to hire-purchase. The Committee on Consumer Protection (chaired by JT Molony) ('Molony') was appointed by the President of the Board of Trade in 1959 to investigate the whole sphere of consumer protection, hire-purchase being a part of this. The Committee was not a Select Committee of MPs but rather a Government appointed panel, the Government being Conservative this stage, and members came from all walks of life¹⁰² (although there were complaints in Parliament about the absence of a representative from the Co-operative movement).¹⁰³ Indeed both the composition of the Committee and its terms of reference were treated with some suspicion in terms of the Government's true commitment to consumer protection. Despite these reservations, the Report of the Committee, when published, was

⁹⁸ Hire-Purchase Act 1965 c 66 s 11(4).

⁹⁹ Moneylenders Act 1900 (63 & 64 Vict c 51) s 1 as amended by Moneylenders Act 1927 (17 & 18 Geo c 21) s 10 and indirectly by Hire Purchase Act 1938 (1 & 2 Geo c 53) ss 2–3, where the court could impose such conditions it thought fit before an agreement could be enforced by the owner.

¹⁰⁰ Ie where proceedings were brought to enforce the agreement.

¹⁰¹ If signed pursuant to oral representations as part of antecedent negotiations—Consumer Credit Act c 39 s 67—the oral representations must take place in the presence of the debtor. The period of cancellation has also been slightly extended to within five days of receipt of the second notice or copy agreement—Consumer Credit Act 1974 c 39 s 68. There are also cancellation rights included in various regulations implemented as a result of European Directives, discussed in detail in ch 8 of this study.

¹⁰² Including the chairman of a gramophone company a trade unionist and a solicitor's wife.

¹⁰³ This movement being seen as a major supporter of consumer issues Hansard HL (series 5) vol 610 cols 39–48 (27 July 1959).

discussed in detail in Parliament and used to support the pressure for reform. Furthermore although the Committee had much wider terms of reference than pure credit issues it was the only official government committee to look at the English hire-purchase system in any detail before the Crowther Committee was appointed at the end of the 1960s.¹⁰⁴ The Molony Committee published its Report in 1962.¹⁰⁵

The Committee's priority as far as any hire-purchase regulation was concerned seemed to be protections that would work in practice and avoidance of unnecessary inconvenience for traditional business concerns.¹⁰⁶ They rejected the idea of simplification or standardisation of agreement terms, refusing to 'dumb down' at the expense of legal precision and the variety of sales the hire-purchase system covered.¹⁰⁷ Neither would they consider unreasonable conditions affecting business as a whole,¹⁰⁸ reserving 'any interference with freedom of contract for cases which threaten hardship'¹⁰⁹ Their approach to door-to-door salesmen, however was quite different. The stated aim here was to put a 'clog' on this form of business¹¹⁰ rather than avoid inconvenience for the trade. The main concern with regard to the door-to-door salesman related to 'improvident' transactions¹¹¹ brought on by pressuring sales techniques in the home. Yet elsewhere in the Report, vulnerable consumers, particularly gullible ones, appear to be treated with less sympathy. For example, one notable characteristic of the Report is the seeming exasperation with the consumer's "supposed" ignorance. Whilst the Committee were concerned to

¹⁰⁴ There had been a report on the Scottish hire-purchase system leading to the Hire Purchase Scotland Act in 1932 chaired by Fleming—Committee on the Existing Law relating to contracts of Hire-Purchase in Scotland 'Report of the Committee Secretary of State for Scotland' (September 1931). Hire-purchase contracts were also considered in the Law Reform Committee report on Innocent Misrepresentation—Law Reform Committee 'Tenth Report: Innocent Misrepresentation' (Cd 1782, 1962).

¹⁰⁵ Board of Trade Committee of Consumer Protection 'Final Report of the Committee on Consumer Protection' (Cd 1781 1962) Goode found the Report disappointing in terms of its treatment of hire-purchase, although he acknowledges the Committee had very wide terms of reference. Goode *Hire-Purchase Law and Practice* (n 8) 12.

¹⁰⁶ Eg recommending that the 'cooling off' period would not be appropriate for sales from retail premises.

¹⁰⁷ Molony (n 105) [517].

¹⁰⁸ Ibid [519].

¹⁰⁹ Ibid [533]. This particular statement referred to whether or not there should be a statutory formula for rebate payable to a hirer if payments were completed in advance of the agreed term.

¹¹⁰ Ibid [525].

¹¹¹ Ibid [527].

protect those who undertook hire-purchase agreements without considering whether they may have over-committed themselves they believed that to some extent such people were beyond help¹¹²

In the case of doorstep sales a protective device was suggested in the form of cancellation provisions which gave the customer time to reflect on the agreement before becoming committed—a period of cooling off. These provisions, as has been mentioned, were later incorporated into the legislation, although statute was more generous in its allowance than the Molony recommendation.¹¹³ The Committee was very aware of the practicalities of controlling consumer credit law and preferred to reject anything that would fetter business to an unnecessary degree or that would be impractical to enforce. However it is clear that whilst ‘traditional business’ concerns were to be considered, doorstep sale of credit obviously was not regarded as within this sphere. In contrast, it was an area requiring particular regulation and here was a case where interference was justified. This may have been because it was a relatively new method of aggressively selling credit or perhaps because business concerns would in reality only be regarded as relevant and unassailable to the extent they did not interfere with consumer protection.

At a general level the Committee decided, following the trend already being displayed in Parliament, that the best course of action was to try and tackle ignorance as to the nature of the hire-purchase transaction, through informational requirements such as the inclusion of a signature box in the agreement and a statement that the agreement was a hire-purchase agreement and the signatory would be bound by its terms.¹¹⁴ Other recommendations were also put forward such as further amendment to the Advertisements (Hire-Purchase) Act 1957 ensuring the total price of a hire-purchase transaction was stated in any advertisement to which the Act applied.¹¹⁵ With the exception of doorstep sales, which were regarded as requiring more stringent regulation, it would appear appropriate protection for the consumer lay

¹¹² The Committee felt it was difficult to help people who would not help themselves—for example consumers who did not read the agreement they were signing [511].

¹¹³ Molony allowed only a 72 hour cooling off period from receipt of a copy of the agreement [525–528].

¹¹⁴ Molony (n 105) [512].

¹¹⁵ Ibid [564].

primarily in providing adequate information rather than interfering with individual contracts. An informed consumer had the power to make a proper choice and correcting asymmetry of information was the best way to provide a balance between the parties; adequate information effectively provided the consumer with an acceptable level of autonomy, equality and therefore protection.

In the pursuant parliamentary debates that followed Molony it is clear that the general direction of the Report was welcomed. In discussion of a private member's Hire-Purchase Bill, brought before Parliament at the beginning of 1963, the main issue was consumer protection, provided by the Bill's two main provisions.¹¹⁶ When the Conservative Government became directly involved in 1963 with the introduction of the Hire-Purchase (No 2) Bill, it was again made clear that the proposed legislation was very much based on many of Molony's recommendations.¹¹⁷ Whilst not all of the Report's suggestions were implemented Parliament continued to embrace the policy of ensuring consumer welfare, already evidenced in earlier debate, using information as the keystone for protection and introducing consumer autonomy as a means of defeating malpractice in the marketplace.

It is evident there are foundations of present consumer credit provisions and policy relating to consumer welfare set in the proposals put forward by the Committee, not only in relation to information for the consumer but also in relation to protections against doorstep lending through cancellable agreements. However the real importance of this Committee's Report lay in the fact it finally got the Government actively involved, marking the beginning of full Government participation in consumer credit law.

¹¹⁶ Which allowed a cooling off provision and a rise in the financial limit within which regulation would apply.

¹¹⁷ Hansard HL (series 5) vol 253 col 1136 (10 Dec 1963) The policy seems to have been one of ensuring adequate safeguards by changing the unsatisfactory state of the law whilst ensuring a 'proper balance between the different interests' Hansard HC vol 689 col 1036.

(d) General Parliamentary Attitude

It would seem that attitudes to hire-purchase regulation reflected a growing trend in parliamentary thinking that favoured the consumer. Illustration of this can be found not only in the debates but in the underlying policy of parliamentary approved legislation. A wish for high levels of consumer protection was not only proving to be a strong influence on the type of regulation required but also its extent. This was not only in terms of how far control should be taken but also the level to which more general legal issues should be addressed, particularly the legal form of hire-purchase *per se*. This question of the form of hire-purchase was certainly an added aspect to the whole debate on this latest species of consumer credit. Was it a form of sale contract or credit contract? Was it really a contract of hire with an option to purchase or was it a credit-financed sale secured by a chattel mortgage? In Parliament there were differing views as to the true nature of the hire-purchase contract¹¹⁸ and both Molony and the Crowther Committee considered the question of the nature of hire-purchase. The courts' view of hire-purchase as a contract for hire with an option to purchase was something recognised by Molony;¹¹⁹ consumer interests in their opinion were adequately served by this form.¹²⁰ In contrast, the Crowther Committee later referred to hire-purchase as a legal fiction¹²¹ and abolition was recommended, the suggested replacement being something akin to the American chattel mortgage. In spite of this the Conservative Government rejected the suggestion, the dismissal was hardly challenged in Parliament and as a result hire-purchase retained its form,¹²² although questions as to its validity are still raised.¹²³ It seems that as far as Parliament was concerned if consumer interests were not harmed by the fictitious nature of hire-purchase there was no need for change.

¹¹⁸ As early as 1928 it had been described as the buying of goods on credit Hansard HC (series 5) vol 216 col 2077 (4 May 1928). In Ireland in the 1930s it was characterised as money-lending by a Commission investigating the hire-purchase system—Hansard HC (series 5) vol 330 col 742 (10 December 1937). In 1958 those who provided hire-purchase facilities at high interest rates were actually referred to in Parliament as the worst type of money-lender Hansard HC (series 5) vol 586 col 767 (22 April 1958).

¹¹⁹ Molony (n 105) [503].

¹²⁰ *Ibid* [568]–[569].

¹²¹ Crowther (n 5) [5.2.2].

¹²² Consumer Credit Act 1974 c 39 s 189.

¹²³ One commentator has described this missed opportunity as a 'major disappointment' H Johnson 'Consumer Credit Familiar Tales Part 2' (2002) *Finance and Credit Law* 4.2(1).

Besides purely legal considerations, in terms of general consumer protection again there was some discussion about how far legislation should go.¹²⁴ Whilst outright paternalism was rejected by some MPs¹²⁵ it was recognised a compromise was needed between protection of the vulnerable (in the wider sense) and ease of access for the consumer to credit facilities.¹²⁶ This led to arguments, already rehearsed in the 19th century debates regarding money-lenders and bankruptcy, as to the extent to which people should suffer the consequences of their own actions. Was the task of the legislature to protect people from their own mistakes?¹²⁷ The principle of allowing parties freedom to contract as they wished and the sanctity of such contracts were no longer regarded as unassailable principles and indeed were seen as inadequate when it came to considering malpractice and possible inequality in bargaining power between consumer and creditor:

When you are dealing with a mass of the population which has very little means it is no use relying on freedom of contract to prevent abuses...it is entirely unsafe to rely on freedom of contract¹²⁸

It has all too readily been assumed ...that there is freedom of contract between contracting parties. There has been slavish adherence to the so-called principle of sanctity of contract. What the common law ignores is the complete inequality in the status of different contracting parties¹²⁹

Essentially the feeling was that the law of contract as it stood could no longer provide an adequate framework within which consumer credit or indeed the sale of consumer goods could operate.

Until we face up to the fact that all legislation affecting buyers and sellers of goods...urgently needs a basic, clear, concise,

¹²⁴ Hansard HC (series 5) vol 751 col 1824 (25 October 1967).

¹²⁵ Hansard HC (series 5) vol 650 col 1747, 1756 (8 December 1961); Hansard HL (series 5) vol 254 col 793 (16 January 1964); Hansard HC (series 5) vol 689 col 1087 (18 February 1964).

¹²⁶ Hansard HL (series 5) vol 110 col 520 (5 July 1938).

¹²⁷ Hansard HC (series 5) vol 312 col 2223 (28 May 1936 WA).

¹²⁸ Hansard HC (series 5) vol 330 col 760-761 (10 December 1937) per Mr Silverman (Labour).

¹²⁹ Hansard HC (series 5) vol 689 col 1099 (18 February 1964) per Mr Eric Fletcher (Labour).

modern law of contract as a firm foundation, we shall never get the rules clear and satisfactory¹³⁰

The approach adopted by Parliament therefore effectively rejected freedom of contract principles, concentrating instead on removing exploitation through ensuring some form of balance between creditor and debtor. This in turn justified interference with the contract as to the extent to which its terms could be enforced, if at all.¹³¹ With regard to hire-purchase, intervention depended on how the contract was entered into in the first place—not only was the imbalance of the circumstances in which contracts were agreed significant¹³² but also the informational deficiencies that led to such conditions.¹³³ These factors created unfairness in the detail of the contract making process: in effect a question of procedural unfairness. Parliament, however was not only interested in procedure. In its concern, as in money-lending, for the social consequences of hire-purchase, caused by hire-traders abusing the system or onerous contracts through doorstep sales, it also showed a desire to prevent possible harsh/unfair outcomes of hire-purchase credit caused by the contract terms—what could be termed ‘substantive’ unfairness.¹³⁴

These ideas of unfairness in contracts now had a larger part to play in Parliament’s approach to the regulation of consumer credit. Parliamentary attitude indicates a move towards philosophies that not only advocated equality of bargaining

¹³⁰ Hansard HC (series 5) vol 689 col 1061 (18 February 1964) per Mr George Darling (Labour Co-operative). Also Hansard HL (series 5) vol 246 col 455 (31 January 1963).

¹³¹ SN Thal argues it is justified to limit freedom of contract through the courts where exploitation is present. The problem however is how a test identifying exploitation in any given situation could be devised. ‘The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness’ (1988) 8 OJLS 17.

¹³² For example sale on the doorstep.

¹³³ PS Atiyah sees legislation that deals with consumer ignorance as ‘a supplement to a serious weakness in the classical model of contract law.’ *The Rise and Fall of the Freedom of Contract* (Clarendon Press, Oxford 1979) 703.

¹³⁴ The ability to usefully separate substance and procedure in terms of unfairness has been questioned by a number of commentators—referred to for example in the discussion by Thal of Atiyah’s approach to this issue ‘The Inequality of Bargaining Power Doctrine’ (n 131) 26. S Smith also refers to this line of thought in ‘In Defence of Substantive Fairness’ (1996) 112 LQR January 138, although he defends substantive fairness as a valid concept. Unfairness surrounding the formation of the contract has also been described as ‘non-substantive’, ‘procedural’ being regarded as too restrictive a term (because it concentrates on the negotiating process rather than considering factors which justify interference even if negotiations have been fair) A Schwartz ‘A Re-examination of Non-substantive Unconscionability’ (1977) 63 Virginia Law Review 1053.

power and fairness but which also allowed interference with freedom of contract in the interests of consumer protection.¹³⁵ However besides safeguards provided by interference with the contract itself, Parliament was just as interested in less drastic, preventative measures which would provide equality, choice and therefore a level of protection for the consumer. Such aims were to be achieved through communication of adequate information to the consumer pre-contract, at inception and during the lifetime of the agreement. The idea was that this would enable the borrower to understand the basis and contractual consequences of the agreement and facilitate an informed decision as to whether to enter into the contract in the first place. A knowledgeable consumer was regarded as a more powerful consumer—informational efficiency within the market place would ensure some form of balance between consumer and creditor and therefore some degree of protection against unfair or exploitative terms.

This then was MP's attitude to credit at the time of the creation and development of hire-purchase regulation. The general Government approach however was a little different. Reluctance to become deeply involved in hire-purchase law is readily detectable from the Parliamentary debates. All the Bills up to the 1960s (as in most legislation relating to credit to the individual) were Private Members Bills.¹³⁶ Even though the importance of regulating consumer credit was recognised, Government was happy to leave it to individual members of Parliament to initiate change.¹³⁷ Various excuses were given such as lack of feasibility,¹³⁸

¹³⁵ In other words consumer welfarism, integral to which are principles of reasonableness and fairness. It has been suggested that compared to market individualism, which requires freely agreed exchanges to be honoured by the parties, consumer welfarism is inconsistent—its principles lack unity in that they have the potential to clash with one another, as there is no particular order in which they should be applied—JN Adams and R Brownsword *Understanding Contract Law* (Sweet and Maxwell, London 2004) 199; R Brownsword 'Static and Dynamic Individualism' in R Halson (ed) *Exploring the Boundaries of Contract* (Aldershot: Dartmouth 1996) 49. The particular form of interference allowed—namely allowing the consumer to set aside the contract—is an indication of the trend in the modern law of contract noted by Atiyah—a growing importance of the right for parties to change their mind as to future agreed conduct—a change in emphasis that Atiyah believes has shaped the developing amendments in consumer law. Atiyah (n 133) 756.

¹³⁶ A point also made by Goode in relation to hire-purchase in *Hire Purchase Law and Practice* (n 8) 13.

¹³⁷ For example Ellen Wilkinson.

¹³⁸ Hansard HC (series 5) vol 35 cols 196, 956 (5 March 1912 OA).

complexity,¹³⁹ need for consultation, consideration or enquiry¹⁴⁰ lack of time¹⁴¹ or even satisfaction that the regulation was adequate.¹⁴² It was only when the advancing tide of consumer interest could not be stopped that the Government realised it needed to act—no doubt from a political viewpoint even though the regulation of hire-purchase in terms of consumer protection was not, at least at this stage, a partisan issue as such.

It was finally in 1964 that the Conservative Government (which lost power to Labour in October of that year) decided to take the reins and produce hire-purchase legislation with the introduction of the Hire-Purchase (No 2) Bill,¹⁴³ galvanised into action at least in part by Molony. Whilst the Government shied away from a complete overhaul of the law, it did accept that the legislation as it stood was in an unsatisfactory state.¹⁴⁴ Emphasis was on consumer protection and this policy was illustrated, for example, by the raising of the limit to include all consumer transactions¹⁴⁵ and the exclusion of corporate bodies.¹⁴⁶ Whilst there was a stated desire to not interfere with normal trade practices,¹⁴⁷ the purpose of the Bill was to prevent hardship caused by ignorance,¹⁴⁸ and provide tight regulation of the door-to-door salesman, thus creating legislative measures to address parliamentary concern about exploitation.¹⁴⁹ The legislation, finally embodied in the Hire-Purchase Act 1965¹⁵⁰ included not only an allowed period of cooling off,¹⁵¹ but also the right for the hirer to terminate the agreement in prescribed circumstances,¹⁵² control of

¹³⁹ Hansard HC (series 5) vol 567 col 1322 (28 March 1957).

¹⁴⁰ Hansard HC (series 5) vol 35 col 1711 (5 March 1912); Hansard HC (series 5) vol 287 col 595 (15 March 1934 WA).

¹⁴¹ Hansard HC (series 5) vol 163 col 1648 (9 May 1923 WA); Hansard HC (series 5) vol 222 col 1403 (19 November 1928 WA); Hansard HC (series 5) vol 545 col 1975 (10 Nov 1955).

¹⁴² Hansard HC (series 5) vol 571 col 1060 (4 June 1957 OA); Hansard HC (series 5) vol 586 col 767 (22 April 1958 OA).

¹⁴³ HC (1963–64) 81.

¹⁴⁴ Hansard HC (series 5) vol 689 col 1036 (18 February 1964).

¹⁴⁵ From £300 to £2000.

¹⁴⁶ Hansard HC (series 5) vol 689 col 1037 (18 February 1964).

¹⁴⁷ *Ibid* col 1040.

¹⁴⁸ *Ibid* col 1038.

¹⁴⁹ *Ibid* col 1039.

¹⁵⁰ C 66. This was a consolidating Act the previous Act having been passed in 1964, Hire-Purchase Act (c 53).

¹⁵¹ Hire-Purchase Act 1965 c 66 ss 11–15.

¹⁵² *Ibid* ss 27–30.

enforcement on default¹⁵³ and detailed requirements as to the provision of information both at the commencement and during the lifetime of the agreement.¹⁵⁴ Government policy has been outlined as one that created practical measures for consumers' protection, and strengthened their standing in the market.¹⁵⁵ It would seem that even though Government at this stage was trying to retain some balance for the trade, the interests of consumers was now the driving force behind legislative policy and resultant regulation.

3. THE CROWTHER COMMITTEE

(a) Committee Report

Towards the end of the 1960s it was clear that consumer credit legislation was still unsatisfactory and needed further reform. A committee was appointed, under a Labour Government, in 1968 to consider and review 'the present law and practice governing the provision of credit to individuals for financing purchases of goods and services for personal consumption'. The work of this committee has been described as 'the most wide ranging review of consumer credit'¹⁵⁶ and it was certainly of immense importance to the development of consumer credit legislation. The committee was chaired by Lord Crowther, who had a history of economic connections having been, inter alia, the chairman of the Economist newspaper, the Director of the Commercial Union Assurance Co and a member of the governing body of the London School of Economics. The list of witnesses that presented evidence was extensive, ranging from official bodies such as the Bank of England, commercial bodies such as the Finance Houses Association Ltd and consumer organisations such as the Consumers Association (although such advocates of the consumer were vastly outnumbered by the commercial nature of the majority of witnesses).

¹⁵³ Hire-Purchase Act 1965 c 66 ss 25–26 (notice as to default); ss33–50 recovery of possession, money claims and court jurisdiction.

¹⁵⁴ Hire-Purchase Act 1965 c 66 ss 6–10, ss 21–24.

¹⁵⁵ Hansard HC (series 5) vol 689 cols 1047–1048 (18 February 1964).

¹⁵⁶ RM Goode (ed) *Consumer Credit: Law and Practice* (Butterworths, London 1999). It should perhaps be pointed out that this comment was made before the current Consumer Credit Review had commenced.

The Crowther Committee was to assess the pros and cons of existing (and possible alternative) provisions of credit, the interests of all relevant parties, including depositors, to be kept in mind.¹⁵⁷ It decided however that a more universal approach was needed in examining the question of consumer credit, using a two-tiered framework that encompassed first a general restructuring of credit law and secondly particular provisions in relation to consumer transactions.¹⁵⁸ The priority for the latter was to be protection of the small borrower, whatever the purpose of the credit.¹⁵⁹ In other words the aspiration was for a new legal framework for credit with particular emphasis on protection of the consumer.

The examination of consumer credit 'that is...the provision of credit to individuals for their private purposes'¹⁶⁰ was exhaustive. The Crowther Committee considered at length the nature of credit, the technical details of the current legislation and the basis upon which consumer credit had been regulated up to this point.¹⁶¹ Considerations however were not only made at a technical level. Distinctions were also made between the underlying purposes of a loan obtained by an individual, recognition being made of the fact that credit given to help an individual in need as a result of unforeseen events was quite different from that given to someone who merely wished to anticipate future income as a means of maximising his/her resources. It was admitted such differentiations would not work well within the legal framework of credit as such but that it should be a driving factor in formulating a foundation for consumer protection in this area.

It would appear then that there was recognition of the contrast between susceptibilities of different types of credit customer. Whilst the capable and more prosperous individual was still seen as being able to adequately protect his or her interests, vulnerability was regarded as a widening problem. By now, as shown by the debates surrounding hire-purchase, the idea of the vulnerable borrower at the time of the Moneylenders Acts had developed from a poor and needy individual due

¹⁵⁷ Crowther (n 5) iii, particular mention being made of the Moneylenders Act 1900 (63 & 64 Vict c 51).

¹⁵⁸ Crowther (n 5) [1.1.4].

¹⁵⁹ Ibid.

¹⁶⁰ Ibid [1.1.1]

¹⁶¹ Ibid chs 1, 6.2.

to social circumstances, to the various categories of threatened consumer, such as the customer subject to undesirable practices and the ill-informed consumer.¹⁶² The basis of protection for all these individuals was the aim of some form of equality between creditor and borrower, illustrated according to the Crowther Committee by the three principles upon which protections for the consumer were envisaged—redress of bargaining inequality, the control of trading malpractices and the regulation of remedies for default.¹⁶³ Bargaining equality, according to the Committee was not only best achieved by providing the consumer with ‘built in contractual rights’¹⁶⁴ and the restriction of harsh contract terms or provisions that would result in hardship,¹⁶⁵ but also by requiring the disclosure of accurate information.

The idea of information disclosure as a protective device for the consumer, rather than restrictive regulation, is indicative of the Crowther Committee’s general approach to the basic regulation of credit. Again, just as with the governmental review of hire-purchase legislation, whilst there is no doubt the priority lay with the consumer, protections were not to come at the expense of trade flexibility within the credit business:

policy should have a threefold orientation towards the users of consumer credit, towards the firms granting credit and towards the monetary authorities charged with responsibility for managing the economy¹⁶⁶

the philosophy underlying the proposed new legal framework is that commercial concerns involved in credit transactions should be allowed to get on with their business in their own way with the minimum of interference¹⁶⁷

There was a place for legal regulation, but it was considered that control could be provided just as adequately though healthy competition within the marketplace. This could be delivered through licensing,¹⁶⁸ the control of advertisements,¹⁶⁹ disclosure

¹⁶² Crowther (n 5) [6.1.2–14].

¹⁶³ Ibid [6.1.15–16].

¹⁶⁴ I.e. implied conditions as to fitness and merchantable quality of the goods.

¹⁶⁵ Crowther (n 5)[6.3.1].

¹⁶⁶ Ibid [3.8.1].

¹⁶⁷ Ibid [5.2.16].

¹⁶⁸ Ibid [6.5].

requirements¹⁷⁰ and better assessment of a borrower's ability to meet repayments, with protection coming into play if borrowers did fall into difficulty.¹⁷¹ Information gave a basic protection by providing consumers with the freedom to choose:

the state should interfere as little as possible with the consumer's freedom to use his knowledge of the consumer credit market to the best of his ability and according to his judgment of what constitutes his best interests¹⁷²

This however did not amount to an endorsement of freedom of contract principles as such, at least not as far as the consumer was concerned. As the Committee said 'It has long been recognised that freedom of contract has little meaning in consumer transactions'.¹⁷³

The approach of providing basic regulation with consumer protection as an added layer is evidenced not only by the Crowther Committee's stated aims but by the proposed Consumer Sale and Loan Act which was to be super-imposed on the Committee's Lending and Security Act as an added safeguard with regard to consumer transactions. This approach is also particularly evident in individual legislative provisions regarding credit cost. At a first glance the detailed control of actual agreed credit terms seems to be rejected. An interest rate ceiling was seen as inadvisable¹⁷⁴ albeit the Committee disliked the high interest rates paid by low-income borrowers¹⁷⁵ or the terms controls contained in the Control Orders. However, for the purposes of consumer protection, freedom to contract for any interest rate was qualified. Here, it was recommended that an interest rate above 48% was to be prima facie extortionate and therefore subject to review by the court.¹⁷⁶ It was, at least on paper, a safety net for consumers, a means of protection from the undesirable

¹⁶⁹ Crowther (n 5) [6.4].

¹⁷⁰ Ibid [6.5].

¹⁷¹ Ibid [3.7.17].

¹⁷² Crowther (n 5) [3.9.1].

¹⁷³ Ibid [6.1.12].

¹⁷⁴ As according to the Committee not only did it tend to bring rates up to the ceiling but also the reasonableness of a rate depended on the size and duration of the loan. [6.6.6–6.6.9]

¹⁷⁵ Crowther (n 5) [6.6.2].

¹⁷⁶ Ibid [6.6.9].

consequences that freedom of choice could bring.¹⁷⁷ In the event the 1974 Act effectively took the sting out of the tail by removing the prima facie limit and replacing it with the generality of the extortionate credit provisions,¹⁷⁸ provisions that arguably have proved too elusive to be of much use.¹⁷⁹

In terms of other undesirable consequences of credit that might affect the consumer, whilst the Crowther Committee voiced concerns over vulnerable consumers and improvidence,¹⁸⁰ over-indebtedness was not yet something that was regarded as a major issue.¹⁸¹ It did consider in some detail the social and economic aspects of consumer credit, exploring indebtedness and its social dangers; the evidence examined in relation to over-commitment was provided by a consumer credit survey conducted by NOP Market Research Ltd. The survey found inter alia that only 5% of borrowers who had used credit (in the forms listed in the survey) felt their commitment was too high¹⁸² and that of those with repayment difficulties only 6% felt over-commitment was the cause of their default.¹⁸³ Although the Committee treated the figures with some caution, the evidence brought them to the conclusion

¹⁷⁷ Other protections against extortionate charges were seen as the licensing system (including revocation of licence), quarterly returns to the Consumer Credit Commissioner (a new administrative agency envisaged by the Report) allowing the Commissioner himself to initiate proceedings with regard to a harsh and unconscionable interest rate and the prohibition of default interest higher than contract interest. Crowther (n 5)[6.6.9].

¹⁷⁸ With its less determinate qualification of 'grossly exorbitant and gross contravention of 'ordinary principles of fair dealing' Consumer Credit Act 1974 c 39 s 138(1).

¹⁷⁹ There have been very few cases successfully brought under these provisions. Some believe this is because the provisions are working—preventing extortionate credit—others believe that the provisions are too narrow, discouraging the challenge of agreements. D Rosenthal *Guide to Consumer Credit Law and Practice* (2nd edn Butterworths Lexis Nexis, London 2002) [23.4]; L Bently and G Howells 'Judicial Treatment of Extortionate Credit Bargains' [1989] *Conveyancer* 234–235. One recent case has however illustrated that the extortionate credit provisions can be successfully argued. In the case of *London North Securities v Meadows*, LTL 25/11/2004 heard at Liverpool County Court, where the mortgagee brought proceedings for possession, the judge found that the agreement in question was extortionate and contravened the ordinary principles of fair dealing under s 138 Consumer Credit Act 1974. Whilst the stated rate of 34.9 % was not in itself seen as excessive it was a combination of factors including the ability to charge interest on arrears and compound interest that amounted to potentially exorbitant terms. The mortgagee's claim was dismissed, the judge finding the mortgagors had been subject to informational and procedural errors with regard to the agreement, the compound interest amounted to an unenforceable penalty and that the agreement was indeed an extortionate credit bargain.

¹⁸⁰ Crowther (n 5) [6.1.7].

¹⁸¹ *Ibid* [3.7.3.].

¹⁸² NOP Market Research Ltd, *Consumer Credit Surveys* [43] Tables 254–255, Crowther (n 5) [3.6.9].

¹⁸³ NOP Survey, Crowther (n 5) [3.6.14].

that as only a small proportion of borrowers seemed to get into trouble with their repayments, action with regard to indebtedness as such was not justified.¹⁸⁴ There was not however a complete abandonment of defaulting debtors or at least those who were not fraudulent. It was felt however that policy should concentrate on prevention rather than cure, providing assistance to those who still found themselves in difficulty. Whilst reasons for default were identified as usually linked to unforeseen events, it was acknowledged simple over-commitment and poor financial management could also contribute to non-payment of debt.¹⁸⁵ The latter were considered to be easier to prevent, through lender assessment of a potential borrower's credit rating, and yet again provision of adequate information. The combination of improvement in consumer knowledge and a competitive market¹⁸⁶ was seen as a basis for the efficient use of credit.¹⁸⁷

It would appear then that the most effective means of regulating credit envisaged by the Crowther Committee was by promoting choice through the provision of a basic legal framework upon which particular protections for the consumer could be built where appropriate, such protections being primarily information based. Freedom for parties to enter contracts as they wished also had a place within the recommendations, but this freedom was limited. In terms of the consumer, the promotion of real choice necessarily entailed requirements upon at least one party to the transaction—not only did the consumer need adequate knowledge of what was available in the credit market but also of the terms upon which an agreement was made. Besides archaic and inappropriate legislation, consumer ignorance was seen as a cause of inequality and market imperfection, factors which effectively prevented true choice for the consumer.¹⁸⁸ Disclosure of relevant and adequate information or 'truth-in-lending', were seen as the best means of providing the depth of consumer knowledge required to tackle these problems.¹⁸⁹

¹⁸⁴ Crowther (n 5) [3.6]–[3.15].

¹⁸⁵ *Ibid* [3.9.1].

¹⁸⁶ *Ibid* [3.9.5].

¹⁸⁷ *Ibid* [3.8.2].

¹⁸⁸ Inertia in relation to product comparison was also seen as a relevant factor in the cause of these problems.

¹⁸⁹ Crowther (n 5) [3.3.13].

As with the policy underlying the hire-purchase legislation, a fair balance between the parties to a transaction was central to the Crowther Committee's programme of regulation for consumer credit¹⁹⁰ Besides truth-in-lending this balance was to be achieved by reducing unfairness in the circumstances in which contracts were entered into and providing some protection against harsh or oppressive terms. Could it be said, then, at this point that Crowther's approach and indeed that of Parliament before it indicates a developing general policy of regulating unfairness? In terms of procedure, Parliament indirectly regulated unfairness by giving the consumer the opportunity to withdraw from a contract that may have been agreed to in unfair circumstances. The Crowther Committee, whilst continuing with this protection, also provided for regulation of unconscionable creditor behaviour by means of a licensing system with sanctions for malpractice. In terms of substance, again Crowther went further than the hire-purchase legislation. Whilst the Hire-Purchase Act regarded some terms as void from the outset¹⁹¹ and ensured the court was involved at some point in the enforcement process¹⁹² it did not allow for the possibility of subsequent interference with individual agreed contract terms. The Crowther Committee however, effectively advocated the direct regulation of unfair contract terms by allowing the court to re-open contracts where terms could be seen as harsh and unconscionable.¹⁹³

Those who dismiss the need for direct regulation of substantive unfairness would argue that such measures merely disadvantage those they are designed to protect, a particular example being the control of price.¹⁹⁴ Whilst the Crowther Committee considered but 'did not subscribe to this argument'¹⁹⁵ the now Conservative Government effectively did. In the White Paper that followed, any suggestion of a prima facie interest rate cap was rejected, preferring more general considerations, such as an examination of the particular circumstances of the case.¹⁹⁶

¹⁹⁰ Crowther (n 5) [6.1]

¹⁹¹ For example agreement terms purporting to exclude the cooling off provisions or terms authorising entry onto premises for the possession of goods subject to a hire-purchase agreement (or conditional sale or credit-sale agreement).

¹⁹² Hire-Purchase Act 1965 c 66 Pt III.

¹⁹³ See text to nn 175–177.

¹⁹⁴ In fact the capping of interest rates is used as an example H Collins *Regulating Contracts* (OUP, Oxford 1999) 276.

¹⁹⁵ Crowther (n 5)[6.6.6].

¹⁹⁶ 'Reform of the Law on Consumer Credit' (Cmnd 5427, 1973) [68–69].

A reason given for this was that it would be difficult to set a fair standard rate for every type of loan, short loans sometimes justifying higher rates. If a maximum level were laid down it 'may well cut away people's ability to borrow small sums for short periods'.¹⁹⁷

Recommendations from the Crowther Committee that address issues of unfairness however can perhaps be explained as other than a desire to directly regulate unfairness. It has been suggested there is some doubt whether legislative measures designed to address substantive fairness in the terms of contracts, particularly consumer contracts, actually demonstrates a policy of regulating unfairness as such—rather such regulation is justified via other means, for example remedy of market failure.¹⁹⁸ Market failure correction, for instance, can be employed to explain disclosure requirements when used as a means of balancing asymmetries of information; this is a method embraced by the Crowther Committee and the Hire-Purchase Acts. The desire to directly regulate the substantive unfairness in contracts seems to be apparent not only in the Crowther Committee's effective retention of the 48% interest rate cap originally provided by the Moneylenders Act¹⁹⁹ but in the aim (clear from the approach of both Parliament and the Committee) of safeguarding against the harsh social consequences of unfair credit terms. However, as has already been explained, the main thrust behind the reforms was to provide protection by tackling lack of competition and inequality by reducing consumer ignorance, in other words dealing with market imperfections.²⁰⁰ The way forward as far as the Committee was concerned was considered to be a 'properly conducted and efficient consumer credit industry', the objective being to 'create a competitive environment which will provide the maximum scope for future development, promote the efficient use of resources and offer the incentive for innovation and experiment'.²⁰¹ In the same way the hire-purchase regulation attempted to address inefficiency in the consumer credit market by providing information so the consumer could make an informed choice and protection from malpractice through the cooling off provisions.

¹⁹⁷ Hansard HC (series 5) vol 864 col 553 (14 November 1973) Under Secretary for State for Trade and Industry.

¹⁹⁸ Collins *Regulating Contracts* (n 194) 257.

¹⁹⁹ 48% to be seen as prima facie harsh and unconscionable Crowther (n 5) [6.6.9].

²⁰⁰ Certainly market competition and the contribution consumer ignorance made to its imperfections was a topic that the committee considered—Crowther (n 5) [3.3].

²⁰¹ Crowther (n 5) [3.8.14].

It could be argued then that the approach of Parliament and the Crowther Committee up to this point was to regulate market behaviour as a means of protecting the consumer rather than a desire to regulate unfairness as an individual issue. That being said, as is shown by the pursuant parliamentary debates, fairness to the consumer was now a key factor in parliamentary attitude to any measure designed to protect the consumer in credit transactions.

(b) Parliamentary Response to the Crowther Committee Report

In what seems to be the only major parliamentary debate on the Crowther Committee, which took place in the House of Lords, the report was described as a 'splendid document of social economic and legal significance'²⁰² and Members were impatient for legislation. From the floor of the House numerous suggestions were made, such as a decent system for enforcement of protections,²⁰³ declaration of the true as opposed to flat rate of interest,²⁰⁴ need for rationalised simple formula for determining interest and a set maximum interest rate.²⁰⁵ The majority of comment related to proposed reforms that affected the consumer directly; adequate comprehension of the cost of credit²⁰⁶ by the consumer was seen as extremely important. Knowledge it seemed was the essential factor, in whatever form it took, whether through details of interest rates or general education as to how credit should be used.

When the Consumer Credit Bill came before Parliament in 1973 fairness to the consumer, not just in terms of equal bargaining power at the negotiation stage of the contract but throughout the life of the agreement was still apparent as an underlying theme. This manifested itself in concerns not just for 'truth in lending,' seen as the most important aspect to the new law but also in the attention given to the prevention of unfair terms, particularly extortionate credit. The emphasis on

²⁰² Hansard HL (series 5) vol 332 cols 929, 935, 936–937 (28 June 1972).

²⁰³ Ibid col 943.

²⁰⁴ Ibid col 945.

²⁰⁵ Ibid col 948.

²⁰⁶ Hansard HL (series 5) vol 332 col 944 (28 June 1972).

unfairness however differed as between Government and other MPs. Whilst the Conservative Government continued the Crowther Committee's theme of encouraging protection through equality for the consumer and a more competitive marketplace by means of provision of information, MPs emphasised regulatory protection, in particular protection of the vulnerable. The focus for the floor of the House was on the social as well as the monetary cost of credit, expressing concern for consequences such as over-commitment and family break-up. However, the imposition of restrictions for consumer protection were seen not so much as means of establishing fairness for its own sake, but as preventing exploitation of the vulnerable. Extortionate credit in particular was seen as a burden on the most vulnerable in society and an interest rate cap was still focussed on as the most effective way to deal with this problem, information and access to the courts being seen as unrealistic protections for the illiterate, underprivileged and ill-educated.

there is a large section of the community...about whom the Government should be more concerned. These people will continue to pay interest rates which would be regarded by the courts as extortionate partly because they are afraid of the cost and the inquiries that would be made²⁰⁷

Whilst vulnerability had been considered to varying degrees in debates relating to earlier legislation, by the time of the Consumer Credit Bill it was not just an important factor but a driving force behind parliamentary attitude, in debate, to the regulation of credit.

In terms of general approach to the regulation of consumer credit Parliament seems to have taken the route of high visibility consumer protection without embarking on more in depth legal change, not questioning the Conservative Government's reluctance to introduce the complete new legal framework for lending and security recommended by the Crowther Committee. Whilst the majority view in Parliament was that consumers, and particularly vulnerable consumers should be the focus of attention, for some the new power of the consumer had produced too much

²⁰⁷ Hansard HC (series 5) vol 864 col 553 (14 Nov 1973) per Mr WT Williams (Labour and Co-operative).

of a magnet in one particular direction. As one member of the House of Lords said in 1974

I am perplexed by the dislike of the profit motive...Unless the big corporations – and indeed others in this country make good profits, whence will come the revenue Government need?...if the medium sized concerns cannot make profits how, in a free market system...can they get the necessary funds from the stock market with which to expand and give employment when the amounts generated from profit are manifestly insufficient?...other people feel that credit itself is too easily accessible and that a bigger proportion of goods should be paid for in cash, “on the nail”. But consumer credit is a social habit now assumed and understood²⁰⁸

The Government too, whilst accepting consumer protection as the main aim of legislation, seemed to recognise the continuing importance of business within the sphere of consumer credit regulation. Not only did it advocate a competitive market place, within which legitimate concerns could operate on a fair basis, it also agreed with the Crowther Committee that there would be dangers in over-regulation.²⁰⁹ This could be a reason for the decision against implementing the proposed Lending and Security Act. The Government certainly was not keen on the proposed register of secured interests²¹⁰ and with certain business groups apparently raising concerns about such a development the idea was shelved together with the remainder of the Lending and Security Act, including the proposal of changing the legal form of hire-purchase. This consequence is perhaps surprising in view of the fact both consumer and trade lobbyists²¹¹ favoured the removal of the legal distinction between hire-purchase and other forms of credit tied to the sale of goods. As the Consumers Association said itself in the evidence submitted to the Committee

To the consumer, the different types of credit boil down to the same thing in the end: getting goods or services without paying

²⁰⁸ Hansard HL (series 5) vol 350 col 1174 (19 April 1974) per Lord Barnby (Conservative).

²⁰⁹ Hansard HL (series 5) vol 332 col 960 (28 June 1972). The concern was it would encourage people to enter into transactions i.e. creating a false sense of security.

²¹⁰ ‘Reform of the Law on Consumer Credit’ (n 196).

²¹¹ RC Kirkpatrick and B Greene ‘The Policies of Instalment Credit Law—An Appraisal from the viewpoint of the finance houses’ in AL Diamond (ed) *Instalment Credit* (Stevens & Sons, London 1970). This article comprises a part of the evidence submitted by the FHA to the Committee.

for them at the time. The law should come into line with reality and deal with all types of credit together.²¹²

Interestingly, this reluctance to examine the form of hire-purchase continues today. As a result of industry response to the White Paper 2003, further consultation has been undertaken with regard to hire-purchase, in particular as to the voluntary termination provisions of the Consumer Credit Act 1974.²¹³ In their response to the consultations, the motor finance industry complained it was suffering large losses as a result of these provisions, due to the massive depreciation on the value of vehicles.²¹⁴ In the event the Government decided against any amendments over and above those contained in the Consumer Credit Bill, the reasons being cited as a lack of compromise between the industry and consumer lobbyists.²¹⁵ There is also however, as demonstrated by Government in the drafting of the Consumer Credit Act in 1974,²¹⁶ a seeming reluctance to avoid any further detailed examination of the actual form of hire-purchase.²¹⁷

In the White Paper published in 1973²¹⁸ the Government however did follow the Crowther Committee's direction in relation to protection of the consumer. The Consumer Credit Bill was said to have two purposes: to provide comprehensive protection for the consumer and to encourage competition not only in general terms

²¹² Consumer's Association 'The Credit Jungle' *Money Which?* (September 1969).

²¹³ These provisions allow customers under hire-purchase or conditional sale agreements to terminate the agreement and hand back the goods without further liability as long as at least 50% of the amount due under the agreement has been paid. Consumer Credit Act 1974 c 39 ss 99–100.

²¹⁴ 'Establishing a Transparent Market: Responses to a consultation on proposals for regulations on: Early Settlement, Consumer Credit Advertising, Form and Content of Credit Agreements, APRs on credit cards, On-line Agreements' (DTI 2003) 30–31.

²¹⁵ Enforcement bodies and consumer groups wanted retention of the existing provisions, but the credit industry desired the opposite. Neither side was keen on the compromise suggestion of moving the threshold. 'Summary of responses to a consultation of 2nd September 2004 on voluntary termination of hire purchase and conditional sale agreements under the Consumer Credit Act 1974' DTI Consumer and Competition Policy Directorate (2005).

²¹⁶ In the 1973 White Paper 'Reform of the Law on Consumer Credit' (n 196) the Government was happy to retain the status quo, stating there were 'insufficient grounds' for change [8(b)].

²¹⁷ 'It has become clear that it would not be possible to remove the provisions on voluntary termination in isolation. Given their position at the heart of the law on hire purchase, to do so could call the whole concept of HP into question. We do not therefore believe that they should be abolished without a wider consultation on the future of hire purchase and other forms of secured lending for goods and vehicles' Summary of responses (n 215).

²¹⁸ 'Reform of the Law on Consumer Credit' (n 196)

but also between different types of activity and business.²¹⁹ The basic template for the new Act was to be the hire-purchase legislation with appropriate adjustments—may be a reason for keeping hire-purchase in place. In essence the Bill fortified the hire-purchase provisions applying them across the board, establishing truth in lending provisions through disclosure requirements and advertisements regulations and establishing general control of conduct in the marketplace through licensing.²²⁰

Whatever influence business may have had on the new legislation, the Government heralded the Bill in Parliament as substantially increased protection for the consumer. Truth-in-lending, i.e. the provision of adequate and accurate information, was seen as the most important issue being referred to as ‘the fundamental principle’ underlying the Bill²²¹ creating (together with licensing) equality of bargaining power, competition and natural protection against exorbitant interest rates.²²² Government and Parliament, upon passing the Bill had therefore again emphasised information as the ultimate protective tool. Unfairness was addressed, but in terms of preventing exploitation and ensuring an adequate balance between the parties by providing power to the consumer again through knowledge and a competitive market place, rather than an issue in its own right. The Consumer Credit Act received the royal assent on 31st July 1974. Some provisions were implemented immediately²²³ but even with some (though not concerted) parliamentary pressure, it took ten years for the Act to be fully operational. The Act itself has now faced re-appraisal from the Consumer Credit Act Review and the White Paper 2003²²⁴ and as a result has been amended by the Consumer Credit Act 2006.

²¹⁹ ‘The Bill takes the line that it is the circumstances of the case and not the status of the lender that should decide whether or not protection should be given in any particular case’ Reform of the Law on Consumer Credit (n 196) [6].

²²⁰ ‘Reform of the Law on Consumer Credit’ (n 196) [5].

²²¹ Hansard HC (series 5) vol 864 (14 November 1973).

²²² Hansard HC (series 5) vol 875 col 46 (17 June 1974).

²²³ Such as licensing, Pt III and liability of lenders for misrepresentation or breach of contract of the supplier of goods/services sold on credit s 75.

²²⁴ Cm 6040, 2003.

4. CONCLUSION

What approach then did Parliament take to hire-purchase and to consumer credit in its modern form? At first it would seem disinterest, even though the practice had become well established by the end of the 19th century. This may seem surprising given the already permanent nature of the system within the fast developing psyche of the “consumer”. It has been suggested that this is because there was, at this stage no glaring abuse to be dealt with²²⁵ and because hire-purchase related to the purchase of consumer niceties rather than necessities it did not prompt action.²²⁶ This is certainly supported by the fact there was more interest later when, for instance, cars primarily bought on hire-purchase were no longer seen as a luxury. Yet furniture, surely regarded as a necessity, was estimated as being 50% hire-purchase acquired by 1928²²⁷ and it is quite clear that people were indeed being exploited through the medium of practices such as “snatch back”,²²⁸ which were designed to abuse the system.

As has been demonstrated by the historical examination of the development of consumer credit legislation so far, desire for regulation was slow to gain impetus with regard to the provision of credit to the individual. This to some extent had been due to the unquestionable influence of business on parliamentary attitudes to credit, ensuring creditors’ concerns were high on the agenda when discussing regulation. In contrast, the drive for reform, when it came, was initiated by concern for the debtor and his social well-being. This in turn signalled the beginning of a new trend in parliamentary thinking in terms of credit, one that favoured the “consumer”. This trend continued, gaining significant momentum during the development of hire-purchase legislation. Trade was still consulted and had some effect on the outcome of earlier statute. Nevertheless, although consumer power only emerged in name during

²²⁵ McManus ‘Law and Power’ (n 10) 94.

²²⁶ Ibid.

²²⁷ Hansard HC (series 5) vol 216 col 269 (4 May 1928).

²²⁸ ‘snatch back’ described the practice of the hire-purchase company terminating the agreement for insignificant defaults in payment, repossessing the goods even if nearly all the instalments had been paid and then making a profit on the sale of the goods—Crowther (n 5) [2.1.46].

the 1960s and 1970s,²²⁹ the parliamentary debates from earlier periods show consumers already enjoyed some influence; this made itself felt through MPs concern for the vulnerable. Initially this was only a small section of society but by the later debates of the 1960s 'vulnerable' was encompassing not only the poor or ignorant but also a significant proportion of consumers, whatever their status.

There is no doubt that with the development of the hire-purchase legislation emerges a change in parliamentary approach to consumer credit that had been evident but not fully developed in earlier debates on money-lenders and matters of enforcement; this marked a real shift in emphasis as to the forces that framed the policy behind legislation i.e. from business to consumer. In addition with corporate business-to-business credit removed from the ambit of the legislation from the Hire-Purchase Act 1965 onwards, fortifying the position of the consumer seemed now to be the prominent aim. One area in which this was amply illustrated was by the new concern to promote consumer power in the credit marketplace. Freedom of choice for the consumer was to be encouraged, but freedom for both parties to contract in any way they wished had to be curtailed.²³⁰ It is also clear from Parliament's attitude to the door step salesman that the consumer was now regarded as 'vulnerable' in any situation where he/she might be subject to unconscionable conduct or terms, or suffer undesirable consequences from being in a weaker bargaining position; in other words unfairness. For Parliament to ensure protection against this and provision of true consumer choice, these situations had to be addressed by the law. This was done through the provisions in the hire-purchase legislation allowing cancellation of the agreement and just as prominently through the requirements ensuring detailed information for the consumer. The Consumer Credit Act 1974 not only included these safeguards but increased the promotion of fairness. This was achieved with the prevention of malpractice through a detailed licensing system and the provision, through the extortionate credit provisions, of the ability for the borrower to challenge

²²⁹ McManus 'Law and Power' (n 10) 236; certainly debates about general 'consumer' issues begin to surface only at around this time.

²³⁰ The downfall of freedom of contract has been considered in detail by Atiyah in *Rise and Fall* (n 133) Freedom of contract and equality of bargaining power have been the subject of much discussion within wider debates on the freedom of contract, for example FH Buckley (ed) *The Fall and Rise of Freedom of Contract* (Duke University Press, Durham and London 1999).

terms of an agreement on the basis they grossly contravened ordinary principles of fair dealing.

It is not clear however that at this stage Parliament actively wished to establish a general policy of combating unfairness as a separate issue. Issues of fairness, whether procedural, such as the circumstances in which the agreement was made, or substantive, that is in relation to contract terms, seemed to be approached more as a matter of market regulation. What is evident is that Parliament regarded information as the most essential tool in realising consumer protection. It was believed an informed and knowledgeable consumer would be able to protect himself more efficiently against exploitation and/or unfairness by putting him/her on an equal footing with the creditor. Although other protections were introduced and even though the desire for more stringent provisions such as interest rate control were favoured by some MPs, it was 'truth-in-lending' which united MPs and the Government in their attitude towards protection of the credit consumer.

In conclusion, it can be deduced from the ample evidence provided by parliamentary debates and proceedings of the first three quarters of the 20th century, that the hire-purchase legislation, continuing what had been begun by the Moneylenders Acts, provided the template for modern consumer credit legislation. This was not only through its direct provisions but also in relation to the consumer-orientated policy that lay beneath it. The law was moving ever further away from traditional ideas of freedom of contract and the sanctity of contract. Furthermore, societal rather than legal considerations were now the priority. Informed choice for the consumer, equality of bargaining power and the prevention of exploitation of the vulnerable were seen as the most important issues, vulnerability now seeming to encompass not only those who were destitute or under-privileged but also the general persona of the consumer when in a position of inequality.

The policy of consumer protection effectively resulted in purely legal issues being of less relevance than social ones, with more traditional contractual rules being adapted to fit the desired framework within which it was envisaged consumer credit would operate. It seems the promotion of consumer welfare was, in essence, the underlying policy to consumer credit legislation. The key to achieving consumer

protection was giving power to the consumer within a competitive environment through specific legislative provisions, such as the ability to withdraw from the contract and, just as importantly, from the provision of adequate and accurate information. What is clear from the development of the hire-purchase legislation through to the Consumer Credit Act 1974 is that Parliament regarded a knowledgeable consumer as a powerful consumer and that information was an essential tool in the providing protection. Indeed availing the consumer of adequate information was seen as something that would not only provide a deterrent to exploitative and unfair behaviour by creditors but would also actively promote equality between the parties.

These policies of promotion of consumer welfare within a competitive market and the importance of information as a protective device continue today as is demonstrated by the White Paper 'Fair Clear and Competitive The Consumer Credit Market in the 21st Century'. This states that the major objective of proposed change to the law is 'an efficient, fair and free market where consumers are empowered to make fully informed decisions'.²³¹ Even though the Government did not desert the interests of commerce, during the developments that led to the present statutory framework, as consumer dominance grew business influence waned. Whilst perhaps concerns as to consumer over-commitment and debt were in no way as prominent as they are now, this is only because Parliament was getting to grips with the idea of its new protégée, the consumer. It appears obvious that the welfare of this individual was developing into the most relevant factor in Parliament's consideration of credit legislation, a relevance that continues in current legislative reform.

²³¹ Cm 6040, 2003, 4.

CHAPTER 7

THE CONSUMER CREDIT ACT AND OVER-INDEBTEDNESS

1. INTRODUCTION

The Consumer Credit Act 1974 was finally fully implemented in 1985. It has not however survived without criticism and a number of reforms have been mooted over the years, ranging from deregulation for unincorporated businesses to amendments to the extortionate credit provisions. Despite this up until 2006 the legislation has escaped any major amendments.

In 2001 a concerted effort was taken to reassess the consumer credit legislation. The Labour Government, galvanised into action by concerns about rising levels of consumer borrowing, failures in the consumer credit licensing regime, and indications that a modernisation of the Consumer Credit Directive was on the agenda, announced the Consumer Credit Act Review (“the Review”). One issue that was highlighted as a particularly important factor within this reassessment of the consumer credit legislation was the developing problem of “over-indebtedness”. It is this element of the Review that is the subject of discussion in this chapter.

In 2000 the DTI had set up a Task Force to take a general look at reasons for and consequences of over-indebtedness and to explore avenues for improving levels of responsibility with regard to the provision of credit.¹ In July 2001, at the same time as the Consumer Credit Review was announced, the Task Force published its first Report (“Task Force Report 2001”).² This Report recommended, inter alia, research into the cause effect and extent of over-indebtedness, development of best practice with regard to marketing techniques (including the review of advertising regulations), provision of information pre-contract, improvements to the form and

¹ Transparency of information, establishing principles of lending practice and the notification of information with respect to no/low interest agreements were issues seen as particularly relevant. Task Force on Over-indebtedness ‘Report by the Task Force on Tackling Over-indebtedness’ (DTI, 2001) [2.2].

² (n 1).

content of credit agreements and continued work on the provision of advice for the consumer.

The emphasis of the Review, besides the issue of over-indebtedness was on tackling loan sharks³ and providing regulation that ‘protects the consumer against ... unfair lending practices while enabling business to operate competitively in a modern credit market.’⁴ It covered a number of issues seen as problem areas, such as financial limits and exempt agreements, the licence regime, the redress mechanism for consumers and extortionate credit. The Task Force also highlighted this latter issue, it being seen as a contributory factor to over-indebtedness. The Review, in addition, addressed other concerns underlined by the Task Force, such as transparency of information,⁵ content and form of agreements, debt advice and principles of responsible lending. Indeed the importance of the Task Force on Over-indebtedness was acknowledged, with its recommendations being seen as one of the priorities.⁶ Furthermore research into the cause effect and extent of over-indebtedness, including identifying methods for prevention, were envisaged as an integral part of the Review and it is clear that over-indebtedness was seen as one of the ‘main drivers’ behind consultation on legislative amendment.⁷

Over-indebtedness continues to be a topical issue. The Task Force was given a more permanent role after the White Paper ‘Fair Clear and Competitive The Consumer Credit Market in the 21st Century’ (“the White Paper”) was published in December 2003.⁸ Working groups were set up to develop an ongoing policy with regard to over-indebtedness and in 2004 the newly appointed Ministerial Group on Over-indebtedness issued an Action Plan, outlining the continuing strategy with regard to over-indebtedness.⁹ This group has announced it will produce an annual

³ Loan sharks have been identified in the White Paper ‘Fair Clear and Competitive The Consumer Credit Market in the 21st Century’ (Cm 6040, 2003) as illegal money-lenders [1.44].

⁴ Melanie Johnson MP ‘Progress Report’ (DTI, 2002) 1.

⁵ Both in terms of marketing and pre contract, through for example proposed consultation on the advertisements regulations.

⁶ ‘Tackling Loan Sharks –and more:—Consultation Document on Modernising The Consumer Credit Act 1974’ (DTI July 2001) [1.2].

⁷ Ibid.

⁸ Cm 6040, 2003.

⁹ DTI, DWP ‘Tackling Over-indebtedness Action Plan 2004’ (DTI 2004).

report, the first of which was published in August 2005¹⁰ and that levels of over-indebtedness will continue to be monitored on a quarterly basis.

The purpose of this chapter is to demonstrate that before a full analysis of the present amendments to the consumer credit legislation can be made, the concept and influence of over-indebtedness should be assessed. First the concept of over-indebtedness itself is explored. This is done by considering various definitions that have been used and identifying important elements of over-indebtedness which have emerged as a result of these various descriptions. The extent to which over-indebtedness is considered in Parliament is then addressed. Parliamentary attitudes and approach are examined within the context of the proposed legislative reform, with the aim of demonstrating not only the importance of over-indebtedness to the reform of the consumer credit regulatory framework, but also the underlying principles of the parliamentary approach to consumer credit legislation as a whole.

2. OVER-INDEBTEDNESS

(a) What is Over-indebtedness?

The aim of the Task Force on Over-indebtedness was to tackle—over-indebtedness. There was, however, one potential problem; no one really knew what “over-indebtedness” meant. This was recognised in the Task Force Report 2001¹¹ and it was recommended that research be commissioned to provide an insight into the factors that cause over-indebtedness. The initial step was the collection of data with regard to the distribution of consumer borrowing across households, the extent of financial difficulties being experienced and any connection between this and lending practices. In September 2002, Elaine Kempson (from the Personal Finance Research Centre at Bristol University) was commissioned to analyse the data (collected by MORI) with the added remit of exploring whether there were any links between specific lending practices and financial difficulties. The findings were published in

¹⁰ DTI DWP DCA ‘Tackling Over-indebtedness Annual Report 2005’ (DTI 2005).

¹¹ (n 1) [1.5].

‘Over-Indebtedness in Britain. A Report to the DTI’ (“Kempson Report”).¹² With reference to the meaning of over-indebtedness, the conclusion was ‘Although it is widely used, there is no generally agreed definition. Indeed, various commentators have interpreted it in quite different ways’.¹³ In the meantime, to overcome this difficulty, the Kempson Report opted for a ‘pragmatic approach’ and employed the following as a benchmark:¹⁴

a measure of the extent of current financial difficulties,¹⁵ including arrears, and two definitions of heavy credit use, both of which are strongly associated with reported levels of financial problems:

spending more than 25 percent of gross income on consumer credit¹⁶ and

spending more than 50 per cent of gross income on consumer credit and mortgages¹⁷

The White Paper, amongst other reports and publications,¹⁸ also admits there is no universal definition. It bases its criteria on the Kempson Report using the combination of spending more than 25 percent of gross income on consumer credit, spending more than 50 per cent of gross income on consumer credit and secured lending or four or more credit commitments.¹⁹

In terms of deciding what over-indebtedness means, perhaps it would be useful to consider from where the expression might have originated. The Crowther Report in 1971²⁰ refers to possible dangers of consumer indebtedness and inherent

¹² E Kempson ‘Over-Indebtedness in Britain. A Report to the Department of Trade and Industry’ (Personal Finance Research Centre, 2002).

¹³ Kempson Report (n 12) 39.

¹⁴ Although this was only seen as a loose indicator—‘In doing so we are not saying that a household is only over-indebted if their spending is above these levels—it is merely an analytical tool that accords with a common sense view of experts on borrowing’ *ibid* 39.

¹⁵ Financial difficulty included struggling to reduce running account credit balances (credit cards and overdrafts) and borrowing to satisfy outstanding debts. *Ibid* 23 fn 1.

¹⁶ 5 % of all households.

¹⁷ 6 % of all households.

¹⁸ For example ‘Over-indebtedness in Britain: A DTI report on the MORI Financial Services Survey 2004’ (DTI, 2005) [3.1], DCA ‘A Choice of Paths better options to manage over-indebtedness and multiple debt’ (2004) 8.

¹⁹ White Paper (n 8) [5.5].

²⁰ Crowther Committee ‘Consumer Credit: Report of the Committee’ (Cmnd 4596, 1971)

problems with excessive commitment. The nearest we get to any kind of definition is in paragraph 3.7.2.—‘an individual is borrowing excessively if the cost of borrowing is greater than the monetary and non-monetary returns’—but there is no specific reference to over-indebtedness as a term.

Over-indebtedness is an issue at European level. Research into over-indebtedness was seen as a priority as early as 1992²¹ although no policy measures were implemented at that time.²² The Council of the European Union and the European Economic and Social Committee, (“EESC”) however, regarded this issue as extremely relevant to the aim of a harmonised European market. On 24 April 2002 an ‘Opinion (own-initiative) on Household Over-Indebtedness’ was published by the EESC,²³ which outlined its concerns about the lack of progress by the European Commission (“the Commission”) in tackling the problem

Over-indebtedness is a phenomenon with social, economic, financial, legal (civil and procedural) and, of course, political aspects, all of which merit being tackled at Community level.²⁴

The EESC felt that in order for the single market to operate effectively in terms of consumer credit, a harmonisation of legal systems dealing with the issue was essential

A Community-wide approach to the essential legal aspects of household over-indebtedness is...absolutely vital to the single market’s effective operation²⁵

Later when the EESC came to consider the proposal for the new Consumer Credit Directive in 2003, it was still disappointed at the Commission’s ‘persistent

²¹ Within the development of consumer protection policy—‘Opinion of the Economic and Social Committee on Household over-indebtedness (own initiative opinion)’ CES (511/2002) 1.1.

²² Ibid [1.2].

²³ CES 511/2002.

²⁴ Ibid [2.1].

²⁵ Ibid [2.4]. The EESC made various recommendations including asking the Commission to produce a green paper, provide measures for harmonisation of the legal framework and suggestions for various courses of action for member states, such as codes of conduct for industry, information and education. Ibid [3.2.1].

unwillingness' to progress in this area.²⁶ It found that not only was there was a lack of any real consideration of over-indebtedness but that the Commission's reliance on information requirements was inadequate²⁷ in that it was not backed up by more dynamic forms of consumer protection.²⁸

Yet the EESC too have recognised that in fact no single definition of over-indebtedness exists. In 2000, on its instructions, an information report was compiled on Household Over-indebtedness.²⁹ In this it is considered a choice must be made, when choosing a model by which to measure over-indebtedness, between a measurement based on objectivity,³⁰ subjectivity³¹ or administration.³² Alternatively, a definition could include elements of all three. These models were examined by ORC Macro in their Report (on the statistical aspects of consumer indebtedness) to the Commission in 2001.³³ In this report the authors opted for a model that encompassed subjective and objective parameters, including expected future income.³⁴ Their decided definition of over-indebtedness was that a consumer was 'over-indebted if he or she considers that he or she has difficulties in repaying debts, whether consumer debt or a mortgage.'³⁵

It seems definitions currently floating around range from a mere consumer perception to regarding it as a factor of bankruptcy. In a recent comparative study between French and United States law, legislation dealing with consumer debt relief is treated as synonymous with law on over-indebtedness.³⁶ Certainly the connection

²⁶ EESC 'Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers' [2003] OJ C 234/1 [2.4.5].

²⁷ EESC Opinion (n 26) Summary.

²⁸ Ibid [2.4.3].

²⁹ Ferreira, A., rapporteur INT section, EESC 'Information Report on Household Over-indebtedness' (CES 212/2000 final of 20.6.2000).

³⁰ Ie quantitatively based for example on debt to income ratio.

³¹ The consumer's perception of their indebtedness.

³² In effect registration on the non-payment of debt.

³³ ORC Macro 'Study of the problem of consumer indebtedness: statistical aspects Final Report' (October 2001).

³⁴ Expected future income was included in an attempt to reduce 'discrimination between households of different age groups.' ORC Macro (n 33) 63.

³⁵ Ibid 2.

³⁶ The treatment of over-indebtedness by French law resembles a personal bankruptcy style system whereby debtors can agree arrangements for the payments of their debts. The French

with bankruptcy cannot be denied, in that over-commitment to debt may obviously lead to an eventual inability to meet repayments—making personal bankruptcy an option.³⁷ The relationship between over-indebtedness and debt enforcement procedures are addressed by Nick Huls in ‘Overindebtedness and Overlegalization: Consumer Bankruptcy as a Field for Alternative Dispute Resolution’.³⁸ To Huls, debt enforcement and bankruptcy epitomise the legal aspects of over-indebtedness. He takes the view that over-indebtedness should be approached within a framework encompassing both legal and social elements, including debt counselling and negotiated settlements. The law’s role in this is envisaged as providing procedural regulation to establish a mechanism of debt settlement that is fair for all parties,³⁹ combined with a facility for professional debt counselling, the aim being that repayment of debt where possible should be handled without court intervention.

Debt counselling is something considered by the White Paper. The importance of free debt advice is recognised and a number of new initiatives are set out including ‘joined-up debt advice’⁴⁰ and improvement in the availability of face-to-face advice. With reference to debt settlement however the White Paper would seem to concur with Huls, in that this aspect of over-indebtedness is clearly treated as an insolvency rather than credit issue.⁴¹ Apart from active encouragement in the development of codes of conduct by the industry,⁴² action with regard to debt collection and legal processes are clearly placed with the DCA. The DCA has now published its own consultation paper with regard to debt—‘A Choice of Paths: Better

system is comparatively analysed in detail in J Kilborn ‘La Responsabilisation de l’Economie: What the United States can learn from the new French law on over-indebtedness’ (2005) 26 *Mich J Intl L* 619.

³⁷ A discussion of this aspect of over-indebtedness is contained in ch 5 of this study.

³⁸ N Huls ‘Overindebtedness and Overlegalization: Consumer Bankruptcy as a Field for Alternative Dispute Resolution’ (1997) *Journal of Consumer Policy* 20, 143.

³⁹ *Ibid* 147.

⁴⁰ Vehicles envisaged include a telephone gateway, formal referral mechanisms between telephone services and those provided face to face and methods for referring consumers already ‘within the system’ to appropriate advice services—White Paper (n 8) [5.33]–[5.43].

⁴¹ The EESC also made this connection in the Opinion of 2002 (n 23) where they recommend Member States address the possibility of business insolvency regulations being used as a template for dealing with legal aspects of over-indebtedness. [3.2.2(b)].

⁴² White Paper (n 8) [5.68]–[5.80].

Options to Manage Over-indebtedness and Multiple Debt'⁴³ This paper concentrates on relief for those already in financial distress rather than preventative measures, including the introduction of a variety of mechanisms such as a debt relief scheme,⁴⁴ the introduction of an Enforcement Restriction Order⁴⁵ and reform of the Administration Order scheme. Private and voluntarily agreed schemes are also to be strengthened.

Yet the issue of over-indebtedness is surely more complicated than simply a precursor to bankruptcy. Could over-indebtedness be a mixture of psychological and economic factors that cause the individual to take on more debt than he can truly afford? In an article written by S Lea, P Webley and C Walker⁴⁶ the thorny question of what constitutes over-indebtedness was not directly addressed. However the study did conclude that whilst the causes of debt tended to be economic there were psychological factors that affected an individual's position in relation to debt. The study found the decision to take on, and the approach to, debt (and its consequences) were affected by psychological factors even though the reason for debt was essentially a matter of economics and poverty. Over-indebtedness perhaps could encompass all these features. This position was adopted recently by the DTI in their Report on the Financial Services Survey (undertaken by MORI) in 2004 (the "DTI Report 2004")⁴⁷ Here, in order to identify over-indebtedness, both subjective and objective measures were used. Whilst the objective indicators relied on debt-income ratio, arrears and credit commitments, the subjective indicator consisted of those borrowers who found their repayments a 'heavy burden'.⁴⁸ The Report concluded that pure economic factors related to actual size of credit commitment (extent of repayments and arrears) could not alone account for the "burden" of household borrowing repayments.⁴⁹ In other words, a number of factors needed to be considered

⁴³ DCA 'A Choice of Paths' (n 18) Proposals for reform include a debt relief scheme, the introduction of enforcement restriction orders and reform of the administration order scheme.

⁴⁴ For those debtors who simply cannot pay.

⁴⁵ For those debtors temporarily struggling to pay.

⁴⁶ 'Psychological factors in consumer debt: Money management, economic socialization and credit use' (1995) 16 *J Economic Psychology* 681.

⁴⁷ DTI Report on the MORI Financial Services Survey 2004 (n 18).

⁴⁸ *Ibid* 3-4.

⁴⁹ *Ibid* 17.

in conjunction with one another, including borrowers' subjective view of their situation in terms of their indebtedness.

“Phenomenon” is perhaps the only truly universal description we have of over indebtedness. This description of over-indebtedness crops up in nearly every report and study on the subject. Certainly it is “a thing that appears, or is perceived or observed”⁵⁰ and is being commented on in great detail. Having said that—if there is no common definition of over-indebtedness—what is it that is actually being observed? Various other descriptions and definitions, besides those already discussed, have emerged over the last few years:

persons not being in the situation of sustainably paying their required or approaching debts⁵¹

households no longer able to meet their payment obligations through their revenues or assets⁵²

those households that are not able to meet their monthly payments of their debts for whom the total amount of debt cannot be repaid within three years, taking into the type of debt, or having a certain (given) level of debt⁵³

those households or individuals who are in arrears on a structural basis, or are at a significant risk of getting into arrears on a structural basis⁵⁴

It seems that the majority of descriptions use a statistical economic basis,⁵⁵ with the emphasis being on size of and/or difficulty in paying debts (whether actual or probable).⁵⁶ There is also variation as to whether this difficulty should be assessed objectively or subjectively and has been shown in the DTI Report 2004 both methods

⁵⁰ Definition of ‘phenomenon’ taken from the Oxford English Dictionary.

⁵¹ Definition of over-indebtedness for Belgium IEIC (2000) ORC Macro (n 33) 42.

⁵² Definition of over-indebtedness for Germany IEIC (2000) ORC Macro (n 33) 42.

⁵³ Definitions of over-indebtedness for the Netherlands IEIC (2000) ORC Macro (n 33) 42 (this may have meant to have read ‘taking into account the type of debt’).

⁵⁴ OXERA ‘Are households over-indebted?’ (Oxford, April 2004).

⁵⁵ As the Annual Report 2005 points out “exact definitions are derived through statistical measures” (n 10) [2.1] n 7.

⁵⁶ Although the Task Force in 2001 saw the issue as more complex than simply being in arrears. Task Force Report (n 1) [1.5].

of assessment are used. However the most important element to over-indebtedness seems to be financial difficulty in some form and this has been reinforced in reports recently commissioned by the DTI⁵⁷ and the industry.⁵⁸

Maybe then this is all over-indebtedness really is—simply a term that was originally used loosely to describe financial difficulty and in the process has come to have more significance. In analyses that use the term over-indebtedness and do not attempt to define it, we can see this general assumption that financial difficulty is the same thing as over-indebtedness. For example, in “The History of Consumer Credit ” by R Gelpi and F Julien-Labruyere⁵⁹ a whole chapter is committed to asking whether we are over-indebted and it appears to be regarded as synonymous with difficulty in meeting payments.⁶⁰ The DTI itself recently acknowledged the fact that over-indebtedness was often regarded as synonymous with financial difficulty

Reporting on the levels of consumer over-indebtedness is made more difficult by the lack of a universally agreed definition of over-indebtedness and the use of a number of similar terms, such as problem debt and financial difficulty⁶¹

There is plenty of information as to the causes of over-indebtedness experienced by households. Reasons have been listed as a drop in income, poor budget management, compulsive buying and aggressive advertising although the one thing on which all the research seems to agree is that the condition normally results from an unexpected event or from life-changing situations. These are all things that effectively make financial commitments difficult to keep. There are however other factors pertinent to the question of over-indebtedness when considering the Review.

A connection has also been made between over-indebtedness, poverty and exclusion, both social and financial.⁶² The Treasury recently published a paper

⁵⁷ DTI Report on the MORI Financial Services Survey (n 18).

⁵⁸ OXERA Report (n 54)(commissioned by APACS, BBA, CCA, FLA).

⁵⁹ *The history of consumer credit: doctrines and practices* (Macmillan Basingstoke, 2000).

⁶⁰ Ibid 162.

⁶¹ Annual Report 2005 (n 10) [3.6].

⁶² White Paper (n 8) [5.1] Annual Report 2005 (n 10) [2.2]. Exclusion, particularly social exclusion, is also an issue that is being considered in Europe. Member States adopted National Action Plans for social inclusion—the basic aim being to promote more effective

'Promoting financial exclusion' which directly addresses the connection between exclusion, burdensome debt and high cost or illegal credit.⁶³ Perhaps inevitably, it states the more vulnerable members of society (for example those on low incomes, single parents) are those more likely to be excluded,⁶⁴ just as it has been found the vulnerable are more likely to experience financial difficulty.⁶⁵ The link between exclusion, low income and over-indebtedness is also made by the White Paper.⁶⁶ The White Paper expresses concern that those on low incomes and the young are the most likely to become over-indebted should they suffer financial shock, whether through the economy (a rise in interest rates) or through personal circumstances (such as unemployment).⁶⁷ Financial exclusion will contribute to this. Those consumers who do not have access to the full range of credit facilities within the market place are left with no option but to turn to more expensive forms of credit. Higher costs will inevitably mean a higher risk of inability to cope in the event of an unexpected event. It is these consumers that are targeted by the over-indebtedness reform initiatives.⁶⁸

It would appear then that a number of elements constitute over-indebtedness. It is however financial difficulty with its link to exclusion and vulnerability⁶⁹ that is identified as the nub of the problem⁷⁰ in terms of review of the present consumer credit framework. It could be said then that these are the real targets for this area of

policy in relation to social inclusion. These plans were reviewed by the Commission in 2003, where the importance of fighting exclusion and poverty and social was reiterated 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Joint Report on social inclusion summarising the results of the examination of the National Action Plans for Social Inclusion' (2003–2005) Com (2003) 773 final.

⁶³ HM Treasury 'Promoting Financial Inclusion' (2004). Financial exclusion is seen as including a number of elements, including lack of access to financial products or exclusion due to individual factors such as geography or price [1.6].

⁶⁴ Ibid c 2. Low income consumers are more likely to want short-term cash loans—a service not provided by mainstream lending.

⁶⁵ Kempson lists young householders, those who experience key life events, low incomes or drop in income as most likely to be in financial difficulty. Kempson Report (n 12) [3.3].

⁶⁶ There is even consideration of 'vulnerable business borrowers' that are without access to mainstream lenders. White Paper (n 8) [3.68].

⁶⁷ Ibid [1.46].

⁶⁸ Ibid [5.20].

⁶⁹ Even vulnerability itself, in relation to over-indebtedness, seems to be synonymous with lack of financial resources.

⁷⁰ The Ministerial Group on Over-indebtedness also makes this connection—Annual Report 2005 (n 10) [1.1–1.10].

consumer credit reform; tackling over-indebtedness has simply become a way of describing this aim.

(b) The Importance of Over-indebtedness

As has been demonstrated the real undercurrent of concern with regard to over-indebtedness is not some ethereal concept but financial difficulty and its connection with vulnerability and exclusion. Furthermore, problems of debt and financial difficulty and the long and short-term costs arising from this⁷¹ hinder the Government's stated commitment to 'social justice and prosperity for all'.⁷² Issues of exclusion, vulnerability and over-commitment can, to some extent, be counteracted. In the Action Plan 2004 suggested methods include the increase of consumer financial capability and awareness, access to affordable credit for low earners, responsible lending, promotion of savings, debt advice and support, avoidance of court procedure if possible and if court action is inevitable, efficiency and speed. Of these, however, the new legislation is only seen as relevant with regard to unfair practices (in particular the licensing regime and the unfair relationship test)⁷³ and financial awareness (through advertising and information provisions).⁷⁴

Fairness as the basis of legislative reform in relation to over-indebtedness gives the impression of a subtle change of emphasis, something observable in the direction of general consumer credit reform. In the initial consultation document on modernising the 1974 Act, reasons behind the review of the law were to improve the licensing system, consider the proposals for a new consumer credit directive, ensure relevance of the law to the modern credit market and take action on over-indebtedness, with the objectives of providing a framework that would target rogue traders and reduce burden on legitimate business.⁷⁵ Whilst fairness was envisaged as part of this, particularly in relation to the extortionate credit provisions and amendment to the early settlement regulations, protection against lenders who operated on the edges of the legitimate market, elimination of illegal lenders and

⁷¹ Costs of over-indebtedness are considered for example in the White Paper (n 8) Annex C and also the Action Plan 2004 (n 9) 4.

⁷² Action Plan 2004 (n 9) 4.

⁷³ Ibid [67].

⁷⁴ Ibid [61].

⁷⁵ 'Tackling Loan Sharks and More' (n 6) c 1.

general modernisation of the legislative framework seem the priority. As the Consumer Minister said at the time

We will take action to protect vulnerable consumers who are preyed on by rogue lenders and make sure that consumers get clear and understandable information so they know exactly what they are getting into before they sign on the dotted line⁷⁶

By the time of the White Paper however there is an identifiable change of language. Fairness itself is now, it seems, the more prominent incentive for reform, with often used phrases such as ‘fair and even basis’⁷⁷ ‘unfair practices’⁷⁸ ‘fairer framework’;⁷⁹ ‘Charges will be fairer for borrowers’,⁸⁰ ‘Better monitoring of the fitness of licence-holders will encourage lenders to behave in a fair manner’,⁸¹ promises to ‘Ensure that all credit advertisements are clear, fair and not misleading’.⁸²

In respect of tackling over-indebtedness, there are initiatives to address this. However the only matter addressed by legislative reform is unfairness experienced through undesirable practices of lenders and extortionate credit (via the licensing regime and the new unfair relationship test). Over-indebtedness then, whilst still visible in relation to the overall review, seems at first to have limited impact in relation to the actual consumer credit legislative reform. It has, after all, been acknowledged that over-indebtedness itself is not a pressing problem at a macro-economic level⁸³—it is only problematic at the level of those consumers vulnerable to being financially excluded.⁸⁴ Yet this latter element is why over-indebtedness retains its importance in a discussion of the Consumer Credit Act reforms.

⁷⁶ DTI ‘Johnson announces biggest overhaul of credit laws for a generation’ Press Release P/2001/398 25 July 2001.

⁷⁷ White Paper (n 8) 4.

⁷⁸ Ibid [3.37].

⁷⁹ There is a whole chapter dedicated to this in the White Paper, covering extortionate credit the licensing regime, improvement in consumer redress mechanisms, interest rate ceilings, and abolition of financial limits. White Paper (n 8) ch 3.

⁸⁰ [2.52] (this refers to the new Early Settlement Regulations which reform the basis upon which early settlement rebates are made S1 2004/1483).

⁸¹ [3.8] (with regard to the new licensing regime).

⁸² [2.8].

⁸³ DTI ‘Over-indebtedness Monitoring Paper Quarter 1 2005’ (June 2005) 1; Annual Report 2005 (n 10) [3.12].

⁸⁴ ‘The distribution of assets, income and liabilities cross UK households: results from the 2005 NMG Research Survey’ Bank of England Quarterly Bulletin, Spring 2006.

Minimising the problem is treated primarily in terms of practical initiatives. Yet the aim of creating a fairer framework—the real driving force behind legislative reform⁸⁵—is arguably something that has, at least partly, developed from the desire to address over-indebtedness of vulnerable consumers. As the White Paper says itself

In a small minority of cases, extortionate credit agreements may contribute to over-indebtedness. The review of the CCA has specifically looked at this issue...Of particular relevance to the over-indebtedness agenda are the measures designed to make it easier to challenge unfair credit agreements⁸⁶

Over-indebtedness does have an impact on the review of actual consumer credit regulation. Transparency and fairness, goals that are key to the reforms of the legislation as a whole, are used to tackle financial exclusion, financial difficulty and vulnerability at a regulatory level. It is expected that transparency will be provided through regulated advertising, provision of clear information pre-contract and within the form and content of agreements, online facilities and clarity with regard to the early settlement rebate. Fairness will be delivered through the restriction of unfair practices, by strengthening the licensing regime, reforming the extortionate credit provisions and removing the current financial limit within which the Act's provisions operate. The detailed nature of the Consumer Credit Act reforms is something that will be dealt with in more depth in the following chapter of this study. What is clear is that, whilst it is perhaps of less significance at a specific legislative level, over-indebtedness has had a pivotal part to play in the policy underlying the proposed reforms.

(c) Over-indebtedness in Parliamentary Debate

It has been demonstrated that control of financial difficulty, exclusion and protection for the vulnerable is in essence the underlying approach of Government to over-indebtedness. This is not only evident in the action that has been taken but also in the Government's position in parliamentary debates. Continual statements of concern for the financially vulnerable and the social problems caused by over-indebtedness reflect the Government's direction:

⁸⁵ White Paper (n 8) 4.

⁸⁶ Ibid [5.66].

The Government are particularly aware of measures needed to aid the more vulnerable members of society.⁸⁷

We must take the impact of debt on vulnerable consumers extremely seriously⁸⁸

over-indebtedness...has several distressing effects and costs for the communities we represent, whether rural or urban⁸⁹

The Government's position being clear, how does the rest of Parliament view the problem? Whilst over-indebtedness is a relatively new phenomenon, concerns about overspending on credit were raised in Parliament as early as 1975. The first mentions of over-indebtedness as a concern started to surface in the mid to late 1980s, being of interest both to the Commons and the Lords, although the Government at this time could not be persuaded to review legislation in any detail.⁹⁰ Vulnerable consumers and the burden of debt also started appearing as topics of debate and indeed these were cited as reasons for amendment to the Consumer Credit Act, particularly in terms of extortionate credit and allowable rates of interest.⁹¹ Commentators were also taking an interest in growing consumer indebtedness. In 'The Credit Society: Its Benefits and Burdens'⁹² Sir Gordon Borrie warned against a complacent approach to levels of credit over-commitment and that the 'continuing growth of the credit society has serious dangers' unless excess and negative consequences were addressed.⁹³ Over-indebtedness, it seems was and is regarded

⁸⁷ Hansard HL (series 5) vol 653 cols 1584–1585 (21 October 2003) per Parliamentary Under-Secretary of State, Department of Trade and Industry, Lord Sainsbury of Turville.

⁸⁸ Hansard HC (series 6) vol 423 col 650 (5 July 2004) per Financial Secretary to the Treasury, Ruth Kelly.

⁸⁹ Hansard HC (series 6) vol 428 col 470 (29 November 2004) per Parliamentary Under-Secretary of State for Trade and Industry, Mr Gerry Sutcliffe.

⁹⁰ Although they did look at extortionate credit in the 1990s. A consultation paper was published addressing a possible reform of the extortionate credit provisions Director General of Fair Trading Sir Gordon Borrie 'Unjust Credit Transactions A report by the Director of Fair Trading on the provisions of sections 137–140 of the Consumer Credit Act 1974' (OFT, 1991).

⁹¹ A private member's bill was introduced in February 1988 to control the rates of interest charged by credit card companies.

⁹² [1986] JBL 181.

⁹³ Ibid 5.

primarily as a problem at a micro rather than macro-economic level⁹⁴ with unsecured borrowing being of particular concern

In the absence of a massive and sustained increase in mortgage interest rates, we do not see a likely collapse in house prices or a return to the high levels of negative equity of 10 to 15 years ago. However, it is extremely worrying that many individuals are running up high and unsustainable debt levels. Research published last week by J P Morgan pointed out that 3.3 million individuals are responsible for 44 per cent of the £178 billion unsecured debt in the UK, giving them an average unsecured borrowing of £24,000 each. The report concludes that the debt appears to be, "one of over-borrowing on unsecured terms by relatively low-income consumers", and to be disproportionately concentrated on non-homeowners. For those individuals, that is a major issue.⁹⁵

my concerns about unsecured lending ... have far more to do with the impact on individuals than the impact on the economy overall⁹⁶

Excessive debt is regarded as a social problem primarily because of its consequences,⁹⁷ rather than, as was still being asserted to some extent in earlier debates surrounding the drafting of the Consumer Credit Act 1974, because personal credit itself was seen as inadvisable.⁹⁸

poorly managed credit debts can have tragic consequences on a social level⁹⁹

⁹⁴ Hansard HL (series 5) vol 654 col 1209 (11 November 2003), Hansard HL (series 5) vol 655 col 35 (27 November 2003). Although this is not to say the macro-economics of the situation were ignored and there was a whole debate on this issue in the House of Commons Hansard HC (series 6) vol 423 cols 607–651 (5 July 2004). The lack of incentive for consumers to save rather than borrow was regularly referred to in the debates. Eg Hansard HL (series 5) vol 662 col 337 (9 June 2004).

⁹⁵ Hansard HL (series 5) vol 655 col 35–36 (27 November 2003) per Lord Newby (Liberal Democrat).

⁹⁶ Hansard HL (series 5) vol 662 col 336 (9 June 2004) per Baroness Noakes (Conservative).

⁹⁷ Hansard HL (series 5) vol 653 col 1569–1570 (21 October 2003).

⁹⁸ Elements of the House of Lords were still exhibiting old-fashioned view, with talk of thrift and profligacy Hansard HL (series 5) vol 662 col 318, 319 (9 June 2004). However 'deep-seated moral attitudes' were also referred to as anachronistic and positively obstructive to sensible debate Hansard HL (series 5) vol 662 col 323 (9 June 2004).

⁹⁹ Hansard HL (series 5) vol 653 col 1570 (21 October 2003) per Baroness Wilcox (Conservative).

When however we cannot cope with personal debt lives and marriages start to fall apart which has a huge negative impact on wider society¹⁰⁰

Consumer borrowing is not inherently wrong...However the increase in the number of people taking their debt problem to citizens advice bureaux shows that the growing consumer debt in our society is now a major problem.¹⁰¹

Although credit can be a useful budgeting tool for consumers, it is the level of access to credit facilities to those who are financially illiterate or inexperienced or to those on low incomes which gives rise to concern.¹⁰² It is therefore the increased availability of credit, particularly at the lower end of the market,¹⁰³ and the resultant level of debt, rather than the concept of credit, that is causing the problem.

There are many different dimensions to the growing problem of debt. One is the easy availability of credit¹⁰⁴

Extremely well informed credit card companies are able to take advantage of naïve customers who do not understand what they are letting themselves in for.¹⁰⁵

The question of available credit facilities, however, goes further than simply the lending practices of companies who service the alternative and sub prime lending sector. Irresponsible lending is viewed by MPs as an issue that goes to the very heart of the whole credit industry;¹⁰⁶ the reduction of aggressive or misleading

¹⁰⁰ Hansard HC (series 6) vol 423 col 632 (5 July 2004) per Tom Harris (Labour).

¹⁰¹ Hansard HC (series 6) vol 391 cols 275–276 (30 October 2002 WH) per Mark Lazarowicz (Labour).

¹⁰² Hansard HL (series 5) vol 662 cols 325–326 (9 June 2004), Hansard HL (series 5) vol 653 col 1570 (21 October 2003).

¹⁰³ Hansard HC (series 6) vol 421 col 357 (12 May 2004). The lower end of the market consists primarily of the ‘alternative’ and ‘sub prime’ markets. Alternative credit typically serves those on low incomes who only require small loans and therefore who have difficulty borrowing from mainstream lenders. Such creditors include lenders such as doorstep lenders and pawnbrokers. The ‘sub-prime’ or ‘non-status’ market serves those excluded from mainstream borrowing because of a bad credit record. Credit within these markets is studied in the Report by E Kempson and C Whyley ‘Extortionate Credit in the UK—A Report to the Department of Trade and Industry’ (June 1999).

¹⁰⁴ Hansard HC (series 6) vol 421 col 357 (12 May 2004) per Adam Price (Plaid Cymru).

¹⁰⁵ Hansard HL (series 5) vol 653 col 1570 (21 October 2003) per Baroness Wilcox (Conservative).

¹⁰⁶ Hansard HC (series 6) vol 391 col 276–277, col 281, col 290 (30 October 2002) Hansard HL (series 5) vol 653 col 1571 (21 October 2003).

marketing¹⁰⁷ and lenders considering in more detail the circumstances of potential borrowers¹⁰⁸ are seen as key deterrents. Unmonitored availability of credit and concerns about the social impact of debt inevitably relate to the vulnerable. Parliament had been concerned, whilst drafting the Consumer Credit Act and hire-purchase legislation, about the general vulnerability of consumers and their bargaining position in the market place. Now, besides those with a lack of understanding about the credit product (particularly the young and elderly) vulnerability pertains more to those who are poor or with low income,¹⁰⁹ where the debt-income ratio is likely to be less manageable:

the real problem is that the ratio is far higher for the poorest households, and it is those households that are most likely to be in arrears. They are the ones that are much more likely to be paying the high interest rates on credit cards and store cards¹¹⁰

The poor in particular find it easy to slip into debt levels which they cannot sustain¹¹¹

I will talk about those who unfortunately cannot cope or get credit from the usual sources, and whose level of debt and total lack of access to reasonably priced loans makes the need urgent for an integrated strategy to tackle debt among our most excluded people¹¹²

So what strategy does Parliament envisage? Just as before, as in previous discussions of reform of credit law, education and information are seen as key to assisting consumers against over commitment with lack of transparency¹¹³ and financial illiteracy¹¹⁴ regarded as major contributors to the problem. One particular area of transparency that has been targeted is the issue of the Annual Percentage

¹⁰⁷ Hansard HL (series 5) vol 653 col 1571, (21 October 2003). Hansard HC (series 6) vol 391 col 277 (30 October 2002) Hansard HL (series 5) vol 662 col 330 (9 June 2004).

¹⁰⁸ Hansard HC (series 6) vol 391 col 288 (30 October 2002), Hansard HL (series 5) vol 655 col 180 (2 December 2003).

¹⁰⁹ Hansard HL (series 5) vol 662 col 316 (9 June 2004).

¹¹⁰ Ibid col 337, per Baroness Noakes (Conservative).

¹¹¹ Ibid.

¹¹² Hansard HL (series 5) vol 653 col 1573 (21 October 2003) per The Lord Bishop of Sheffield.

¹¹³ Hansard HC (series 5) vol 421 col 357 (12 May 2004).

¹¹⁴ Hansard HL (series 5) vol 653 col 1570 (21 October 2003), Hansard HC (series 6) vol 391 col 289 (30 October 2002).

Rate.¹¹⁵ Its complexity and the lack of meaningful comparison has been seen as a hindrance to consumers to make a truly informed choice about credit products.¹¹⁶

Transparency however is not the only issue relevant to the APR—the level of some rates charged by credit providers are seen as just as relevant in terms of pushing borrowers into levels of debt they cannot manage. Inevitably this has led to calls for the introduction of an interest rate cap¹¹⁷ and has resulted in a number of private members bills being introduced, all with this aim.¹¹⁸ This approach to credit control, as has already been discussed in the previous chapter on hire-purchase, has not been supported by the Government and such control is unlikely to materialise in the near future.¹¹⁹ There is, however, another aspect to the control of high cost credit, apart from ensuring ability to adequately compare cost of credit between different providers or directly controlling the price. High cost credit is pinpointed by Parliament as a major factor in extortionate credit and the unfair treatment of those in debt.¹²⁰

Parliament certainly sees stricter regulation of lenders through the licensing regime¹²¹ and control of unattractive market practices, such as aggressive advertising, as a useful tool for prevention of unfairness in the market place. However unlike control of licensing and marketing, an area that essentially relates to procedure, the provisions relating to extortionate credit encompass control of both substantive and procedural fairness. Not only are the practices surrounding the provision of the credit addressed, such as high-pressure sale or coercion, but also the terms of the credit itself, primarily its cost; it is this latter aspect that is focussed on

¹¹⁵ For example Hansard HL (series 5) vol 662 col 329 (9 June 2004).

¹¹⁶ Hansard HL (series 5) vol 662 col 329–330 (9 June 2004). Hansard HC (series 6) vol 423 col 634 (5 July 2004).

¹¹⁷ Hansard HC (series 6) vol 391 col 277–278 (30 October 2002).

¹¹⁸ The Credit Control Bill was published in 1988 to control inter alia the interest rate charged by credit card companies (by linking it to the rate recommended for borrowing by the Bank of England, to prohibit inducements that encouraged excessive borrowing on credit cards and the charging of arrangement fees for consolidation or other loans. Credit Control Bill HC 94 (1987–1988); The Interest Rates (Limits on Charges) Bill was published in 2004 with the primary aim of providing a ceiling on interest rates that could be charged—HC 107 (2003–2004).

¹¹⁹ Text to n 45–47 ch 6 of this study.

¹²⁰ Hansard HL (series 5) vol 653 col 1571 (21 October 2003).

¹²¹ Hansard HL (series 5) vol 653 col 1579 (21 October 2003). Hansard HL (series 5), vol 391 col 276 (30 October 2002).

by Parliament in relation to over-indebtedness. In the majority of debates on indebtedness it is extortionate rates that are seen as the culprit:

Many are poorer families who have found themselves the victims of aggressive marketing and then extortionate loan rates ¹²²

We must find some way of preventing people from being charged extortionate interest rates ¹²³

The debates demonstrate that Parliament has made a connection between over-indebtedness and a fair price and that fairness in this situation is in fact indicated by the cost of the credit:

I will talk about those who unfortunately cannot cope or get credit from the usual sources and whose level of debt and total lack of access to reasonably priced loans makes the need urgent for an integrated strategy to tackle debt among our most excluded people ¹²⁴

Regulating substantive unfairness through, for example, control of price, can be criticised as effectively causing what it seeks to avoid.¹²⁵ There are also arguments that where regulation seeks to control market failures, such as lack of competition, a natural consequence of this will be the substantial reduction of substantive unfairness in any event, therefore negating the need for regulation of the latter.¹²⁶ This presupposes however that the object of the regulation is the market itself.¹²⁷ In terms of 'extortionate credit' the control is slightly different. Here the aim is not to create blanket regulation over the market, but to allow judicial assessment of individual contract terms. The ability to challenge individual contract terms on the basis of an unfair price could be seen as having the objective of regulating unfairness between two parties to a contract and as a desire to regulate unfairness in its own

¹²² Hansard HL (series 5) vol 661 col 10 (10 May 2004 WH) per Lord Newby (Liberal Democrat).

¹²³ Hansard HL (series 5) vol 391 col 277 (30 October 2002 WH) per Mark Lazarowicz (Labour).

¹²⁴ Hansard HL (series 5) vol 653 col 1573 (21 October 2003) per The Lord Bishop of Sheffield.

¹²⁵ H Collins *Regulating Contracts* (Oxford University Press, Oxford 1999) 278–279.

¹²⁶ *Ibid* 280.

¹²⁷ *Ibid*.

right. Yet, certainly in terms of over-indebtedness, the problem can still be seen as one of imperfections within the market structure, in that those with low incomes are often forced to obtain credit from more expensive sources due, for instance, to the fact they are financially excluded.¹²⁸ Whilst a judicial doctrine of unconscionability in this kind of scenario has been welcomed, it is viewed as problematic if it has distributive elements to its basis;¹²⁹ indeed enabling the judiciary to regulate fairness through redistributing the rights of the parties is itself a controversial question.¹³⁰ In the same way redistributive consumer protection legislation has been dismissed as highly unlikely to assist low income consumers.¹³¹

The White Paper envisages the ability to challenge unfair agreements as an effective weapon in the fight against over-indebtedness.¹³² Yet it is still debatable whether Parliament really intends to regulate unfairness per se, as opposed to cost, when utilising the extortionate credit provisions as a tool for tackling over-indebtedness. There is no doubt from the debates that high credit prices are seen as the major component in consumer over-indebtedness and levels of cost are focussed on in discussions over extortionate credit and unfair treatment of vulnerable consumers. As far as the general review of consumer credit law is concerned, the Government's consideration of the extortionate credit bargain is wider than pure price considerations. It encompasses not only unfair credit costs but also unfair practices and circumstances surrounding the provision of the loan in question. However again this is something that will be examined in more detail in the next chapter.

¹²⁸ Circumstances where an individual is in effect entering a contract under economic pressure because, for instance, of his/her lack of financial resources has been termed a situational monopoly M Trebilcock 'An Economic Approach to the Doctrine of Unconscionability' in B Reiter and J Swan (eds) *Studies in Contract Law* (Butterworths Toronto 1980) 392. There is also the question of whether there is a wider monopoly in the sense that there may be inadequate competition within that element of the consumer credit market that services low income consumers.

¹²⁹ I.e it is likely to be unsuccessful or even counter-productive Trebilcock 'An Economic Approach to the Doctrine of Unconscionability' (n 128) 421.

¹³⁰ The arguments against redistribution within consumer credit law, particularly in relation to low income consumers are discussed at length in I Ramsay 'Consumer Credit Law, Distributive Justice and the Welfare State' (1995) 15 OJLS 177.

¹³¹ D Cayne and M Trebilcock 'Market Considerations in the Formulation of Consumer Protection Policy' (1973) 23 University of Toronto Law Journal 396.

¹³² White Paper (n 8) [5.66].

The final question to ask then is what is Parliament's overall approach to over-indebtedness? In terms of who is ultimately responsible for remedying the various difficulties associated with over-indebtedness, both in the House of Lords and the House of Commons it has been felt that Government policy has a role to play in 'establishing the economic climate and sentiment in which people live their lives'¹³³ with a desire to kick-start a rehabilitation of the savings culture.¹³⁴ In the Commons, in particular, it is also felt that industry, as well as Government has an important part to play in terms of providing simplicity, transparency and marketing.¹³⁵

Over commitment with regard to debt is obviously something that deeply concerns Parliament. It is not however the larger economic implications which seem to occupy MPs. In contrast to the Government's concern about the wider costs of over-indebtedness, it is the individual's situation and their vulnerability, in particular to high cost credit, which receives attention in debate. Whilst practical measures, such as cash for advice bureaus and education are demanded,¹³⁶ legislation, more than anything else, is called for in relation to extortionate credit,¹³⁷ stretching even to justifying interference with the terms of individual contracts.¹³⁸ Control of cost is regarded as a means of regulating unfair practices, unfairness seemingly measured on the price of individual consumer credit contracts. MPs it seems are primarily interested in controlling market activity, an approach also underlined by their approach to licensing and advertising.

¹³³ Hansard HL (series 5) vol 662 col 318 (9 June 2004).

¹³⁴ This was the tenure of a whole debate on the evening of 5 July 2004. Hansard HC (series 6) vol 662 cols 607–659 (5 July 2004). Inadequate savings also has a knock on effect with regard to pensions and pensioner poverty—an issue currently concerning the Government. In November 2005, the Pensions Commission published their second report, concluding that inter alia the state system needs reforming to 'underpin private saving'. Pensions Commission A New Pension Settlement for the Twenty First Century The Second Report of the Pensions Commission (30 Nov 2005) Executive summary 9.

¹³⁵ Hansard HC (series 6) vol 391 cols 279, 285 (30 October 2002); Hansard HC (series 6) vol 653 col 1573 (21 October 2003).

¹³⁶ Hansard HL (series 5) vol 653 col 1571 (21 October 2003) col 285; Hansard HC (series 6) vol 391 col 290 (30 October 2002).

¹³⁷ Hansard HC (series 6) vol 391 col 282 (30 October 2002); Hansard HL (series 5) vol 662 col 329 (9 June 2004)

¹³⁸ Hansard HC (series 6) vol 391 col 281 30 October 2002); Hansard HL (series 5) vol 662 col 333 (9 June 2004) although there was some opposition to this approach—Hansard HL (series 5) Debs vol 665 col 183 (2 December 2003).

It is evident from parliamentary debate that whilst the emphasis as to approach may differ MPs and the Government regard tackling over-indebtedness as in reality dealing with financial difficulty and vulnerability to unfair practices. MPs see regulation of perceived failures in the market as the way forward in terms of controlling over-indebtedness and the vulnerability linked to it. To what extent this indicates the attitude to the basis of regulation of consumer credit as a whole is explored in the next chapter. What can be concluded at this stage is that MPs concur with the Government position that transparency and fairness are key to dealing with the constituent elements of over-indebtedness, a policy which, as has been explained, underlies the proposed reforms as a whole.

3. CONCLUSION

In drawing conclusions about over-indebtedness a number of questions need to be asked. What is it that actually constitutes over-indebtedness? What approach has Parliament taken to the problem of over-indebtedness? What, finally, is its relevance to the development of consumer credit law?

Over-indebtedness has been shown to be a somewhat elusive term, in that there is no universally agreed definition. The expression has been given a number of meanings throughout Europe, from bankruptcy to simply being in arrears, but as yet has not been definitively identified. Models that attempt to measure over-indebtedness have used a variety of methods, based for example on objective meters, subjective meters, or even a combination of both.¹³⁹

There is plenty of research to indicate the triggers of household over-indebtedness. These range from market conditions such as aggressive advertising to individual circumstances such as poor budget management and more significantly unexpected or life-changing events, for example a loss of income. In terms of what actually constitutes over-indebtedness however, it is financial difficulty that appears to be the most significant. The majority of attempted definitions or descriptions of over-indebtedness fall back on some manifestation of financial problems as their

¹³⁹ For example the test employed in ORC Macro 'Study of the problem of consumer indebtedness: statistical aspects Final Report' (n 33).

base; indeed in some cases financial difficulty actually has been viewed as synonymous with over-indebtedness.¹⁴⁰ This is something that has been implicitly accepted within the ambit of UK consumer credit reform. In the White Paper, over-indebtedness identifiers are presented primarily on the basis of a high debt to income ratio, therefore placing importance on the likelihood of the consumer encountering problems in meeting financial commitment. Other definitions from across Europe have a similar theme, whether focussing on arrears or simply difficulty in meeting current commitments.

What is clear is that even though a single definition of over-indebtedness is yet to be found, financial difficulty is a major component in its make-up. However in terms of the consumer credit reforms now being brought forward, it is not only financial difficulty that is seen as integral to the question of over-indebtedness, but also vulnerability of consumers, especially when due to inexperience, low income or exclusion (whether financial or social). The connection lies in the fact that vulnerable consumers are more likely to suffer financial difficulty, either simply because of their lack of resources or experience or because they are excluded due to their income status.¹⁴¹ Low-income consumers are more likely to be financially excluded because, for example, they present a higher risk of default or because they require small cash loans.¹⁴² Financial exclusion then inevitably leads to restricted credit availability, what availability there is being at a higher price.¹⁴³ This in turn leads to a relatively heavier burden in terms of debt and a higher likelihood of financial difficulty in the event of unexpected financial shock; in other words, over-indebtedness.

Financial difficulty and vulnerability are regarded by Parliament as being core issues and it is the approach to these factors that illustrates parliamentary attitude to over-indebtedness. It is clear that the Government's basic approach to over-indebtedness is one of focus on financial difficulty and those individuals who are vulnerable to it, rather than the debt liabilities of consumers as a whole. After all, in terms of household indebtedness, recent analyses have indicated that households

¹⁴⁰ DTI Annual Report 2005 (n 10) [3.6]; Gelpi *The History of Consumer Credit* (n 59)162.

¹⁴¹ Exclusion can occur because of other factors such as the area of residence. HM Treasury 'Promoting Financial Inclusion' (December 2004) [1.6].

¹⁴² Something not provided by mainstream lenders Ibid [2.6].

¹⁴³ Ibid [2.9].

generally are not experiencing problems with the level of their commitment.¹⁴⁴ The direction the Government has taken however is not only prevention of financial difficulty where possible but elimination of unfair treatment that may contribute to or result from this problem. Methods adopted not only include practical measures such as debt advice centres and affordable credit through for example credit unions, but also legislation designed primarily to control activity in the marketplace to ensure some level of protection. Whilst it has been implicitly accepted that legislation is not the key to preventing over-indebtedness/financial difficulty, it can reduce contributing factors, such as lack of transparency and irresponsible lending, in other words, unfair practices. In terms of those consumers who are already in difficulty, relief from the effects of over-indebtedness are addressed by easing the burden of unmanageable debt; methods for the latter include practical measures such as debt advice centres and, running in parallel with the Consumer Credit Review, proposed reforms for default legislation.

MPs in general seem to agree with the Government that the best way forward is adoption of practical initiatives such as those outlined above together with legislative control of market practices that prey on the vulnerable. In parliamentary debate over-indebtedness is regarded as a danger for consumers at an individual level, particularly for those consumers who are poor or struggle to cope with credit due to inexperience or lack of financial acumen. These individuals are regarded by MPs as vulnerable consumers who run a greater risk of falling foul of unfair practices and unmanageable debt. In order for adequate protection to be provided, transparency and fairness are seen as essential. Parliament sees a transparent market as one in which consumers are privy to adequate information and are possessed of the ability to use this information, in effect empowering the consumer to make a proper choice. In terms of unfair practices a stricter licensing regime and control over advertising are outlined as key. There is one specific element in debate however which links the two essentials of transparency and unfairness and that is the cost of credit. Parliament has demonstrated a desire to ensure that rates of interest charged on loans are clearly stated for the consumer. In terms of over-indebtedness in debate

¹⁴⁴ DTI 'Over-indebtedness Monitoring Paper Q1 2005' (2005); 'The distribution of assets, income and liabilities cross UK households: results from the 2005 NMG Research Survey' Bank of England Quarterly Bulletin, Spring 2006 .

however, it is not just the transparency of rates but their levels too that create concern. Indeed high rates of interest are not only seen as a major factor in relation to over-indebtedness but are also used by MPs as a loose indicator of unfairness in general.

It is in the approach to the unfair treatment of consumers that a divergence in approach between Government and the rest of Parliament can be found. Whilst MPs, as the Government, concentrate on particular practices of lenders within the market place, for Parliament in general this does not just encompass stricter regulation over licensing and advertising, areas covered by the Government's proposed reforms. In both the House of Commons and the House of Lords there is a desire to have control over the charging of high interest rates. High credit cost is seen as the archetype of unfair creditor behaviour and indeed extortionate credit and extortionate rates have been treated as effectively the same thing. The Government's approach is a little different. The new test set to replace the extortionate credit provisions envisages a much wider idea of unfairness with terms being only one relevant factor, circumstances and procedure surrounding the loan being of equal relevance. This raises the question as to what it is Parliament actually wishes to regulate. Whilst MPs generally seemed focussed on rectifying imperfections within the market place, in particular price, the Government seems to have taken a more expansive approach to the question of regulating unfairness itself. The move towards the regulation of unfairness is something that will be considered in more detail in the subsequent chapter. What is pertinent here is that the desire to minimise over-indebtedness has contributed to the higher profile that fairness now enjoys within consumer credit reform.

So what is the relevance of over-indebtedness to the development of consumer credit law? It has been demonstrated that vulnerability and exclusion are the targets behind the aim of tackling over-indebtedness, financial difficulty contributing not only to the creation of these conditions but also something to be addressed in its own right. The real undercurrent of concern demonstrated in Parliament is not some theoretical concept of over-indebtedness but financial difficulty, inability to meet debt and vulnerability to these conditions. Protection against over-indebtedness is dealt with through methods employed to protect the

vulnerable and/or those who are excluded; relief from over-indebtedness comes in the form of help for those already in financial difficulty. It is these elements then that are integral to the policy underlying consumer credit law reform in relation to over-indebtedness.

Even though over-indebtedness was stated as one of the major factors in the Consumer Credit Review, it seems very little regulatory control has emerged. Most initiatives relating to over-indebtedness are either non-legislative or relate to regulation of loan default. It is debt relief in the form of enforcement, court and insolvency procedures that has emerged as the area to be specifically legislated for, much of which is outside the ambit of the Consumer Credit Act. New consumer credit legislation is only seen as relevant with regard to eliminating unfair practices and financial awareness, yet these are matters that could be regarded as necessary for protection of consumers as a whole, rather than just those who are over-indebted. Relevance of over-indebtedness to the nature of consumer credit legislative reform however should not be underestimated. Whilst the majority of White Paper reforms specifically relating to over-indebtedness are not actually legislatively based, protection of the vulnerable, borne at least partly out of the desire to minimise over-indebtedness and its consequences, is one of the major influences behind the unfairness and transparency provisions of the draft legislation. Furthermore as time has progressed, fairness has come to play more of a role in terms of legislative reform. An explanation for this shift can again be provided, at least in part, from the desire to address the over-indebtedness of vulnerable consumers. It is certainly apparent the White Paper recognised that these individuals are most likely to suffer from unfairness within the consumer credit market.

In conclusion then, it appears that although over-indebtedness itself has never been authoritatively identified at a universal level, its individual elements have been the focus of much of the UK consumer credit reform both in terms of parliamentary debate and proposed action. Whilst over-indebtedness was originally a reason for the Consumer Credit Review, its significance in terms of direct regulatory intervention has been small. What is clear however is that concerns about over-indebtedness have highlighted the vulnerable and their exposure to unfairness, an emphasis that is present in the proposed amendments to the Consumer Credit Act 1974. Whether the

concept of over-indebtedness is a reason for or merely an indicator of the direction of the Review, it can be concluded that it is integral to any detailed consideration of the ethos behind current legislative reform.

CHAPTER 8

THE CONTINUED DEVELOPMENT OF CONSUMER CREDIT LAW

1. INTRODUCTION

The development of consumer credit law from the abolition of the Usury Laws up until the Consumer Credit Act 1974 (“the CCA”)¹ was, it has been shown, primarily a matter of establishing various different pieces of legislation, each one covering specific situations. The Pawnbrokers Act regulated pawnbrokers, the Moneylenders Act regulated money-lenders and the Hire-Purchase Acts regulated hire-purchase and instalment sales. Each piece of legislation was a reaction to changing circumstances in the way in which society chose to pay for goods and services, whether essentials for living or luxuries. In terms of consolidation and unification of the law of consumer credit, the CCA achieved what the Crowther Committee² (‘Crowther’) had set out to do, putting all types of credit available to the individual under the umbrella of one piece of legislation.³ The CCA, whilst not implementing all of Crowther’s vision, provided a legal framework that, it was hoped, would provide protection for the credit consumer whilst not interfering unduly with the interests of business.

However, within a few years of the final implementation orders coming into force in the mid 1980s, general dissatisfaction with the working of the CCA was beginning to surface, and suggested reform, from deregulation to a review of the extortionate credit provisions, appeared in the 1990s. In 2001 the Consumer Credit Review was launched culminating in the White Paper ‘Fair Clear and Competitive

¹ C 39.

² Committee on Consumer Credit ‘Consumer Credit: Report of the Committee’ (Cmnd 4596, 1971).

³ Although some credit was exempted from the provisions of the Act, for example certain loans provided by named institutions and secured on land where the credit financed the purchase of the land or the provision of dwellings or premises on the land. S16 CCA, Consumer Credit (Exempt Agreements) Order 1989 SI 1989/869. First mortgages of residential property are now regulated by the Financial Services Authority under the Financial Services and Markets Act 2000 c 8.

The Consumer Credit Market in the 21st Century'⁴ ("the White Paper") published in December 2003 and the Consumer Credit Act 2006 which received Royal Assent on 30th March 2006 ⁵ ("the 2006 Act").

The main driving force behind the 1974 legislation has been shown to be protection of the consumer, through truth in lending and abrogation of the effects of malpractice, ensuring equality of bargaining power whilst maintaining a balance between the interests of business and consumers within a competitive environment. This chapter explores the influences important in progress towards subsequent reform of the CCA, illustrating any differences in policy that may have taken place since the drafting of the 1974 legislation. As has been demonstrated by the previous chapter, the concept of over-indebtedness, with its constituent elements of vulnerability and financial difficulty, has had an important part to play. Within this it has been shown that unfairness to the consumer is perhaps the most important consideration. Regulation of unfair practices is therefore an area that will be given particular focus. There are however other areas that cannot be ignored. The influence of Europe is analysed, by considering not only European legislation specific to consumer credit but also Europe's approach to the broader question of consumer protection as a whole. Whilst dedicated consumer credit legislation from Europe consists of only one Directive, itself under review, there are a number of other Directives that have a bearing on the regulation of consumer credit. These too are considered.

By identifying the factors relevant to consumer credit regulation and parliamentary attitudes to them, the aim is to provide a clear picture of what drives current reforms to the consumer credit legislative framework. Furthermore, from an analysis of parliamentary attitudes and approach to reform, some prediction can perhaps be made to the future direction of consumer credit regulation as a whole.

⁴ Cm 6040, 2003.

⁵ C 14.

2. CONSUMER CREDIT ACT REVIEW

(a) Background to the Review

The CCA was finally fully implemented in 1985.⁶ It provides for regulation of all consumer credit and hire agreements made with an individual,⁷ not only during the life of the transaction but pre and post agreement as well, including matters relating to default.⁸ The provision of information, a matter integral to the policy behind the CCA, is regulated pre-contract through advertising provisions,⁹ including methods for calculating the annual percentage rate (“the APR”)¹⁰ and during the agreement by, inter alia, providing detailed requirements as to form and content¹¹ and provision of copy documents and notices in given circumstances.¹² The nature of agreements is also addressed in terms of identifying multiple agreements and linked transactions, spreading the regulation to areas that might otherwise slip through the net.¹³ In the same way sections 56 and 75 of the Act provide liability for other parties intimately

⁶ A large chunk of the Act was brought into force from 19 May 1985 by the Consumer Credit Act 1974 (Commencement No 8) Order 1983 SI 1983/1551. Ss 123–125 of the Act (negotiable instruments) were also operational from this date under the Consumer Credit Act 1974 (Commencement No. 9) Order 1984 SI 1984/ 436. The only other commencement order was passed in 1989, which related to transitional provisions for licence holders and amendments relating to licences for those traders granting credit of under £30—Consumer Credit Act 1974 (Commencement No 10) Order 1989 SI 1989/1128(36).

⁷ Although some agreements enjoy exemption under s 16.

⁸ Rules as to default and termination are contained in Pt VII. The CCA initially covered all agreements under £5,000—s 8(2). This was increased first to £15,000 and then £25,000. The limit will be removed by s 2 of the Consumer Credit Act 2006.

⁹ The regulation of seeking business is covered by primarily by Pt IV of the CCA and initially was provided by The Consumer Credit (Advertisements) Regulations 1980 SI 1980/54, as amended. These were consolidated and amended by The Consumer (Advertisements) Regulations 1989 SI 1989/1125, now themselves replaced by the Consumer Credit (Advertisements) Regulations 2004 SI 2004/1484.

¹⁰ Consumer Credit (Total Charge for Credit Regulations) 1980 SI 1980/51 (as amended).

¹¹ Ss 60–61 of the CCA, the Consumer Credit (Agreements) Regulations 1983 SI 1983 /1533 (as amended), the Consumer Credit (Cancellation Notices and Copies of Documents) Regulations (as amended) 1983 SI 1983/1557.

¹² The Consumer Credit (Cancellation Notices and Copies of Documents Regulations (as amended) 1983 SI 1983/1557; ss 62–65, 68–69, ss 76–78, 87–89, 98, 107, 108, 111 of the CCA.

¹³ The provisions relating to multiple agreements are designed to prevent evasion of the CCA through the merger of agreements, s 18. The rules relating to linked transactions provide for the impact the CCA may have on transactions that are connected to the regulated agreement, s. 19.

involved with the process of the transaction.¹⁴ Borrowers are also given numerous rights, such as cancellation¹⁵ and the ability to ask the court to re-open a transaction, if proved to be extortionate.¹⁶ As far as regulating practices by lenders is concerned, there is a licensing mechanism.¹⁷ Much of the control, particularly in relation to the information provisions, has been provided through secondary legislation; there have in fact been over 80 statutory instruments¹⁸ relating to the CCA since it was passed.

Within only a few years of Royal Assent the CCA was running into trouble. There were complaints about the complexity of the legislation,¹⁹ and there was argument over the section 16 exemption criteria for certain bodies (particularly building societies).²⁰ The Conservative Government held back on the implementation of some sections, fearing a prohibitive burden on business.²¹ Deregulation for unincorporated businesses was mooted in the 1990s²² and twice, in an atmosphere of increasing concern for vulnerable consumers, review of the extortionate credit provisions was undertaken.²³ No amendments to the Act were made, but in 2001 the Labour (Labour now remaining in power) Government announced the Consumer Credit Act Review (“the Review”) against a background of increasing incidence of over-indebtedness and pending modernisation of the Consumer Credit Directive. Emphasis was on tackling loan sharks and providing regulation that reflected the

¹⁴ S 56—negotiations by credit broker or supplier are deemed to be as agent for creditor; s 75 attaches liability of the supplier to the creditor with regard to breach of contract.

¹⁵ Ss 67–73.

¹⁶ Ss 137–140.

¹⁷ Part III of the CCA.

¹⁸ Some of these constitute amending legislation.

¹⁹ Hansard HC vol 991 cols 1044, 1050 (3 November 1980).

²⁰ Ibid cols 1048–1049.

²¹ Hansard HC vol 28 col 102 WA (20 July 1982).

²² As part of an established Deregulation Initiative. Three White Papers were published between 1981 and 1988 dealing with general proposals for deregulation for businesses. Minister without Portfolio ‘Lifting the Burden’ (Cmnd 9571, 1985), Department of Employment ‘Building Businesses not Barriers’ (Cmnd 9794, 1986) DTI ‘Releasing Enterprise’ (Cmnd 512, 1988). A Deregulation Order was proposed with regard to small businesses and the CCA, but changes to the legislation never took place. D Rosenthal *Guide to Consumer Credit Law and Practice* (2nd edn Butterworths, London 2002) 9. There is a discussion about the seeming global trend towards deregulation in the 1990s in R Howse, J Pritchard and MJ Trebilcock ‘Smaller or Smarter Government?’ (1990) 40 University of Toronto LJ 498.

²³ There were two reviews, one in 1991 (under the Conservatives) and one in 1999 (under Labour)—these are discussed in detail at text to nn 35–44.

nature of the modern market, protecting consumers but maintaining a balance between business and consumer interests to ensure healthy competition.²⁴

The Review covered, *inter alia*, financial limits and exempt agreements, early settlement regulations, on-line credit agreements, the licence regime, the extortionate credit provisions, the advertising regulations and independent redress for consumers. As a result various consultation papers have been published, covering alternative dispute resolution, voluntary termination of hire purchase and conditional sale agreements, electronic credit agreements, early settlement, form and content of agreements, disclosure of information and advertisements. Other action has also been taken such as the availability of Stop Now Orders (since the Enterprise Act 2002²⁵ known as Enforcement Orders) a mechanism by which enforcement bodies can stop acts which breach consumer protection legislation and which harm the collective interests of consumers.²⁶ The objective of the White Paper, published as a result of the Review is stated as being 'to create an efficient, fair and free market where consumers are empowered to make fully informed decisions and lenders are able to compete on a fair and even basis.'²⁷ Problems in the consumer credit market to be tackled are stated as including the lack of information pre-purchase, undue surprises post purchase, unfair practices, illegality and over-indebtedness.²⁸

The importance of over-indebtedness to the Review is a topic that has been examined in detail in the previous chapter of this study. One area in which it has been particularly relevant is the issue of vulnerable consumers and their subjection to unfair practices, for example extortionate credit. Information as a consumer protection device remains crucial here, with proposed amendments encompassing changes to information regulation, both in terms of advertisements, form and content of agreements, and other information to be provided during the course of the

²⁴ DTI 'Review of the Consumer Credit Act: Progress Report' (2002) 1.

²⁵ C 40.

²⁶ The idea behind these is to avoid having to take lengthy action to revoke licences. The Enterprise Act has also set up a mechanism for super complaints under s 11. It is as a result of one of these that the home collected credit market has been referred to the Complaints Commission—OFT 'Terms of Reference—Home Credit' (20 December 2004). The Commission should publish its Report within two years—P Freeman (then Deputy Chairman of the Competition Commission) CCA Convention 20 April 2005.

²⁷ White Paper (n 4) Executive Summary 4.

²⁸ *Ibid* 5.

contractual relationship. This is not the only method employed to tackle the problem. Regulation prima facie dealing with unfairness now represents a substantial proportion of the reforms which will be introduced by the 2006 Act, once implemented. Toughening up the licensing system and providing alternative methods of redress give practical means, within market procedures, by which the consumer can be protected against unfair market practice and the consequences of unfair behaviour. However, it could be said that it is primarily the substantial repeal and replacement of the extortionate credit provisions that will allow the control over unfairness as a separate concept.

(b) Extortionate Credit

It has been indicated that one of the White Paper's stated aims is tackling over-indebtedness. Whilst over-indebtedness itself is not an issue of fairness to the consumer, but rather an issue of social circumstance, unfairness is seen as a causal element.²⁹ The concern reaches further than wanting protection for vulnerable consumers in the sense of a consumer in an unequal position to the creditor, a stance adopted in relation to the hire-purchase and the CCA. Here concentration is on the vulnerable in society and this group encompasses the poor, those on low incomes and those who truly have no choice because of their social status or cognitive limits. Vulnerability arises here because choice is restricted or non-existent due to social, financial or educational circumstances; invariably these factors result in some form of exclusion.³⁰ Whilst it is recognised over-indebtedness is usually caused by unforeseen factors such as illness, sudden unemployment or bereavement, it has also been concluded that it is the vulnerable who are most likely to become over-indebted should one of these events occur.³¹ The ultimate problem is that the only available credit to such consumers is often provided on extortionate terms. Extortionate credit therefore has particular relevance to the question of protecting the vulnerable against over-indebtedness, since this is where it is most likely to arise.

²⁹ It is unfairness at the procedural stage of the transaction that is the contributing factor, although this of course may lead to unfairness in the substance of the transaction.

³⁰ White Paper (n 4) [5.5–5.12] [5.24].

³¹ Because they tend to have a higher debt to income ratio caused by lack of knowledge or awareness of the consequences of credit, or lack of true choice White Paper (n 4)[1.46].

Regulation that deals with extortionate credit is, in effect, protection designed to address elements of consumer credit that produce the most harmful social consequences. It was concerns about credit that could be 'socially harmful' (i.e. where any benefit in having access to the credit is outweighed by its cost)³² that first led Crowther to propose the extortionate credit provisions.³³ Social disadvantages of over-indebtedness are also addressed in the White Paper,³⁴ this is not however the first time Government has looked at the issue of extortionate credit practices since the CCA was passed. In the early 1990s a review of the extortionate credit provisions was requested from the then Director General of Fair Trading, Sir Gordon Borrie, who reported back to the Government in September 1991 ("the Borrie Report").³⁵ The Borrie Report also raised concerns about 'socially harmful lending', where the costs of the credit (both terms and price) were such that a sensible person with independent advice would not find them acceptable.³⁶ The conclusions were that the extortionate credit provisions had not delivered the protection they had been designed for, practices 'on the margins of the market'³⁷ still in some cases being oppressive and/or misleading. Recommendations included replacing the extortionate credit bargain with a test of whether there was an 'unjust credit transaction'. Various additional factors for the court to consider were suggested, for example the level of responsibility displayed by the lender in providing the loan in the first place. Whilst the Conservative Government welcomed the Borrie Report's findings³⁸ and stated changes would be brought forward as soon as parliamentary time allowed, no amending legislation materialised.

A few years later, (under a now Labour Government) the DTI commissioned research to determine the extent extortionate credit was a problem in the UK. The

³² Crowther (n 2)[6.6.6].

³³ Ibid [6.6.9].

³⁴ White Paper (n 4) [5.14].

³⁵ 'Unjust Credit Transactions A Report by the Director General of Fair Trading on the provisions of ss 137–140 of the Consumer Credit Act 1974.'

³⁶ Ibid [1.5].

³⁷ Ibid.

³⁸ Hansard HC vol 200 col 499–500 WA (12 December 1991) This was a time of Thatcherism with policies that, inter alia, advocated home ownership and financial independence.

report (“the Extortionate Credit Report”)³⁹ found that extortionate credit, as had been concluded by the OFT in 1991, was not as widespread as was feared. What did concern the authors however, was the situation of that group of people who were subject to extortionate credit practices—namely those on low incomes (e.g. lone parents, the long-term unemployed) and/or those with a history of bad debt or county court judgments. These borrowers were described as the most vulnerable in society, vulnerability here being defined as having to ‘engage in necessitous borrowing for the management of poverty rather than the facilitation of affluence’.⁴⁰ The vulnerable were in effect those with limited choice and little or no bargaining power, or the less well-informed, paying higher charges, with greater risk of default and undesirable consequences. These vulnerable consumers were driven to the alternative credit market and the non-status credit market, the former being expensive, the latter providing credit on often ‘punitive terms and conditions’.⁴¹ This was, in other words, the socially harmful lending disapproved of by the Borrie Report and Crowther. It was concluded that enforcement procedures needed tightening up, the extortionate credit provisions needed changing and, in qualified situations, that an interest rate ceiling should be considered.⁴²

Unfairness, according to the Extortionate Credit Report had a great deal to do with extortionate credit. It occurred not just within the terms of the agreement but via circumstances under which the credit was offered and taken; in other words both substantively and procedurally. The former related to high costs and terms of the agreement, such as high and/or dual interest rates and penalties for early settlement, the latter to targeted sale practice, lack of transparency and debt recovery. Protecting the consumer once this situation has arisen is dealt with by sections 137–140 of the CCA. The Extortionate Credit Report found that the courts took a narrow approach under these provisions, tending to rely on substantive unfairness when applying the

³⁹ E Kempson and C Whyley ‘Extortionate Credit in the UK—A Report to the Department of Trade and Industry’ Personal Finance Research Centre (June 1999).

⁴⁰ The Extortionate Credit Report (n 39) Summary and Recommendations.

⁴¹ Ibid Summary. Whilst the alternative credit market was not regarded as a problem as such (apart from the practice of rollover loans) the non-status credit market caused more consternation, particularly in the area of secured loans and equity lending, due to inadequate competition and information.

⁴² The UK Government however has not been in favour of interest rate ceilings for some time. A brief discussion of this can be found in this study at Ch 6, 9.

section (in itself a rare occurrence). As a result, agreements were rarely set aside.⁴³ The White Paper also agrees that the extortionate credit provisions are ineffective. This however is not only due to the fact that courts seem to concentrate on unfairness as to the terms of an agreement (in particular the rate of interest), but also because the costs and qualifiers for seeking redress under the provisions are prohibitive, the latter particularly so for vulnerable consumers.⁴⁴

Costs of bringing an action have been addressed by the 2006 Act, through the introduction of an alternative dispute resolution scheme.⁴⁵ This will be operated by the Financial Ombudsman Service, set up under the Financial Services and Markets Act 2000,⁴⁶ the costs of which will be met by the industry.⁴⁷ As far as the narrowness with which the present provisions seem to have been applied, the 2006 Act will, when implemented, introduced a new test.⁴⁸ This centres on the establishment of an unfair relationship between the creditor and the debtor, not so much focussing on the terms of the agreement but entailing consideration of the creditor's behaviour towards the borrower, either before or during the life of the contract. The new section 140A(1) states

The court may make an order...if it determines that the relationship between the creditor and the debtor arising out of the agreement...is unfair to the debtor because of one or more of the following—

(a) any of the terms of the agreement...

⁴³ C 3 Extortionate Credit Report (n 39). The Borrie Report (n 35) also came to this conclusion, finding that the courts tended to rely on the price of credit rather than unfair practices as the basis for deciding whether or not an agreement could be set aside under the CCA—c 4 the Borrie Report (n 35). Two recent cases illustrate this approach. In *London North Securities Ltd v Meadows* (Southport County Court, 28 October 2004, Lawtel AC 0107408) Judge Howarth held the agreement was an extortionate credit bargain due to the high interest rate and the fact compound interest could be charged on arrears costs and charges (on appeal the Court of Appeal agreed the contract should be set aside but on other grounds raised in the initial hearing, the issue of extortionate credit not being discussed [2005] EWCA 956). Similarly in *Paragon Finance plc v Pender* [2005] EWCA760, [2005] 1 WLR 3412 the question of extortionate credit was considered purely in terms of the interest charged.

⁴⁴ White Paper (n 4) [3.31].

⁴⁵ 2006 Act s 59.

⁴⁶ C 8.

⁴⁷ By means of a levy 2006 Act s 60.

⁴⁸ Ss 137–140 of the CCA are, apart from certain transitional provisions under Sch 3, repealed.

- (b) the way in which the creditor has exercised or enforced any of his rights under the agreement...
- (c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement...)

The court however is not given further guidance but rather

In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant⁴⁹

This is in spite of the fact the White Paper lists various circumstances that would contribute to a finding of an unfair credit agreement, including inter alia costs, irresponsible lending⁵⁰ and the circumstances of the borrower. In the event the Government it would appear, favours allowing the courts to effectively set the parameters of unfairness rather than laying down prescriptive rules within legislation. Whilst it has been concluded elsewhere in this study that the ethos behind the CCA was as much to regulate market failure as unfairness⁵¹ (the Borrie Report also saw extortionate credit as market failure),⁵² here the breadth of the unfair credit relationship test and the willingness to consider a wide, non-exclusive variety of factors suggest that unfairness really is the target, whatever form it might take.

The new unfair credit test under section 19 of the 2006 Act will establish protection for the consumer once the unfairness has taken place. But what about protection against the elements that contribute to the incidence of unfairness in the first place? Transparency is dealt with as an issue in its own right, and one that pertains as much to empowering the consumer and ensuring competition generally as to protection against unfairness. It has been demonstrated already that the provision of information has been seen as an essential part of any credit consumer protective

⁴⁹ S 140A (2). Under s 138 of the CCA relevant factors the court are to consider are outlined, although the section does allow for other 'relevant considerations'—this is however only in deciding whether or not an agreement comes within the definition of extortionate credit, a narrower test than the one now proposed.

⁵⁰ Irresponsible lending is however included as a relevant factor for the OFT to consider when assessing the conduct of licence applicants 2006 Act s 29.

⁵¹ Ch 6 of this study.

⁵² Borrie Report (n 35)[1.5].

framework.⁵³ The White Paper continues this emphasis and a number of statutory instruments have been passed as a result of its proposals, including provisions relating to pre-contract information, form and content of agreements and advertising.⁵⁴ Requirements with regard to the provision of information can also be found in amendments to the main body of legislation itself, dealing with new rules with regard to statements⁵⁵ and notices relating to arrears and default interest.⁵⁶ Protection of the consumer, at the initial stages of a transaction, obviously has an important part to play in ensuring fairness at the first stages of a transaction for all consumers, not just those who are vulnerable. Yet even here it could be said there is a distinction drawn between the general persona of the consumer and the vulnerable. The 2006 Act will give the Secretary of State the ability to provide a mechanism whereby certain borrowers may in effect exempt themselves from the protection of the new provisions. Under section 3, if a debtor makes a statement of 'high net worth' then he/she may make statement agreeing to 'forgo the protection and remedies that would be available'.⁵⁷ This indicates the underlying emphasis on the vulnerable consumer—whilst the protections are there for all consumers, those who are perceived as being able to look after their own interests are given the option of removing themselves from the protections of the CCA. Yet this freedom only stretches as far as procedural elements of the contract. The unfair relationship test in section 19 will still apply to all borrowers under a credit agreement (whether regulated or exempt)⁵⁸ therefore allowing unfairness to be challenged.

Besides ensuring transparency, tackling unfair practices at a general level can be achieved by monitoring and controlling those who operate within the market, thus reducing the opportunity for misconduct. The issue and control of consumer credit licences and licensees takes up half of the 2006 Act's provisions, with rules as to

⁵³ Ch 6 of this study.

⁵⁴ The Consumer Credit (Disclosure of Information) Regulations 2004 SI 2004/ 1481; The Consumer Credit (Agreements)(Amendment) Regulations SI 2004/1482; The Consumer Credit (Advertisements) Regulations 2004 SI 2004/1484.

⁵⁵ Ss 6–7 of the 2006 Act.

⁵⁶ Ibid ss 9–12, 14.

⁵⁷ S 3. The high net worth exemption is only available for natural persons. There is also a mechanism for business borrowers to exempt themselves, whether natural persons or not s4.

⁵⁸ Unless that exemption relates to any credit agreement secured by a land mortgage regulated under the Financial Services and Management Act 2000("FSMA"). New s 140A (5) (to be inserted by 2006 Act s 19); s 16(C) CCA (in essence first but not second residential mortgages are regulated by the Financial Services Authority under the FSMA).

applications for licences, powers of the OFT and the consequences of non-compliance. Here the rationale behind the reforms is closely connected to the prevention of unfair practices, the licensing provisions being seen as part of the process for creating a fairer framework.⁵⁹ As the White Paper says, 'better monitoring of the fitness of licence-holders will encourage lenders to behave in a fair manner',⁶⁰ with fitness for a licence being seen in terms of practices and procedures the licensee proposes to employ and any unfair practices employed by the licensee in the past.⁶¹ As with the unfair relationship test, it seems it is the procedure surrounding the transaction rather than its substance that is the focus, with the Government indicating it is the conduct of the licensee, rather than terms it imposes on its customers, that are likely to trigger these provisions.⁶² This emphasis on procedure is a trend not only being demonstrated within the proposed amendments to the UK consumer credit law but also in some areas of European consumer protection legislation. A parallel with European developments raises the question of European influence over the development of UK consumer credit law, an issue that will now be considered in more detail.

3. EUROPE

(a) The Consumer Credit Directive 1987

The role of Europe is an important factor in any examination of the development of modern consumer credit law. On the face of it, influence over UK law is obvious, in that as a Member State, the UK is obliged to pass national legislation implementing provisions of European Directives. This, of course, is applicable to the Consumer Credit Directive and its past amendments and the forthcoming new Directive presently under consultation. There have however been other consumer Directives implemented in this country that bring to bear some form of regulation over consumer credit and/or its practices.

⁵⁹ White Paper (n 4) c 3.

⁶⁰ Ibid [3.9].

⁶¹ 2006 Act s 29.

⁶² Hansard HL vol 675 col GC 310 (16 Nov 2005).

The extent of any direct influence these Directives may have or have had over policy underlying UK consumer credit legislation is, at a first glance, debatable. In terms of Directives that deal with methods of selling financial products, whilst providing a form of regulation for consumer credit practice they could be seen as existing at the periphery of consumer credit legislation, dealing as they do with consumer protection as a whole rather than exclusively with credit provision. In terms of dedicated consumer credit legislation the national regulatory framework has in fact proved to be more stringent than its European counterpart. Indeed in some respects national legislation could be seen as the influencing factor behind European law.⁶³ After the Commission's first proposal for a new Consumer Credit Directive, designed to replace the existing Directive adopted in 1986, consultation was entered into with Member States during the amendment process.⁶⁴ Some of the UK's concerns about the initial draft are incorporated into the amendments.⁶⁵ In the modifications, Member States are assured some flexibility, for example in relation to pre-contract information.⁶⁶ Some Articles have also been amended to reflect national provisions, for example the amended definition of overdraft and the right of withdrawal.⁶⁷ However, whilst European influence over UK legislation in this sense may seem weak, specific terms of individual regulatory provision is not the only aspect that should be considered. It is also within the arena of dedicated consumer credit regulatory policy that the impact of European legislation should be addressed.

As has been referred to above, the first Directive that directly related to consumer credit was adopted in 1986 ("the CCD"),⁶⁸ although moves towards

⁶³ The Government certainly regards the UK as highly influential in relation to the regulation of consumer credit. White Paper (n 4) [4.5] [4.14].

⁶⁴ Modified Proposal for a Directive of the European Parliament and of the Council on credit agreements for consumers amending Council Directive 93/13/EC COM(2005) 483 final (7 October 2005) [1].

⁶⁵ Such as the removal of lending on property and reserving a national approach to joint and several liability DTI 'Government Consultation on the Consumer Credit Directive Proposal' (25 February 2005) Executive Summary; Modified Proposal (n 64) [5.3.1] [5.11].

⁶⁶ Modified Proposal (n 64) [5.4].

⁶⁷ Ibid [5.2.1.] [5.7].

⁶⁸ Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit OJ L 042/48.

preparing Community regulation began as early as 1965.⁶⁹ The CCD's concentration, obvious from the preamble, was on providing a level market place throughout the European community. Distortion of competition, limitation on the freedom to move goods and services and the removal of obstacles to the establishment of a common market are all cited as problems to be resolved in order to achieve 'the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit'.⁷⁰ Regulation of the market was not only seen in terms of supply, however. Influenced by the Community's developing consumer policy, consumer protection, including against unfair terms, was an integral piece of the harmonisation process.⁷¹ Such protection for the consumer was seen as being achievable, for instance, through conditions on repossession,⁷² allowance for early settlement of the agreement⁷³ and monitoring of credit providers.⁷⁴ However more than any other vehicle, it was the provision of information that was highlighted as important.⁷⁵ The preamble directly refers to requirements for information both in terms of the obligations imposed by the agreement and the cost of credit. Information was to be provided pre-contract, to allow the consumer 'to compare different offers' and agreements were to be in writing and contain certain 'minimum particulars' such as the APR.⁷⁶ Furthermore, in certain situations information was to be provided during the course of the agreement, for example where there was an amendment to the interest rate or other charges.⁷⁷ However although the CCD does pointedly refer to unfair terms, the direct regulation of unfairness is not attempted. The problem seems rather to have been approached on the basis of preserving consumer rights (for example in the ability to repay early) and ensuring the consumer was provided with a competitive environment and informed choice.

⁶⁹ This was in relation to instalment credit sales. The proposal relating to the first consumer credit directive appeared in 1979—N Guardia 'Consumer Credit in the European Union, ECRI Research Report No 1' (European Credit Research Institute, 2000) 26. R Goode *Consumer Credit Law and Practice* (Butterworths, London, 1999)[125.1].

⁷⁰ Council Directive 87/102/EEC (n 68) preamble.

⁷¹ *Ibid.*

⁷² *Ibid* art 7.

⁷³ *Ibid* art 8.

⁷⁴ *Ibid* art 12.

⁷⁵ It has been suggested information is the 'fundamental principle of consumer protection regulation' and that community regulation must be viewed with this in mind. Guardia (n 69) 27.

⁷⁶ Council Directive 87/102/EEC (n 68) art 4.

⁷⁷ *Ibid* art 6.

The CCD essentially provided minimum standards by which Member States were to provide consumer protection, allowing retention of stricter measures, as long as these were consistent with obligations under the EC Treaty.⁷⁸ Only minor changes were necessary to UK law, the CCA having in many respects a wider scope than the European legislation,⁷⁹ a seemingly Community wide position as most Member States adopted more stringent provisions.⁸⁰ The CCD was amended in 1990 and 1998 to allow for a single mathematical formula for calculating the APR and determining items to be used in the calculation. These amendments did need to be incorporated into UK law and this was done by the Consumer Credit (Total Charge for Credit, Agreements and Advertisements) (Amendment) Regulations 1999.⁸¹

The CCD has not stood the test of time well. The need for new regulation was recognised after detailed consultations illustrated the breadth of variety in individual Member States' approach to the legislative control of consumer credit.⁸² The CCD was seen to be inappropriate on the basis of these findings, creating a barrier to competition and cross border activity within the European credit marketplace, leaving levels of consumer protection too low⁸³ and ultimately hindering the EU objective of a single market.⁸⁴ In other words minimum harmonisation was unsuccessful. As a result a process of analysis and revision of the present law was undertaken and in 2002 the European Commission put forward a proposal for a new

⁷⁸ Council Directive 87/102/EEC (n 68) art 15.

⁷⁹ For example the CCA extends to credit for business purposes and to individuals other than natural persons as long as the debtor is not a corporate body—ss8, 189. The CCD only relates to credit to natural persons for non-commercial use, art 1. In other areas the Act is more stringent, e.g. in relation to joint and several liability, copy documents and cancellation rights.

⁸⁰ Commission Report (Com (95) 117 final) (11 May 1995).

⁸¹ SI 1999/ 3177.

⁸² For example in relation to required formalities—K Lannoo, A de la Mata Muñoz 'Integration of the EU Consumer Credit Market: Proposal for a More Efficient Regulatory Model' (CEPS Working Document no 213 November 2004) [2].

⁸³ Working Document of the Committee on Legal Affairs and the Internal Market on the proposal for a European Parliament and Council Directive of the laws regulations and administrative provisions of the Member States concerning credit for consumers Pt 1(27 June 2003) 2.

⁸⁴ Lannoo & Munoz 'Integration of the EU Consumer Credit Market' (n 82) [1.2].

Consumer Credit Directive (“the Proposal”).⁸⁵ In the Proposal, maximum harmonisation and therefore a uniform European framework, rather than minimum standards, were seen as the key to achieving the twin goals of higher levels of consumer protection and improvement in the operation and stability of the EU consumer credit market.⁸⁶ The ultimate aim was seen as the provision of a more transparent and effective market with protection for consumers, allowing free movement of credit provision ‘under the best possible conditions’;⁸⁷ protection of the consumer envisaged as being provided by ‘harmonising practice’ within ‘an established internal market.’⁸⁸

Integrating practice within the European Community reflects the general direction of European law in other areas that affect the consumer. Contract law is a case in point. In 2003 the European Commission adopted an Action Plan,⁸⁹ the central aim of which was to promote coherence within contract law in Europe. The idea however is not to create a compulsory single framework. One product of this Action Plan is a ‘Common Frame of Reference’. This is intended to be a point of reference for those who frame the law at both national and EU level when considering contract regulation, thus assisting in the improvement of the coherence of the present and future *acquis*.⁹⁰ As part of this ongoing aim, the Commission is now reviewing eight key consumer Directives, assessing their effectiveness in achieving the Commission’s goals of consumer protection and a free flowing internal market.⁹¹ This is all part of the general consumer policy strategy which has as one of its objectives a high common level of consumer protection across Europe; necessary

⁸⁵ Commission Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers (COM 2002 443 final (11 September 2002)).

⁸⁶ *Ibid* [2.2].

⁸⁷ Commission Proposal (n 85) [2.1].

⁸⁸ *Ibid* [2.2].

⁸⁹ ‘Action Plan on a Coherent European Contract Law’ (COM 2003 68 final (12 February 2003)).

⁹⁰ Communication from the Commission to the European Parliament and the Council ‘European Contract Law and the revision of the *acquis*: the way forward’ (COM (2004) 651 final) (11 October 2004) [1] [2.1].

⁹¹ Four of these Directives have some bearing on consumer credit regulation: the Doorstep Selling Directive, the Unfair Contract Terms Directive, the Distance Selling Directive and the Injunctions Directive. These are considered in more detail later in text to nn 126–153.

action to achieve this is seen as including the removal of inconsistencies and increased simplification within current consumer contract law.⁹²

The Proposal sees transparency and market efficiency as integral to safeguarding the borrower. Nevertheless, consumer protection in the Proposal is not provided solely through information and competition. Whilst information is still seen as playing a vital role, the Proposal also introduces more direct methods of control than those seen in the CCD. Regulation to ensure fairness in consumer credit contracts now seems to have a larger part to play both with regard to the circumstances surrounding the credit provision and the details of the agreement terms. The introduction of a principle of responsible lending,⁹³ an outright ban on unsolicited door-to-door selling of credit agreements,⁹⁴ more stringent controls on credit intermediaries,⁹⁵ the general duty to provide advice,⁹⁶ a right of withdrawal,⁹⁷ together with an objective calculation of early settlement rebates⁹⁸ and in particular a list of unfair terms⁹⁹ all point to a shift in emphasis. Some Member States themselves were apparently at this time considering reform of domestic legislation,¹⁰⁰ as is shown by the UK's own Review. The Commission saw the new Directive as a means to 'anticipate these reforms and to incorporate them in a harmonised Community system'.¹⁰¹

However, the Proposal has met with much criticism. One complaint was that the new regulations would ultimately make credit more expensive and disenfranchise less well off borrowers from regulated lenders.¹⁰² This argument is not new.

⁹² Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions [2002] OJ C137/02.

⁹³ Commission Proposal (2002) (n 85) art 9 (modified in the later amended proposal).

⁹⁴ Ibid art 5.

⁹⁵ Ibid art 28.

⁹⁶ Ibid art 6.

⁹⁷ Ibid art 11.

⁹⁸ Ibid art 16.

⁹⁹ Ibid art 15. The Commission amended art 15 on 28th October 2004 adopting the approach of the European Parliament to ensure that areas already covered by other Directives should not be duplicated, in this case the Council Directive on Unfair Terms in Consumer Contracts 93/13/EC [1993] OJ L 095/29.

¹⁰⁰ Commission Proposal (n 85) [1.1].

¹⁰¹ Ibid.

¹⁰² Working Document of the Committee on Legal Affairs and the Internal Market on the proposal for a European Parliament and Council Directive of the laws regulations and

Concerns about over-regulation of the credit market in terms of how it would affect the most vulnerable consumers have been considered by a number of commentators, the view being that highly restrictive rules can be counter-productive.¹⁰³ Only recently the UK Government has also considered this question specifically with regard to the possibility of introducing an interest rate cap. The conclusion was that by putting a ceiling on the amount of interest that can be charged, the consumers most vulnerable to high cost credit will effectively be denied credit from regulatory compliant lenders, thus being forced to borrow from illegal lenders.¹⁰⁴ The overall approach of maximum harmonisation has also been regarded as potentially posing problems, one being the conflict between finding a common approach within a highly diverse market and preserving local traditions. Furthermore the consumer credit market is fast moving; the European legislative process is not.¹⁰⁵ This attitude is certainly evident within the UK Parliament. Only recently the House of Lords European Committee published a report on the latest draft Consumer Credit Directive.¹⁰⁶ In this they raise serious concerns about the ability of maximum harmonisation to deliver an efficient single cross-border market in consumer credit. This position is taken mainly due to the inherent inflexibility, the potential for loss of consumer protections and increase in administrative burdens for Member States that maximum harmonisation may bring.¹⁰⁷

In the UK the Government was cautious in its reaction to the Proposal. Whilst it supported the idea of maximum harmonisation in the sharing and giving of information,¹⁰⁸ its major concern lay in a seeming imbalance that the suggested

administrative provisions of the Member States concerning credit for consumers Part 2 (27 June 2003) Introduction.

¹⁰³ D Cayne and MJ Trebilcock 'Market Considerations in the Formulation of Consumer Protection Policy' (1973) *University of Toronto Law Journal* 23, 396; H Collins *Regulating Contracts* (OUP, Oxford, 1999); ME Staten and RW Johnson 'The Case for Deregulating Interest Rates in Consumer Credit' (Credit Research Center, Purdue University, 1995).

¹⁰⁴ Consumer Minister 'No Interest Rate Ceiling For Now' Press Release 2004/315. This position is partly as a result of the empirical evidence provided by the Policis Report 'The effect of interest rate controls in other countries', commissioned by the DTI and published in 2004.

¹⁰⁵ Lannoo & Munoz 'Integration of the EU Consumer Credit Market' (n 82) [3.3].

¹⁰⁶ House of Lords European Committee 'Proposed EU Consumer-Credit Harmonisation Directive: Interim Report' HL 37 (2005–2006).

¹⁰⁷ *Ibid* [16] [20].

¹⁰⁸ Including the APR calculation, databases and pre-contractual and contractual information.

reforms would bring to the market.¹⁰⁹ Whilst committed to consumer protection the Government felt that some of the Proposal's provisions would create unnecessary burdens on business, a fetter to the visions of a 'competitive dynamic single consumer credit market that encourages entrepreneurship and growth.'¹¹⁰ The Proposal was effectively seen as creating an imbalance between consumer well-being and lenders' costs, for example in relation to the imposed duty to advise the consumer and the concept of responsible lending. The idea of a general standard of 'responsible lending' was regarded as potentially creating uncertainty, allowing the possibility of 'minimal compliance' by lenders. This is not to say that the Government considers responsible lending per se as an undesirable concept; rather combined obligations relating to pre-contractual information, fair lending and a robust licensing framework are the answer.¹¹¹

Questions have also been raised as to the legitimacy of controlling consumer protection through establishment of a single market. The Economic and Social Committee ("the ESC")¹¹² were particularly critical. Besides complaints that no research or detailed consideration had been made as to the likely impact the new regulations would have on the market, they too disagreed with the basis upon which the new Directive had been drafted. The Commission had regarded consumer protection as an essential corollary to the progressive harmonisation of the internal market. In terms of consumer credit, the ESC viewed this approach as flawed. It disagreed that the legal basis of the new Directive should be Article 95 of the EC Treaty, which has as its core the 'establishment and functioning of the single market'—in effect an approach which regarded consumer protection as a means to this end rather than as an end in itself.

¹⁰⁹ DTI Consultation 2005 (n 65).

¹¹⁰ *Ibid* 6.

¹¹¹ DTI Consultation 2005 (n 65) Executive Summary, cf White Paper which specifically states support for a duty to lend responsibly to be contained in the Consumer Credit Directive [5.67]. Interestingly the concept of irresponsible lending has at the last minute found its way into the 2006 Act, due to a House of Lords amendment. Whilst not defined in any way, irresponsible lending is seen as relevant when the OFT considers if applicant licensees behaviour has been deceitful, oppressive unfair or improper s 29.

¹¹² Which had to be consulted under Art 95 of the EC Treaty.

The Committee in contrast to the Commission felt that Article 153, dedicated to protection of consumers' (economic) interests, would be more appropriate.¹¹³ The ESC wanted to see a Directive that was more consumer orientated and they felt that requirements for information alone were not enough in terms of consumer protection: 'whilst consumer information is essential, it must be accompanied by active forms of protection and defence for consumers.'¹¹⁴ Although attempt had been made to address unfairness in the Proposal, this was not seen as enough.¹¹⁵ Essentially the ESC felt the Commission's proposal required radical amendment and in its then present form was likely to hinder rather than achieve the aim of transparency and harmonisation throughout the Community. This is a position that has been adopted elsewhere, not just from a legal viewpoint but an economic one as well, although for opposite reasons. In a recent article 'An Economic Analysis of the EU Commission's Proposal for a New Consumer Credit Directive—offering Consumer More Protection Or Restricting Their Options?'¹¹⁶ authors W Kusters, S Paul and S Stein conclude that the proposals would jeopardise competition rather than enhance it. In comparison with the ESC however, they felt it was excessive rather than inadequate regulation that was the problem. Economically they felt what was needed was a balance between consumers rights, consumer responsibility and a restriction on paternalistic regulation. In their view, advice and information were the key.¹¹⁷ Another view is that legislative procedures should be adapted to allow flexibility in terms of the role Member States play in the process, with greater co-operation between national regulators.¹¹⁸ Criticism also came from the Committee on Legal Affairs and the Internal Market. Their report was also unfavourable and like the ESC felt more research as to where the actual problems lay within the market needed to be carried out. Furthermore they believed that although the Commission had made

¹¹³ Opinion 16 and 17 July 2003 of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers' OJ C 234/1 [2.4].

¹¹⁴ Ibid [2.4.3].

¹¹⁵ Fairness was an important factor both in terms of procedure and substance, particularly with regard to the cost of the credit. Ibid [1.2] [2.2.4].

¹¹⁶ (2004) 39 *Intereconomics*, Review of European Economic Policy 2, 84.

¹¹⁷ Ibid 96.

¹¹⁸ Lannoo and Mata Munoz (n 82) base their proposal on the 'Lamfalussy approach' adopted to assist integration of European financial markets. This consists of a legislative process at four levels encompassing fast track procedures, regulations rather than Directives and greater input from Member States with regard to detailed rules and enforcement. [3.4].

reference to problems of over-indebtedness they had not considered the possibility that financial exclusion would result from certain of their stringent measures.¹¹⁹

The European Parliament endorsed the Proposal in April 2004 but only on the basis of a number of amendments. The Commission adopted an amended proposal on 28th October 2004 and, after further consultation with Member States and stakeholders, adopted a further revised proposal on 10th October 2005 ‘the Modified Proposal’.¹²⁰ The main areas that have been revised include a change to the definition of the total cost of credit (as part of the calculations of the APR), removal of all mortgage and surety agreements from the regime and changes to the requirements for pre-contract and contractual information. The harmonisation provisions have also been relaxed allowing adaptation in certain areas to national situations but protecting the single market through a mutual recognition clause. This Modified Proposal is now under consultation in the UK.¹²¹

The CCD seems to rely on the provision of adequate information as the basis for consumer protection¹²² and in this respect is in harmony with UK parliamentary attitude (with regard equally to Members of both Houses of Parliament and Government) surrounding the passing of the CCA.¹²³ The emphasis on informational provision is part of a consumer protection policy developed within Europe which regards imbalance in information between the parties as a cause of ‘problematic transactions for consumers’¹²⁴ The answer appears to be to regulate the information that is provided, ensuring ease of comprehension and comparability.¹²⁵ Whilst the new Directive does refer to unfair credit terms, in fact the provisions concentrate, on providing a balance between the parties, again through informational requirements and also through reducing the likelihood of unfair practices. Unfair terms, as such, are left to be dealt with under the Council Directive 93/13/EC of 5 April 1993 on Unfair Terms in Consumer Contracts (Unfair Contract Terms Directive)¹²⁶ with only

¹¹⁹ Working Document Pt 2 (n 102) a point also made by Kusters et al (n 116):

¹²⁰ n 64.

¹²¹ DTI ‘Proposal for an EC Consumer Directive-Supplementary Consultation’ (2006).

¹²² Goode *Consumer Credit Law and Practice* (n 69) [125.1].

¹²³ See ch 6 of this study.

¹²⁴ N Guardia ‘Consumer Credit in the European Union’ (n 69) 27.

¹²⁵ *Ibid.*

¹²⁶ [1995] OJ L 095/29.

two additional terms, relevant to consumer credit, being added to the indicative list contained in the Directive's Annex. The Unfair Contract Terms Directive was initially implemented in the UK by the Unfair Terms in Consumer Contract Regulations 1994,¹²⁷ replaced by further regulations in 1999.¹²⁸

It appears then that whilst preservation of a competitive environment is still of importance, emphasis on protection of the consumer at a more direct level is now seen as appropriate. This is underlined by the Commission's strategy for consumer policy as a whole stated in the Communication from the Commission in 2002.¹²⁹ The three mid term objectives, high common level of consumer protection, effective enforcement of consumer protection rules and involvement of consumer organisations in EU policies accentuate the role consumer protection now has to play in policy formulation. As time and policy has progressed, it also seems unfairness, as with the direction taken in the UK, has carried increasing weight within the idea of consumer protection, informational efficiency no longer being seen as sufficient. This is not only demonstrated by the discussions surrounding the reforms to the CCD. An illustration of this shift in policy to protection of the consumer against unfairness as a separate element of consumer regulation is also illustrated in other adopted Directives that impinge on consumer credit. It is these Directives that are now examined.

(b) Other European Directives

There are a number of other European Directives that have some bearing on the regulation of consumer credit: Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises ("the Doorstep Sales Directive"),¹³⁰ Council Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive

¹²⁷ SI 1994/ 3159.

¹²⁸ To reflect the wording of Directive and to give new powers to the Director General of Fair Trading and other named official bodies, such as the Data Protection Registrar and the Consumers Association.

¹²⁹ n 92. This sets out the Commission's strategy for consumer policy at European level from 2002-2006.

¹³⁰ [1985] OJ L372/31.

90/619/EEC and Directives 97/7/EC and 98/27/EC (“the Distance Marketing of Consumer Financial Services Directive”),¹³¹ Council Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (“the Distance Selling Directive”),¹³² Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (“the Misleading Advertising Directive”),¹³³ Council Directive 98/27/EC of 19 May 1998 on injunctions for the protection of consumers’ interests (“the Injunctions Directive”)¹³⁴ and the newly adopted Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (“Unfair Commercial Practices Directive”).¹³⁵ All these Directives affect the provision of consumer credit to some degree, some more than others.

Under the Doorstep Sales Directive, implemented by the Consumer Protection (Cancellation of Contracts Concluded Away from Business Premises) Regulations 1987¹³⁶ the customer has the right to cancel a contract concluded away from business premises as a result of various scenarios, including an unsolicited visit to the home.¹³⁷ Credit agreements are included in the ambit of the Regulations if over £35, but ‘cancellable agreements’ under sections 67–73 of the CCA will, in effect, remain under the latter’s control.¹³⁸ In terms of the regulation of credit, these Regulations provide a wider opportunity to cancel agreements, the right of cancellation being no longer restricted to cancellable agreements under the CCA.

¹³¹ [2002] OJ L271/16.

¹³² [1997] OJ L144/19.

¹³³ [1984] OJ L250/17.

¹³⁴ [1998] OJ L166/51.

¹³⁵ [2005] OJ L149/22. As to the extent of applicability of this Directive with regard to maximum harmonisation, see text to nn 185–189.

¹³⁶ SI 1987/2117 as amended by SI 1988/958, SI 1998/3050. There has been public consultation on possible amendment to these Regulations—DTI ‘Doorstep Selling and Cold Calling: Consultation on proposals to improve consumer protection when purchasing goods or services in their home’ (2004).

¹³⁷ The contract can be cancelled within 7 days of the making of the contract and notice of the right must be given—Doorstep Sales Directive (n 130) art 5.

¹³⁸ Only certain agreements under the CCA are cancellable, that is where there have been antecedent negotiations that included oral representations in the presence of the debtor. The customer is entitled to cancel the agreement up to five days from receipt of the required copy of the agreement or notice of cancellation rights CCA s 68.

The Distance Marketing of Consumer Financial Services Directive also covers credit but only to 'natural' consumers i.e. not sole traders partnerships or unincorporated associations and only those borrowing for reasons outside his /her trade, business or profession. Its provisions focus on pre-contractual information disclosure before a customer is committed to a credit contract concluded at a distance and opportunity for the consumer to cancel such a contract within 14 days. The Directive has been implemented by the Financial Services (Distance Marketing) Regulations 2004.¹³⁹ These complement the information requirements under the Consumer Credit (Disclosure of Information) Regulations 2004¹⁴⁰ which already cover those regulated consumer credit agreements not concluded at a distance.¹⁴¹ The Distance Selling Directive,¹⁴² the Misleading Advertising Directive¹⁴³ and the Injunctions Directive¹⁴⁴ are Directives that perhaps affect consumer credit in a less direct manner, being designed for more general consumer protection, dealing with practices that may affect consumers in many different scenarios. Control includes prohibition of certain practices, provision of information for the consumer and rules ensuring compliance with the regulatory regimes. The Unfair Commercial Practices Directive follows this theme. It includes a general prohibition on business to consumer unfair commercial practices including those that are misleading and/or aggressive where such practices may affect the economic behaviour of a consumer.¹⁴⁵

¹³⁹ SI 2004/2095.

¹⁴⁰ SI 2004/1481.

¹⁴¹ Cancellation rights for these contracts remain unchanged.

¹⁴² n 132. The Directive covers selling by a wide variety of means including mail order, telephone or radio. It includes and provides requirements for written information as to the terms of the contract and a cooling off period of 7 days. Contracts for financial services are exempted from its provisions, although it does stipulate cancellation of a distance contract will also cancel any credit agreements linked to that contract. The Directive was implemented by the Consumer Protection (Distance Selling) Regulations 2000 SI 2000/2334, which have recently been amended by the Consumer Protection (Distance Selling)(Amendment) Regulations 2005 SI 2005/689.

¹⁴³ n 133. Amended in 1997 by Council Directive 97/55/EC of 6 October 1997. It intended to reduce the distortion of competition within the European Union and assist free movement of goods and services. The Directive was implemented by the Control of Misleading Advertisements Regulations 1988 SI 1988/915 which apply to any advertisement for, inter alia, goods and services.

¹⁴⁴ n 134. The aim of this Directive is to ensure compliance with EC Directives designed to protect the consumer. The Directive was implemented by the Stop Now (EC Directive) Regulations 2001 which has now been replaced by Pt 8 of the Enterprise Act 2002 c 40.

¹⁴⁵ Art 5.

There are two particular issues underlined in all these Directives—sales procedure and concepts of unfairness. All the Directives seek to ensure that the consumer can operate within a market that provides proper choice and balance; removing the opportunity for unfair practices is naturally part of that process. Although some incorporate a reference to good faith within their requirements,¹⁴⁶ it is only the Unfair Commercial Practices Directive that, whilst introducing a general test, sets out specific conditions that, if present, will show that a practice is unfair. These are that the practice is contrary to ‘professional diligence’¹⁴⁷ and the practice distorts or is likely to distort the consumer’s economic behaviour.¹⁴⁸ the consumer for this purpose is the ‘average consumer’.¹⁴⁹ Misleading or aggressive practices will be automatically unfair.¹⁵⁰

There is one other Directive particularly relevant to the provision of consumer credit and that is the Unfair Contract Terms Directive.¹⁵¹ Whilst applicable to consumer credit agreements, it provides protection for consumers at a general level, relating to terms in contracts between a seller or supplier (acting in the course of his/her trade, business or profession) and a consumer that have not been individually negotiated. Such terms will be unfair if ‘contrary to the requirement of

¹⁴⁶ Distance Selling Directive (n 132) art 4.2 requires pre-contract information to be provided *inter alia* ‘with due regard in particular to the principles of good faith in commercial transactions’. This is repeated in art 3 of the Distance Marketing of Financial Services Directive (n 131). The principle of good faith is also integral to the provisions of the Unfair Contract Terms Directive (n 126). There is however much academic discussion about the efficacy of adopting good faith as a general principle within contract law, as referred to in text to and at n 153.

¹⁴⁷ *Ie* ‘skill ...commensurate with honest market practice and/or the general principle of good faith...’art 2(h).

¹⁴⁸ Art 5(2)(b) *ie* causes the consumer to act transactionally in a way he would not otherwise have done, due to the practice in question impairing his ability to make an informed decision art 2(e). The Misleading Advertising Directive also refers to the effect advertising may have on the ‘economic behaviour’ of its target audience art 2(2).

¹⁴⁹ As established by the ECJ *ie* a consumer who is ‘reasonably well informed and reasonably observant and circumspect’. C Twigg-Flesner, D Parry, G Howells, A Nordhausen with others ‘An Analysis of the Application and Scope of the Unfair Commercial Practices Directive : A Report for the DTI’ 18 May 2005 [2.59].

¹⁵⁰ Arts 6–8. What will constitute misleading or aggressive is contained in these articles and it must also be shown the practice has made the consumer or has a high potential to make the consumer take a ‘transactional decision’ he/she would not otherwise have taken. Transactional decision is defined in art 2(k) but whilst broad in nature doubt has been expressed as to whether this would extend to unfairness that does not affect exercise of the consumer’s choice. Twigg-Flesner et al (n 149) [2.39].

¹⁵¹ n 126.

good faith' they cause 'a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer'.¹⁵² Furthermore, in deciding whether or not a term is unfair, the circumstances at the time the contract was entered into, including other contractual terms will be relevant. This Directive then seems to apply to both substantial unfairness, in respect of the content of terms and procedural unfairness in respect of activities that may surround the making of the contract. The nature of the unfairness being regulated under the Directive and implementing Regulations has however come under some academic scrutiny, with arguments centring on the meaning of unfairness and the significance of the good faith requirement.¹⁵³ What is obvious is that the purpose of this Directive is to regulate unfairness in its own right.

Although Directives such as the Misleading Advertising Directive and the Doorstep Sales Directive have been explained in commentary as tools for correcting market failure,¹⁵⁴ the idea of ensuring fairness in consumer contracts and the role of information in the prevention of unfairness have obviously become of more importance in Europe over the last twenty years.¹⁵⁵ The Unfair Contract Terms Directive was one result of the developing programmes of consumer protection policy, seeking to regulate unfair terms.¹⁵⁶ The emerging importance of consumer protection over preservation of competition and a single market, as demonstrated by the deliberations over the Proposal, demonstrates an increasing reliance on the direct control of unfairness as a consumer protection device. Even the Unfair Commercial Practices Directive, which could be explained as a means to correct market deficiencies, is presented in terms of procedural unfairness.

¹⁵² Art 3(1).

¹⁵³ S Bright 'Winning the Battle against Unfair Contract Terms' (2000) 20 *Legal Studies* 347. Bright contends that unfairness here can be both procedural and substantive and that the requirement of good faith can refer to conduct as well as substance. Good faith as a concept has in fact been interpreted in many different ways. Twigg-Flesner et al (n 149) [2.22].

¹⁵⁴ H Collins 'Good Faith in European Contract Law' (1994) 14 *OJLS* 229, 237.

¹⁵⁵ The Council was constructing a programme for consumer protection and information as early as 1975, but by the late 1990s consumer education and information was seen as a priority by the Commission—G Howells and T Wilhelmsson *EC Consumer Law* (Aldershot Ashgate, 1997) 6–9.

¹⁵⁶ Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy [1975] OJ C92/1; Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy [1981] OJ C133/1.

(c) Impact on UK Consumer Credit Law

How, if at all, has this affected the development of consumer credit legislation in the UK? There is no doubt that the direction of European consumer policy has helped shape much of the UK consumer protection law. As the Government itself stated in Parliament

The development of EU consumer policy in the UK has bolstered our existing consumer protection systems...The European Commission's consumer policy strategy for the next four years is to be welcomed.¹⁵⁷

However as has already been illustrated, the dedicated consumer credit European legislation seems to have had little real impact in terms of the specific provisions of UK law. This may change when and if the new Consumer Credit Directive is adopted and implemented into UK law, although to what extent remains to be seen. When the consultation was set up by the DTI to consider the Commission's amended proposal of October 2004, it supported the approach of maximum harmonisation to the extent the draft directive augmented the transparency and data sharing provisions of the current UK law.¹⁵⁸ To this extent then, the Directive's eventual provisions are likely to further enhance the protections provided by UK legislation. However it is clear the Government is keen to keep the ability to ensure its own stringent consumer protections and is protective of the reforms now being introduced as a result of the White Paper 2003. In areas other than those referred to above, minimum harmonisation is seen as more appropriate for the complex and wide-ranging UK consumer credit market.¹⁵⁹ Nevertheless, even where maximum harmonisation is seen as appropriate, the UK Government argues that further amendments to the draft are needed where it feels UK consumer protections may be jeopardised.¹⁶⁰ With

¹⁵⁷ Hansard HC vol 397 col 112 WH (8 Jan 2003).

¹⁵⁸ Including the calculation of APRs. The reason given for this approach was assist in the removal of 'genuine barriers to cross-border lending'—DTI Consultation 2005 (n 65)[44].

¹⁵⁹ Ibid [43]–[44].

¹⁶⁰ One example is the proposal relating to information to be contained in advertisements. Here although the Government does not favour the amount of detail required by art 4, this is because it feels it will only confuse the consumer and therefore in effect reduce transparency. DTI Consultation 2005 (n 65) [73].

regard to more general legislation, in terms of specific Directives that target specific practices, the extent to which these impact on consumer credit can be deduced from the provisions of the Directives themselves. However when considering the growing emphasis in Europe of regulating unfairness as an element in its own right, it is necessary to consider the provisions of the 2006 Act to gauge whether such developments have influenced the proposed reform of the consumer credit law.

It has already been shown that the majority of the new legislation relates to procedure. Regulation of unfairness in these circumstances could be seen as a means of controlling the market per se rather than unfairness itself, such regulation having as its aim control of practices that constitute an integral function within the consumer credit market. The one area in which it could be argued with some confidence that unfairness is to be controlled as a separate element in its own right is in the new unfair relationship test; indeed the generality of the unfair relationship test bears much resemblance to that contained in the Unfair Contract Terms Directive.¹⁶¹ In some respects, elements of regulating unfairness were already present in consumer credit legislation, most particularly in terms of the extortionate credit provisions. These did not however mirror the idea of unfairness put forward by the Unfair Contract Terms Directive in that price level was regarded as a factor (something specifically excluded by the said Directive¹⁶²) and there was no requirement of good faith (whether in its own right or as an adjunct to another requirement), although a credit bargain was extortionate if it grossly contravened the ordinary principles of fair dealing.

Good faith is now a requirement that affects consumer credit agreements indirectly in that the requirement is included, as a result of the relevant Directives, in the Consumer Protection (Distance Selling) Regulations 2004, the Financial Services (Distance Marketing) Regulations 2004 and the Unfair Terms in Consumer Contracts

¹⁶¹ The difference being the latter also provides a list of practices that presumptively will be regarded as unfair, an approach the Government has shied away from in terms of consumer credit legislation.

¹⁶² Art 4(2). It should be noted that other price issues may however be subject to review for unfairness, for example charges applicable on default. This was held to be the case in *Director General of Fair Trading v. First National Bank* [2001] UKHL 52, [2002] 2 AC 481. A fuller discussion can be found in Bright 'Winning the Battle against Unfair Contract Terms' (n 153).

Regulations 1999.¹⁶³ It also plays an integral part within the meaning of professional diligence in the Unfair Commercial Practices Directive.¹⁶⁴ The 2006 Act, however, has not given good faith a specific part to play in gauging unfairness. The White Paper had thought responsible lending would have a part to play in assessing whether or not the particular provision of credit was unfair,¹⁶⁵ but the 2006 Act simply states that any terms of the agreement and the behaviour of the creditor either with respect to the exercise of enforcement of rights or generally with regard to the consumer are the relevant factors.

In practice however this may include good faith. The courts, at first instance and on appeal in *Director General of Fair Trading v First National Bank*¹⁶⁶ certainly regarded good faith as an integral element in finding unfairness within a consumer credit contract, both at a procedural and substantive level, although in this case the disputed term was, ultimately, not found to be unfair. Here however good faith was a required factor under the Unfair Contract Terms Regulations, the basis upon which the case had been brought. With regard to a more expansive use of good faith, there are arguments against the adoption of the concept as a general principle. It is seen for example as an uncertain test, too vague and a threat to the independence of contracting parties thus challenging the 'adversarial' autonomous nature of English contract law.¹⁶⁷ It has however been pointed out that good faith as a test has to some extent already been utilised in consumer law without problem¹⁶⁸ and indeed would have some advantages, such as allowing efficiency in the courts handling of unfair

¹⁶³ SI 1999/2083.

¹⁶⁴ It has been said that good faith actually 'underpins the overall normative nature' of the concept of professional diligence. Twigg-Flesner et al (n 149) Executive Summary.

¹⁶⁵ Responsible lending was seen as an important factor within the 'unjust credit transaction' test envisaged by the Borrie Report (n 35) [5.16].

¹⁶⁶ [2000] 1 All ER 240 (Ch); [2000] QB 672; [2001] UKHL 52, [2002] 2 AC 481.

¹⁶⁷ R Bradgate, R Brownsword and C Twigg-Flesner 'Impact of Adopting a Duty to Trade Fairly' (ICLS Sheffield July 2003) [4.12]

¹⁶⁸ *Ibid* [4.33]. The adoption of fair dealing principles as a general code however comes with a word of warning—it can only be successful once uniform standards of reference are agreed.

conduct¹⁶⁹ and encouraging an atmosphere within which contractors feel more secure, thus promoting greater flexibility.¹⁷⁰

Within the sphere of consumer credit, cases heard under the extortionate credit provisions have shown that whilst price has been the most influential factor, the fact the creditor enjoyed a favourable imbalance in bargaining power due to the inexperience or situation of the borrower has carried some weight with the court.¹⁷¹ As Sir John Donaldson MR stated in *Wills v Wood* [1984] CCLR 7 ‘The jurisdiction seems to me to contemplate at least a substantial imbalance in bargaining power of which one party has taken advantage’. What is clear is that the imbalance needed to be significant; any contravention of the fair dealing provisions of sections 137–149 of the Act had to be serious to trigger sanctions.¹⁷² This is evident not only from the court’s approach but in the provisions themselves which demand that a term is ‘grossly’ exorbitant or ‘grossly’ contravenes ordinary principles of fair dealing.¹⁷³

Taking advantage of the other party’s weakness, i.e. through the imbalance in bargaining power, or dealing unfairly is something that has been taken up in other recent cases. In *Paragon Finance plc v Nash*¹⁷⁴ the Court of Appeal held that a creditor’s discretionary ability to vary interest rates carried an implied obligation that it should not be exercised dishonestly, for an improper purpose, capriciously or arbitrarily. This was reiterated in *Paragon Finance plc v Pender*¹⁷⁵ although the court did stress that a commercial lender should be allowed to conduct its business in accordance with its best interests. This connection between unfairness and imbalance

¹⁶⁹ By providing a general ‘umbrella’ principle, the courts have more scope to administer justice in ‘hard cases’. Ibid [4.19]

¹⁷⁰ By effectively reducing the chances of one party acting opportunistically or being exploitative, so encouraging trust and co-operation. Ibid [4.23].

¹⁷¹ For example *Barcabe v Edwards* (1983) CCLR 11, *Devogate v Jarvis* (Sevenoaks County Court 1987). These cases amongst others are briefly analysed in the Borrie Report (n 35) Annex A.

¹⁷² *Davies v Direct loans Ltd* [1987] 1 WLR 823, *Broadwick Financial Services Ltd v Spencer* [2002] EWCA 35.

¹⁷³ S 138(1).

¹⁷⁴ [2001] EWCA 1466; [2002] 2 All ER 248.

¹⁷⁵ [2005] EWCA 760; [2005] 1 WLR 3412.

between parties was also reflected in *DGFT v First National Bank*.¹⁷⁶ Lord Bingham regarded good faith as ‘fair and open dealing’¹⁷⁷ and that

a supplier should not, whether deliberately or unconsciously, take advantage of the consumer’s necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 of the Regulations.¹⁷⁸

Whilst these cases dealt specifically with mortgages, an area not covered by this study, the direction taken may still be an indication as to the court’s approach when considering the unfair relationship test. The test will, after all, also apply to some secured agreements, just as sections 137–140 of the Act have done.¹⁷⁹ What is predictable is that the courts are unlikely to be too lenient with offending lenders. This is illustrated by the House of Lords approach in *Wilson v First County Trust Ltd*.¹⁸⁰ Here it was felt the seemingly harsh provisions of section 127(3) of the Act¹⁸¹ were in fact justified. Lord Nicholls felt that ‘moneylending transactions as a class give rise to significant social problems. Bargaining power lies with the lender, and the social evils flowing from this are notorious.’¹⁸² Lord Scott echoed the view that the statutory controls

recognise the vulnerability of those members of the public who resort to pawnbrokers and moneylenders when in dire need... They are open to exploitation; their bargaining power is minimal; their understanding of legal procedures and remedies is likely to be sparse.¹⁸³

¹⁷⁶ [2001] UKHL 52, [2002] 2 AC 481.

¹⁷⁷ *Ibid* 17.

¹⁷⁸ *Ibid*.

¹⁷⁹ From 31st October 2004 most first mortgages have been regulated by the Financial Services and Markets Act 2000 c 8. Under the CCA, exempt agreements (including those regulated by the FMSA 2000) are still subject to the extortionate credit provisions s 16(7)—They will not however be subject to the unfair credit relationship test under s 19 of the Consumer Credit Act 2006 (new s 140A(5)).

¹⁸⁰ [2003] UKHL 40, [2003] 4 All ER 97.

¹⁸¹ Which in effect makes an agreement unenforceable if improperly executed. This section is repealed by the 2006 Act.

¹⁸² [2003] UKHL 40, [2003] 4 All ER 97, 75.

¹⁸³ *Ibid* 169.

It seems likely that an imbalance in bargaining power will remain important in terms of finding unfairness. Whilst the potential ambit of the test is wide, recent cases such as those referred to above suggest the courts' approach will be similar to that of *Crowther* in the 1970s, where the relative bargaining position of the parties was seen as highly significant. This is not necessarily contrary to the Government's own approach; empowerment of the consumer, through a transparent market and protection against unfair practices, an important part of the policy behind the White Paper, inevitably involves moving towards some form of equality of bargaining power. This idea of equality is perhaps also indicated in the treatment of consumers depending on their status. Consumers of 'high net worth' seem to be regarded as enjoying sufficient equality with the creditor to negate the need for detailed protections. They will therefore, once the 2006 Act is implemented, be given the ability to 'opt out' of most of the protections of the CCA under section 3 of the 2006 Act. In the same way, business borrowing of over £25,000 will be exempted from the CCA's provisions under section 4 of the 2006 Act, although in both these scenarios the unfair relationship test under section 19 will still apply.

The growing emphasis of controlling unfairness as an element of consumer protection in Europe is something that has had an effect in the United Kingdom through implementation of the various Directives referred to above. Whether the policies underlying the White Paper and the 2006 Act are a direct result of influence from Europe is less clear. The Government's reaction to the direction of European reforms in terms of regulating unfairness is one of caution. As the White Paper states, the provision of a fair market place where borrowers and lenders can operate on a fair basis is paramount. As has already been illustrated however, there is a limit in the extent to which unfairness is legislatively controlled particularly with regard to substance. The Unfair Contract Terms Regulations¹⁸⁴ provide a basic protection against unfairness where the contract is in standard form; the consumer credit legislation does not expand on this, preferring to remain with the general framework of 'relevant circumstances' and other matters the court might think relevant.

¹⁸⁴ SI 1999/2083.

The Government's approach to the Unfair Commercial Practices Directive also shows a reluctance to definitively identify unfairness, although the parameters of the regulation are slightly different in that the prohibition on trading unfairly is a blanket requirement enforceable by authorised bodies. Whilst the idea of a general duty to trade fairly is welcomed, the Government has been nervous of the definitions of unfairness within the Directive

The Government can welcome the overall structure of the Directive...However it will be crucial to get the definitions right ...The Government will be seeking to ensure that these definitions ensure the right balance of responsibility between trader and consumer¹⁸⁵

It would seem the UK Government is not yet ready to definitively identify, within legislation, what is fair or unfair in any given situation. As was stated with regard to the Unfair Commercial Practices Directive

The Directive should...remain directed at 'unfair' practices rather than setting unnecessary prescriptive rules for 'fair' practices¹⁸⁶

In any event, the Unfair Commercial Practices Directive requires maximum harmonisation, which means its test for what will constitute an unfair practice will eventually become incorporated into UK legislation, without any allowance for amendment by Member States. The projection for the Directive becoming law is the end of 2007 but Member States are permitted to continue applying national provisions if more protective for a further period of six years.¹⁸⁷ However in terms of financial services, which includes credit, there is no such limiting period, Member States having the general right under Article 3(9) to impose more restrictive or prescriptive requirements. How the Directive is ultimately implemented remains to be seen but it may result in some direct modification to the consumer credit

¹⁸⁵ House of Lords Select Committee on European Union Sub-committee G '25th Report of Session 2003-04 Correspondence with Ministers' 168.

¹⁸⁶ DTI 'Consultation on an EC Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market; Government Response' (March 2004). This approach is also evident in the Government's response to art 15 of the draft Consumer Credit Directive.

¹⁸⁷ Art 3(5) where the national provisions implement Directives containing minimum harmonisation clauses.

legislation with reference to hire,¹⁸⁸ where provisions that fall within the ambit of the Directive are not compatible with its provisions.¹⁸⁹

One final observation that should be made is that there are some elements within Europe that still see price as key in determining whether consumer credit is given on unfair terms. The ESC in particular saw price as a relevant factor. It regarded 'usury' as undesirable and a form of unfairness that needed to be regulated against, usury being

an interest rate which is abnormally higher than the legal established rate, or is incompatible with the principles of honesty and fairness in commercial affairs or of public policy and good practice, or which is imposed by exploiting the difficulty of the person requesting the loan.¹⁹⁰

This approach is not in tune with the UK Government, which has stated an interest rate ceiling is unlikely and has omitted any specific reference to price in the unfair relationship test. Interestingly it is however in line with general parliamentary attitude, which has consistently reverted to price as an indicator of unfairness with regard to consumer credit. It is not only with regard to the price of credit that general parliamentary attitude shows a correlation with opinion in Europe. Whilst the Government has avoided providing a legislative definition of unfairness, MPs favour a more detailed approach along the lines taken in Europe.¹⁹¹ It cannot be said with certainty that Europe has influenced this approach, but certainly general parliamentary attitude seems to reflect a parallel.

4. PARLIAMENTARY ATTITUDE

It has already been explained that by 1980 there was disillusionment with the CCA in Parliament. MPs complained that the Regulations relating to advertisements and the

¹⁸⁸ It seems hire does not come within financial services envisaged by art 3(9), which refers to the definition contained in the Distance Marketing of Financial Services Directive (n 131) Twigg-Flesner et al (n 149) 95.

¹⁸⁹ Ibid c 5. On 14 December 2005 the Government published a consultation document with regard to the transposition of the Directive into UK law.

¹⁹⁰ Opinion (n 113) [2.2.4.1].

¹⁹¹ Hansard HC vol 429 col 502 (31 Jan 2005).

total charge for credit were too complex¹⁹² and within a relatively short amount of time the burden of the Act's provisions on business was becoming apparent.¹⁹³ The Conservative Government concern about the over-regulation of business, not just with regard to consumer credit but in a number of areas were considered in the White Paper 'Lifting the Burden'¹⁹⁴ in 1985 and further proposals were examined in the White Paper 'Releasing Enterprise' published in 1988.¹⁹⁵ No action was taken however in relation to consumer credit. Whilst deregulatory changes were still being discussed in 1995 and a draft order for the deregulation of lending and hiring to unincorporated businesses considered in 1997, changes to the legislation never took place, as the protections were seen as too invaluable to lose.

In the 1990s worries about the adequacy of protection for the consumer again became a focus primarily in relation to indebtedness, marketing practices and irresponsible lending. The Government reacted to the concerns raised by MPs distributing a consultative document on the provision of information, which proposed further changes to the Advertisement Regulations and the Agreements Regulations.¹⁹⁶ This was also the time that the Borrie Report reviewing extortionate credit was published.¹⁹⁷ By the time of the Review under the Labour Government, whilst burden on business was a stated concern the greatest emphasis definitely lay with the consumer. As Melanie Johnson, minister for the DTI announced in 2001 the key objectives of the Consumer Credit Review were to

develop a new consumer credit regime that targets rogue traders, reduces burdens on legitimate business, reflects market changes in consumer credit and improve the advice and information that consumers receive about consumer credit products¹⁹⁸

¹⁹² Hansard HC vol 991 col 1050 (3 Nov 1980).

¹⁹³ Because of this some provisions of the legislation were purposely kept under review, rather than being implemented as a matter of course. Hansard HC Deb vol 28 col 102 (20 July 1982) WA.

¹⁹⁴ Cmnd 9571, 1985.

¹⁹⁵ Cm 512, 1988.

¹⁹⁶ 'Credit Marketing: proposals for new legislation on credit marketing' DTI (1991). A further paper was published in 1992: 'Consumer Credit—Revised Proposals for legislation on credit marketing' to take account of the views expressed by consultees.

¹⁹⁷ n 35

¹⁹⁸ Hansard HC Deb vol 372 col 234 (16 Oct 2001 WH).

However, whilst the interests of business were incorporated within the aims of the Review, the priority areas were consumer orientated—removing financial limits to expand the ambit of the Act, amending rules on early settlement to ensure the consumer had a fair rebate, changing licensing regime to keep out “loan sharks”, making extortionate credit provisions more effective and simplifying rules on multiple agreements.

That is not to say Government has lost sight of the relevance of business interests in terms of recent modern consumer credit regulation. As was recognised by the Government spokesman in 2003, allowing lenders to minimise risks and making credit agreements easier to understand is ‘critical to a successful market in credit, in which there is fairness on all sides.’¹⁹⁹ However, any ‘burden’ to business seems now to only have real significance in terms of how it affects the consumer. As had been said earlier in the same speech

We in Government need to be able to create the right regulatory framework to facilitate a competitive market environment and ensure appropriate consumer protection²⁰⁰

It seems a competitive marketplace was and is seen as a means of enhancing consumer protection, something that had been emphasised at the time of Crowther. In turn information was and is seen as a means to effective competition. In 1980, in discussions over the advertisement regulations, truth –in lending was regarded as

playing a significant role in achieving greater or fairer competition...That is why comparable information is particularly important...One must recognise the regulations potential importance in stimulating competition.²⁰¹

Information however is not just an element in ensuring healthy competition. It is also regarded as a tool for consumer protection in its own right and information as a means to empower the consumer is key to current Government thinking. From the

¹⁹⁹ Hansard HC Deb vol 400 col 28 (25 Feb 2003 WH)

²⁰⁰ Ibid.

²⁰¹ Hansard HC vol 991 col 1055 (3 Nov 1980) per Under Secretary of State for Trade, Reginald Eyre.

truth in lending emphasis of the White Paper that led to the Act,²⁰² information has had huge importance within consumer protection policy. As Melanie Johnson confirmed in October 2001 ‘the essential philosophy—that there should be truth in lending—remains just as valid today as in 1974’.²⁰³ There has however been a change of emphasis over the years. Whilst information is still seen as vital

To make informed and confident decisions about credit, consumers need good quality information that allows them to make intelligent choices between different products and makes them aware of the risks²⁰⁴

detailed further regulation, as is shown by the White Paper is now also considered essential. With growing concern for vulnerable consumers and the social consequences of unfair lending to this section of the community, information alone, whilst enough of a protection for the majority average consumer, is seen as inadequate to protect the more vulnerable. Provision of information and protection of those who are unable to understand or take advantage of information they receive are issues that have dominated parliamentary debates for some time. By the 1990s it was not just lack of information that was seen as a problem. Irresponsible lending and other possible unfair practices were also being targeted as a possible cause of consumer detriment. Concern for the consumer has long been a pre-occupation of Parliament but as time has progressed it has been the vulnerable consumer that has received the most attention, even though the idea of vulnerability itself has changed over the years.

Parliamentary attitudes however, can perhaps be most effectively demonstrated by considering the debates surrounding credit cards, a subject that started to rear its head as early as 1975, although at that time they were not the widespread complex credit instrument of today. There are now at least 1600 different cards to choose from. By 2002, 65% of the UK population were in possession of a credit card and total transactions were £120 billion with, in the last quarter of 2003 over £52 billion being owed on cards.²⁰⁵ It is concerns surrounding this type of credit provision that

²⁰² Cmnd 5427, 1973.

²⁰³ Hansard HC vol 372 col 234 (16 Oct 2001 WH).

²⁰⁴ Ibid col 233 per Barry Gardiner (Labour).

²⁰⁵ House of Commons Treasury Committee ‘Transparency of Credit Card Charges’ (First

typify present day parliamentary attitude to consumer credit. Loan sharks, the target of the Government by the time of the Review seemed to be of less interest to Parliament than credit cards.²⁰⁶ Credit card companies like the doorstep lenders and money-lenders before them are now public enemy no 1.

As early as 1975 credit cards were seen as a temptation for consumers to overspend²⁰⁷ and in the 1980s there was a request for some form of control to be put on credit cards in the form of interest rate caps.²⁰⁸ By this time credit cards were already seen as a cause for unmanageable debt suffered by more vulnerable consumers and a link was being made between over-indebtedness and easy but expensive credit made available by the credit card industry.²⁰⁹ The expense of credit cards had become a serious issue by 2003 with the rates, particularly those of store cards being called 'outrageously high' and credit card companies being accused of sharp practice, using 'every trick in the book'.²¹⁰ Hidden charges were seen at this time as a particular problem. A lack of transparency, which restricted the consumer's ability to make proper choice between products, particularly in terms of price, was a problem exacerbated by the arbitrary results that resulted from the current basis of the APR calculation. The feeling from Parliament was that these issues needed to be addressed through regulatory informational requirements.²¹¹ The informational weaknesses in the system were threatening the competitiveness of the market and harming consumers, causing amongst other things over-commitment to debt.

It is in this atmosphere of complaint that the House of Commons Treasury Committee ("the Committee") undertook an investigation into the workings of the credit card industry in 2003. They published their Report, 'Transparency of Credit Card Charges'²¹² in December of that year ("the Treasury Report").²¹³ The

Report of Session) (HC 2003–2004 125–1) 6.

²⁰⁶ Although store card companies have been described as 'today's designer loan sharks' Hansard HC vol 420 col 154 (22 April 2004 WH).

²⁰⁷ Hansard HC vol 897 col 711 (7 August 1975 WA).

²⁰⁸ Hansard HC vol 127 col 368 (10 February 1988).

²⁰⁹ *Ibid* col 370.

²¹⁰ Hansard HC vol 399 col 1016 (13 February 2003).

²¹¹ Hansard HC vol 400 col 27 (25 February 2003 WH).

²¹² n 205.

²¹³ The Committee had ordered the investigation after their Report 'Banking, the Consumer and Small Businesses' HC (2001–2002) 818). The topic of credit card charges had been

Committee consisted of eleven MPs, seven of whom were Labour, three Conservative and one Liberal Democrat.²¹⁴ The chairman Mr John McFall had been an MP since 1987 and held posts within the Government being Junior Minister for Northern Ireland from 1998–1999 and holding a post in the Whips Office from 1997–1998.²¹⁵ The members of the Committee had been involved in a variety of areas, from being involved in the DTI Deregulation Task Force (Angela Eagle) to representing the United Kingdom on the Parliamentary Assembly of the Council of Europe (Robert Walter).

The Committee took a great deal of evidence both written and oral²¹⁶ during its inquiry from a number of witnesses ranging from consumer groups, the DTI, the OFT, the Minister for Employment Relations, Competition and Consumers (Gerry Sutcliffe) and members of the industry. The frustration of the Committee with the state of the credit card industry was evident, not only in the manner with which industry witnesses were examined but also in the manner with which the Government departments were questioned. That the Committee felt urgent action was required could not be mistaken. The credit card industry according to the Committee lacked transparency and engaged in charging and marketing practices that were dubious and contrary to competitive behaviour. A lack of transparency was effectively preventing competition; whilst there was plenty of choice within the market, it was impossible for consumers to properly exercise that choice. Questionable marketing and charges exacerbated inadvisable levels of debt, over-commitment by consumers being seen as a consequence of these elements within the market. People were effectively ‘sleepwalking into a situation of over-commitment.’²¹⁷

Responsible lending was seen as a key component in prevention; this according to the Committee was about treating customers, particularly those

discussed briefly and it was felt then that the situation was serious enough to warrant further consideration [17–21].

²¹⁴ There were two other MPs that also took part in the Committee during the course of the inquiry, one Labour and one Conservative.

²¹⁵ Guardian Unlimited <http://politics.guardian.co.uk>.

²¹⁶ Oral evidence was taken over July and August with over 1200 questions being put to witnesses.

²¹⁷ Treasury Report (n 205) Summary.

struggling with debt, in a fair way. ‘This inquiry arose out of concerns about unfair treatment of consumers and fears that industry practices were raising levels of unmanageable personal debt’.²¹⁸ Whilst it was accepted there was a challenge to any causal link with over-indebtedness, irresponsible lending was regarded as a factor that turned a small change in circumstances into a situation of over-indebtedness. In its conclusions the Committee demonstrated it was not impressed with the current regulatory regime and the role of the OFT within this. It was felt essential that consumers should be able to make a proper comparison between products and to do this clear intelligible information was required. The current rules relating to the APR did not adequately address this. Furthermore interest rates should be calculated on a standard basis, with clarity being provided by a summary box. These measures were aimed at increasing knowledge available to consumers, with the added proviso that consumers should be able to understand it.

It is obvious from debate preceding and following the Treasury Report that an important factor for Parliament in consumer protection is the provision of accurate and adequate information. Another major issue in relation to credit cards however is cost, especially transaction charges and penalties (for example on late payment).²¹⁹ Marketing practices, particularly unsolicited credit offers, credit card cheques and increases in credit limits that encourage people to overstretch themselves are also attacked as resulting in over-indebtedness.²²⁰ Ensuring fairness therefore is essential to combat these undesirable activities

We must... end the industry’s opportunity to exploit vulnerable people. We must ensure that the industry gives all credit card consumers a fair deal across the board²²¹

As far as Parliament was concerned what was needed was transparency, education, financial literacy, and change in lending practices with an effective and up-to-date regulatory framework.²²² The Treasury Committee, having come to its conclusions put pressure on the Government to produce a draft bill to action the proposals put

²¹⁸ Treasury Report (n 205) 137.

²¹⁹ Hansard HC vol 420 col 147 (22 April 2004 WH).

²²⁰ Hansard HC vol 420 col 149, col 153 (22 April 2004 WH).

²²¹ Ibid col 152 per James Plaskitt (Labour).

²²² Hansard HC vol 420 col 160 (22 April 2004 WH).

forward in the White Paper. The first draft of the Consumer Credit Bill was finally published in 2004.

Debate on the 2006 Act also provides a clear illustration of Parliament's present attitude to consumer credit law. Transparency and information are still highlighted as important for a competitive market and therefore consumer protection but it is the issue of unfairness that dominates.²²³ Whilst the new unfair relationship test is welcomed there is much criticism from MPs as to the fact there is no definition.²²⁴ The Government has said this is to prevent an impediment to the court being able to provide justice in every case²²⁵ and as the new test is broader, undue emphasis should not be given to one particular thing. The omission however has been seen as a 'fundamental flaw'²²⁶ and that in effect it will result in more court action;²²⁷ clear guidelines are needed. There is agreement between MPs and the Government that the test in the Unfair Terms in Consumer Contract Regulations and/or Unfair Commercial Practices Directive²²⁸ could be useful tools in helping to give direction. The disagreement comes in how they should be used. Whilst MPs want to see them embodied in some form within the new consumer credit legislation, the present Government would rather lenders simply turned to the existing Regulations for general guidance.²²⁹

This whole question about regulating unfairness also raises the more general issue as to the extent to which Parliament should set the boundaries within which consumer credit operates. This does not just concern unfairness but other areas as well, as is apparent from concerns about the powers of the OFT and the wide discretion it is given under the 2006 Act

²²³ Hansard HC vol 435 col 1407, 1431 (9 June 2005).

²²⁴ Hansard HC vol 430 col 495 (13 Jan 2005). Hansard HL vol 674 col 1038 (24 Oct 2005)—although there was some support for it being left to the courts Ibid col 1034, col 1040.

²²⁵ Hansard HC vol 435 col 1411 (9 June 2005).

²²⁶ Ibid col 1420.

²²⁷ Ibid col 1459.

²²⁸ Hansard HC vol 430 col 502 (13 Jan 2005); Hansard HC House of Commons Standing Committee D col 052 (23 June 2005).

²²⁹ Hansard HC House of Commons Standing Committee D col 052, 061 (23 June 2005).

There is a common thread running through a number of the amendments that the Conservative and Liberal Democrat Opposition have tabled to the Bill—that is, we are seeking more parliamentary involvement in the form of the regulation of consumer credit and rather less simply being left to the regulator.²³⁰

Parliament rather than the Office of Fair Trading should regulate how these issues are dealt with²³¹

The Government however disagrees. Its position is that the OFT does not have extensive rule making powers—these come from secondary legislation which is subject to parliamentary scrutiny²³² and that in any event ground rules with regard to how the OFT should act are laid down in the Enterprise Act 2002²³³ and the CCA itself. It is apparent that, in terms of the circumstances in which credit is provided Parliament wishes to remain closely involved with regulation.

The question of the powers of the OFT also raises another question—that of human rights. The Joint Committee on Human Rights²³⁴ has also considered the power given to the OFT with regard to the requirements on licensees. As far as it was concerned, the Consumer Credit Bill failed ‘to satisfy the requirements of legal certainty and also gives rise to a risk of disproportionate use of power in practice.’²³⁵ It was thought to be incompatible with Article 1 Protocol 1 of the Convention for Protection of Human Rights and Fundamental Freedoms (“ECHR”), which says that ‘every natural or legal person is entitled to the peaceful enjoyment of his possessions...’ Again however the Government disagrees,²³⁶ asserting that the powers fall within the exception to Article 1—the 2006 Act (then the Consumer Credit Bill) is not about taking away a licence but controlling the use of it.²³⁷ This is not the first time that consumer credit regulation has been considered against the

²³⁰ Hansard HL vol 675 col GC 303 (16 Nov 2005) per Lord Macauley (Conservative).

²³¹ Ibid col GC 305 per Lord Razzall (Liberal Democrat).

²³² Ibid col GC 306.

²³³ C 40.

²³⁴ The Committee was set up in 2001 to, inter alia, consider and report to Parliament on human rights issues.

²³⁵ Joint Committee on Human Rights ‘Legislative Scrutiny First Progress Report of Session 2005–06’ (HL–48 HC–560).

²³⁶ Hansard HC Commons Standing Committee D col 107 (28 June 2005).

²³⁷ Hansard HL vol 675 col GC312 (16 November 2005).

background of human rights. *Wilson v First County Trust Ltd*²³⁸ concerned an improperly executed agreement for a loan. The Court of Appeal had held s 127(3) of the CCA, which effectively prevents the court from enforcing an improperly executed agreement in certain circumstances was a contravention of Articles 1 and 6(1) of the First Protocol to the ECHR as enacted by the Human Rights Act 1998.²³⁹ The House of Lords however did not agree, judging that s 127(3) was compatible both with Article 1 (right to peaceful enjoyment of possession) and Article 6(1) (right to fair and public hearing with regard to civil rights).²⁴⁰

One other area of importance to Parliament is responsible lending—indeed some MPs call for a responsible lending test, data sharing being a large part of this.²⁴¹ A responsible lending test is not something that has been provided within legislation, rather Government is encouraging use of data between lenders, sharing MPs belief in its value in this regard. Responsible lending is particularly important with regard to the vulnerable. Vulnerability is seen almost entirely in terms of those with low incomes and their vulnerability to high cost credit and over-commitment.²⁴² ‘surely we are seeking to give particular protection to those in the lowest income bracket’²⁴³, ‘I want to highlight ...that poor people are in the main those who suffer from the current credit market.’²⁴⁴ ‘The Bill can play an important role in reducing the sum total of misery caused by poverty and the cost incurred by the general community’²⁴⁵ The Treasury Committee also saw low income and high cost credit as a problem. Indeed the Committee focussed on rates charged by the credit at some length during the examination of witnesses, finding the rates, at the least, uncompetitive.²⁴⁶

²³⁸ (2003) UKHL 40; [2003] 4 All ER 97

²³⁹ [2001] EWCA 633; [2002] QB 74.

²⁴⁰ Their Lordships felt that the lender still had access to the court to argue the enforceability of the agreement and that article 1 was not contravened as the section was proportionate to its aim of consumer protection. Section 127(3) will be repealed by s 15 of the 2006 Act, once it is implemented.

²⁴¹ Hansard HC vol 435 cols 1417, 1426, 1440, 1462, 1478 (9 June 2005).

²⁴² Hansard HC vol 430 cols 465, 488 (13 Jan 2005); Hansard HC vol 435 cols 1425–1429 (9 June 2005).

²⁴³ Hansard HC vol 435 col 1446 (9 June 2005).

²⁴⁴ Hansard HC vol 435 col 1447, 1452 (9 June 2005).

²⁴⁵ *Ibid* col 1454.

²⁴⁶ Treasury Report (n 205) 9.

Away from the specifics of the credit card industry, high cost credit was and is also accepted by Parliament as a major factor in extortionate credit and the unfair treatment of those in debt:²⁴⁷

Consumers, especially those on low incomes, pay a substantially higher price for credit than is warranted we must find some way of preventing people from being charged extortionate interest rates on their borrowing²⁴⁸

There is a further problem, in that the ombudsman does not rule on price—in other words on interest rates. That is clearly central to the problem of unfairness²⁴⁹

High cost credit, responsible lending, fairness and vulnerability; these are all issues bound up in the problem of over-indebtedness. It has been demonstrated that with regard to the review of consumer credit regulation, financial difficulty and vulnerability of consumers, especially when due to inexperience, low income or exclusion are the targets. In parliamentary debate over-indebtedness is regarded as a danger particularly for consumers who are poor or struggle to cope with credit; the real worries lie with consumer financial difficulty, inability to meet debt and vulnerability to these conditions.²⁵⁰

Is the 2006 Act then really about consumer credit at all or is it simply a means of legislating for the economic and social difficulties of consumers? Certainly it is in the area of consumer detriment that MPs concentrate, particularly in terms of social consequences. Whilst there is nothing in the 2006 Act that deals with the technicalities of the consumer credit as such, through concerns about over-indebtedness Parliament has concentrated on protection of the vulnerable. Amendment to the consumer credit legislation is effectively seen as protection for those who struggle with or cannot afford debt because of their own individual circumstances. A particular area that illustrates this is the issue of financial exclusion. Financial exclusion leads to expensive credit for those least able to afford

²⁴⁷ Hansard HL vol 653 col 1571 (21 October 2003); Hansard HC vol 391 col 277 (30 October 2002); Hansard HC vol 421 col 357 (12 May 2004).

²⁴⁸ Hansard HC vol 391 col 277 (30 October 2002 WH) per Mark Lazarowicz (Labour).

²⁴⁹ Hansard HC vol 435 col 1428 (9 June 2005) per Austin Mitchell (Labour).

²⁵⁰ As has been explained in ch 7 of this study.

it,²⁵¹ financial difficulty for those already in a vulnerable position and social exclusion.²⁵² In the Spending Review 2004 the Government made a commitment to tackle financial exclusion. The three main items on the agenda are to provide access to the following: mainstream banking services (such as a bank account); affordable credit; free face-to-face debt advice.²⁵³ The provision of affordable credit is seen as being assisted by providing a transparent and efficiently regulated market place,²⁵⁴ the overall aim of the White Paper. Indeed the 2006 Act itself has been referred to in the context of financial inclusion by the Government in Parliament

The Bill needs to be seen in the context of all the other work that is going on...This Bill is not just about credit; it is about the whole issue of financial inclusion²⁵⁵

We must remember that this Bill must not be seen in isolation, but in the context of the various cross-departmental initiatives on financial inclusion.²⁵⁶

The 2006 Act will indeed, once implemented, provide for a tighter licensing scheme, further transparency in agreements and greater ability to challenge agreements. It could be said that these provisions assist the consumer to deal with financial exclusion, rather than promoting financial inclusion, but even so, the aim of improving the financial and social position of the consumer is clear.

Although rarely stated as such, the approach is one of reinstating a balance in bargaining power not only for the consumer in general, but more particularly for the vulnerable consumer, in an attempt to prevent or ameliorate the consequences of over-commitment. Legislative amendments seek to reinstate the balance by empowering the consumer through information and reducing the opportunity of unfair practices and where this fails by providing means for redress. The aim is to

²⁵¹ The more expensive alternative credit market is the arena within which those on low incomes will take on credit. This is due to the fact such borrowers require small short term loans, a facility not provided by mainstream lenders. [2.9]

²⁵² [1.10]

²⁵³ Treasury Report (n 205) [1.1].

²⁵⁴ By increasing consumers awareness of the terms under which they take credit, and stamping out unfair/illegal practices. [4.6].

²⁵⁵ Hansard HC vol 430 col 453 (13 Jan 2005).

²⁵⁶ Hansard HC vol 436 col 1041 (14 July 2005).

reduce avoidable undesirable social consequences of credit provision and this is underlined by the part over-indebtedness has had to play within the Review. Unfairness however has become of great significance within this. It is no longer one factor to be taken into account within the aim of a competitive market and consumer protection but rather has become an issue to be dealt with in its own right. It could be said then that Parliament's amendments to the legislation do not have as their basis the regulation of credit but rather control, from a social aspect, of initiating factors, circumstances and consequences of credit.

5. CONCLUSION

This then has been an examination of consumer credit law from the advent of the CCA to the present day. Since 1974 there has been little in the way of substantive change to the regulatory framework. There have been minor amendments that for instance have allowed for changes in the way that the APR is calculated and that have increased the monetary limit of the CCA. There have also been various consultations in relation to other areas but these have not resulted in any substantial changes to the legislation. It was not until 2001 that a comprehensive reassessment of the consumer credit legislation was undertaken, resulting in the White Paper, some secondary legislation and the 2006 Act.

Transparency was the key at the time the CCA was passed and this is still recognised as an important factor today. Knowledge can be at least a partial solution to the problem of protecting the consumer whilst keeping the credit market a viable place to do business. It has been demonstrated elsewhere that the basis of the CCA was more one of control of market inefficiencies as a means of consumer protection, primarily through information and the instatement of equality of bargaining power. Whilst the social welfare of the consumer was important and fair treatment was seen as an element of this, unfairness was only really addressed in terms of preventing exploitation so ensuring an adequate balance between the parties.

Information however, whilst still seen as the most effective tool in ensuring competition,²⁵⁷ is no longer seen as adequate in terms of protecting consumers when they are in a vulnerable situation. This may be in part because what is seen as vulnerability has changed. At the time of the hire-purchase legislation and Crowther, any consumer was seen as vulnerable if in a less favourable bargaining position than the supplier. Adequate information to a large extent can remedy this. Now the idea of vulnerability centres on the consumer's position in society, whether due to their difficult economic or social circumstances. As the concern for such borrowers has increased, so the direction of focus has changed to one of fair treatment of consumers, particularly those whose credit provision takes place when the consumer's individual circumstances makes them susceptible to undesirable terms and/or creditor behaviour. In the strategy for tackling over-indebtedness the desire is for a fair efficient marketplace which will empower and protect consumers, provide affordable credit, usable legal processes, financial literacy and will encourage responsible lending practices; all aims of the White Paper. Within this, regulation of unfairness has an important role to play. Fairness within the market place is no longer seen purely as an element of ensuring competition, it is now seen as something to be preserved in its own right.

It seems that, in terms of legislation, Government has traditionally approached the issue of fairness as one of regulating market procedure and reducing market inefficiencies; formal regulation of unfairness at a general level has not featured as a prominent consumer protection tool. Greater attention however is now given to the innate unfairness that may exist within a particular contract. The new unfair relationship test demonstrates this. As with the extortionate credit provisions, the new unfair relationship test envisages both unfair agreement terms and the behaviour of the creditor as within its ambit, but now with much wider scope. Sections 137–140 of the Act applies to bargains that have 'grossly exorbitant' repayments or which 'grossly contravene principles of fair dealing'. In contrast, under section 19 of the 2006 Act procedure is more clearly identified and more widely cast as a causal factor of unfairness. Further more, in deciding what constitutes unfairness (whether procedural or substantive) whilst the question is once

²⁵⁷ The information provisions of the White Paper (n 4) state the reforms are to ensure a competitive marketplace [2.1].

again left to the courts, this time the judiciary are in effect given a much freer hand in terms of the factors they should take into account.

One particular emphasis of the extortionate credit provisions, the reference to price, in effect narrowed its application. This restriction does not exist in the new test. Yet although price as a factor seems to carry less relevance in terms of the proposed reform, MPs generally continue to focus on price as an indicator of unfairness. This is an attitude also evident within Europe, where there have been calls for the regulation of usury within European law from at least one institution. Indeed the approach taken towards the regulation of unfairness is an area in which the attitude of MPs and Europe seem to run in parallel. This is not only apparent with regard to the cost of credit but also with regard to definitions of unfairness itself. It is clear from parliamentary debate that there is support for a definitive approach to unfairness within the legislation. That this is Europe's approach is evident from the provisions of Directives dealing with unfairness, which provide some guidance on what will be subject to review. The Government does not however espouse this view, preferring to leave the detail to the judicature. One problem with this is that it is more difficult to predict with accuracy what will constitute unfairness within consumer credit. An idea of the direction the courts might take can however be gleaned from recent judicial decisions. It seems that good faith, or fair and open dealing and the relative bargaining power of the parties are likely to be highly significant in any consideration of whether a credit relationship is unfair under the new regime.

The idea of bargaining power still being an integral element of fairness suggests an emphasis on procedure. This direction is also evident not only to some extent from the areas in which reforms lie, with a large part of the 2006 Act dedicated to the licensing of lenders and policing their practices, but also within the new unfair relationship test itself. This suggested focus on procedure is also evident to some extent in Europe, the Unfair Commercial Practices Directive being an example. Indeed the majority of Directives that affect consumer credit relate to market practices. To what extent this indicates European influence in UK policy, however is unclear. European consumer policy²⁵⁸ is seen as important to the

²⁵⁸ Stated in the communication from the Commission COM 2002 208 final (n 92).

Commission's objective of creating economic dynamism and modernisation. In the same way the Government wishes to create a fair competitive environment where legitimate business can thrive. The emphasis on information and empowerment of consumers with the ability to make informed choice again reflects the direction of policy in the UK. Yet whilst opinion in Europe may display similarity in attitude to Parliament at backbench level, the Government demonstrates reluctance for the direction of Europe to take too firm a hold in UK consumer credit law. It has been shown that in terms of actual control of consumer credit, national legislation has and probably will in many respects continue to be more stringent than its European counterpart, particularly in relation to specific consumer protections. Conversely, when it comes to the question of unfairness, unlike general parliamentary opinion, the Government is less persuaded by the merits of definitive legislation, an approach favoured by Europe. The same divergence of approach has been demonstrated with regard to the impact of human rights legislation on consumer credit regulation. Concerns about the compatibility of UK legislation within consumer credit have been aired in Parliament. Again the Government has dismissed them.

This review of the continued development of consumer credit law has allowed a number of conclusions to be made about the direction of and parliamentary attitude to modern reform of legislative control of consumer credit. There is however no doubt that one issue dominates: consumer protection. This should be clarified, in that it is in fact protection of the vulnerable consumer that is the real concern of the legislature. It is from this underlying basis that the policy for reform emanates, from transparency and a competitive market to the regulation of fairness and the control of over-indebtedness. The vulnerable consumer is the individual that in effect drives all these issues, thus creating the impression that it is the social aspects of consumer credit for which the legislature is providing the regulatory framework. It has been shown that there have been a number of underlying elements to this, most noteworthy the fact that the regulation of unfairness in consumer credit contracts is now a specific target. Where Parliament will take the legislation next cannot be predicted with certainty, but it seems clear that the aim of preserving fairness will remain.

CHAPTER 9

CONCLUSION

A competitive and efficient financial sector, of which the consumer credit market is an important part, is essential to raise the level of economic growth in the UK economy. Our vision is to create an efficient, fair and free market where consumers are empowered to make fully informed decisions and lenders are able to compete on a fair and even basis.

This is the stated objective of the White Paper ‘Fair Clear and Competitive, The Consumer Credit Market in the 21st Century’ (“the White Paper”),¹ the result of the Consumer Credit Review set up in 2001. A Consumer Credit Bill (“the Consumer Credit Bill”) was drafted in response to this White Paper and brought before Parliament in 2005, now the Consumer Credit Act 2006,² being heralded as ‘the most significant reform of domestic consumer credit law in almost 30 years.’³ The purpose of this research has been to investigate parliamentary attitudes to consumer credit as legislation has developed leading to this latest reform. Within this, one particular factor in modern reform has received some emphasis, namely the concept referred to as over-indebtedness. Conclusions about the parliamentary approach to consumer credit and over-indebtedness can be reached by asking a number of pertinent questions. First, what themes run through Parliament’s attitude to and treatment of consumer credit as the regulation has evolved? Secondly, what similarities can be identified between earlier parliamentary reaction and that of the present day? Thirdly, what predictions, if any, can be made about the future development of consumer credit legislation and parliamentary attitudes to it?

It is apparent that a number of issues can be clearly identified as present. The most obvious is the growth of consumer protection as an aim of legislative control. In the 1800s, the period in which the focus of this study begins, it could be said consumer credit existed in the form of pawnbroking credit and secured loans given to individuals. The persona of the consumer as such, however, did not yet exist and

¹ Cm 6040.

² C 14.

³ Hansard HC vol 429 col 452 (13 Jan 2005).

protections designed primarily for those who made use of the credit available were limited. However as the interests of the borrower became more visible and the methods of providing credit to individuals for private purposes developed, this position changed. The idea of consumer protection steadily developed over the course of legislative development, with one element more than any other developing in significance, namely the vulnerable consumer. The major influence underlying consumer credit legislative reform has developed into protection against the difficulties which have confronted and continue to challenge the consumer, and the methods by which such protection can be provided. Of these ensuring equality, transparency and fairness are regarded as key, not only in providing safeguards for the vulnerable but also in any programme of general consumer protection.

Protection for the consumer with regard to consumer credit is, in essence, about safeguarding the borrower where the credit is provided to him/her as an individual.⁴ The credit caught by the Usury Laws⁵ in the early 1800s fell within this, although if credit was given for private purposes it attracted less attention—the main issue was the concern for a particular type of borrower (i.e. the land-owner or merchant, who were more likely to borrow for commercial reasons) rather than the purpose of the credit which had been afforded to him. Pawnbroker's credit however was used primarily for private purposes, not only for requirements of every day life but also for general consumption such as entertainment⁶ and the purchase of goods. Whilst parliamentary debate in relation to pawnbroking was sparse, the Select Committees⁷ set up to consider its regulation show that protection of the borrower was an issue that was regarded as important. This however was not to be to the exclusion of the interests of the trade itself. It was firmly believed a balance needed to be struck between the ability of the pawnbrokers to operate in a free market and ensuring protection for their customers.⁸

⁴ Borrowing by incorporated bodies is excluded from the Consumer Credit Act 1974 c 39 ss 8(1), 189.

⁵ Act of Queen Anne 1713 (12 Anne 2 c 16).

⁶ Eg alcohol!

⁷ 1870 Select Committee on the State of the Laws affecting the Pawnbroking Trades 1st Report HC (1870) 377; Report from the Select Committee on the State of the Laws affecting the Pawnbroking Trades' HC (1871) 419; 'Report of the Select Committee on the Pawnbrokers Bill' HC (1872).

⁸ Report from the Select Committee on the State of the Laws affecting the Pawnbroking Trades' HC (1871) 419, v.

At this stage then the interest of creditors carried just as much weight, if not more, than borrowers. This is also evident in the first two pieces of 19th century bills of sale legislation. The Acts of 1854⁹ and 1878¹⁰ had as their primary aim the protection of creditors, particularly against fraudulent preferences in a debtor's bankruptcy. However within only a few years of the latter Act there was a notable shift in emphasis. The often-harsh terms of the bills of sale used by money-lenders started to attract Parliament's attention, in particular because it affected the poorer borrower who only required a small loan. Discussions now started to centre on the borrowers' welfare, and questions were being asked about the accepted principles applied to such contractual relationships, in particular the role of freedom of contract. Interests of the borrower, as a priority over those of the lender, became even more marked during Parliament's consideration of the money-lending legislation. This may have had something to do with the lack of approbation money-lenders as a class experienced, but it certainly tipped the balance firmly in favour of the borrower. By the time the first hire-purchase regulation was brought before Parliament in the 1930s, it can be said with confidence that the underlying ethos to the legislation was that of protection of the borrower and removal of trade abuses. Interests of the hire-purchase business were not ignored, but as malpractice became more visible so did concerns about its possible consequences, particularly the social repercussions.

Concern for the borrower in preference to the creditor was perhaps no more obvious than in Parliament's reaction to the development of the debt enforcement and bankruptcy legislation. A connection between default and credit was already recognised in the 1800s, it being acknowledged that the regulation of debt was crucial to the credit system, which in turn, it was considered, provided the basis of the British economy.¹¹ Indeed throughout the history of consumer credit legislation the value of credit has never been in doubt. This is evident not only in the debates relating to money-lending and hire-purchase, but also in parliamentary attitudes to bankruptcy and debt enforcement. In terms of the borrower in debt and struggling with repayment, rather than simply discouraging debt and fortifying the position of

⁹ 17 & 18 Vict c 36.

¹⁰ 41 & 42 Vict c 31.

¹¹ Parl Debs (series 3) vol 80 cols 1011–1019 (29 May 1845).

the aggrieved creditor, the 19th century ethos behind the Bankruptcy Act of 1883¹² allowed for honest failure only punishing irresponsible, reckless or criminal behaviour. This basic principle still has influence and is reflected in the modern reforms of the bankruptcy legislation.¹³ What has changed is the emphasis; the aim now is to actively encourage risk taking, as long as it is responsible.¹⁴ The policy behind reforms to other debt enforcement procedures was also pro-debtor, as long as the debtor had not entirely and/or carelessly contributed to his own misfortune. Current suggested reform to debt enforcement legislation, in many respects remains in the debtor's favour,¹⁵ reflecting the trend in the proposed consumer credit reform now being endorsed by Parliament.

In legislative reform of consumer credit, giving power to the consumer through various protective measures gradually became the primary goal. Even though consumer power was only clearly identified in name during the 1960s and 1970s, its influence was already discernible by the time of the first Hire-Purchase Act in 1938.¹⁶ In many respects the hire-purchase legislation, progressing the direction taken by the Moneylenders Acts 1900–1927,¹⁷ provided the basis for the modern consumer credit regulation contained in the Consumer Credit Act 1974 (“the CCA”), particularly in terms of the influences behind much of the reform. As the law distanced itself from traditional ideas of freedom of contract, societal considerations were now the priority. Whilst the interests of commerce were never completely ignored, as consumer dominance grew business influence receded. That the present day consumer now enjoys a position of power in terms of policy underlying current reforms cannot be disputed, although the Government still makes reference to

¹² 46 & 47 Vict c 52.

¹³ The Insolvency Acts 1985–1986 had the aim of adapting the law to the modern world of financial failure. They have themselves been adapted in favour of the personal insolvent deserving of a ‘fresh start’, through the amendments of the Enterprise Act 2002 c 40.

¹⁴ Secretary of State for Trade and Industry ‘Insolvency—A Second Chance’ (Cm 5234, 2001).

¹⁵ DCA ‘A Choice of Paths better options to manage over-indebtedness and multiple debt.’ (20 July 2004) proposes a three pronged scheme dependant upon the ability of the debtor to pay, with debtor friendly relief for those who genuinely cannot meet their obligations.

¹⁶ 1 & 2 Geo 6 c 53.

¹⁷ 63 & 64 Vict c 51; 1 & 2 Geo 5 c 38; 17 & 18 Geo c 5.

creating a competitive environment where legitimate businesses can thrive.¹⁸ This is not just the position with regard to UK reform however, the increasing dominance of consumer welfare also obvious within European law. Amendments to the Consumer Credit Directive, at present under negotiation, are driven by a desire not only for a single and stable EU consumer credit market, but also for increased levels of consumer protection.¹⁹ This direction is also obvious in other areas, the Unfair Commercial Practices Directive²⁰ being a case in point. This Directive, which is a maximum harmonisation measure,²¹ prohibits unfair practices where they affect the consumer's economic behaviour or transactional decision making.²² The importance of consumer interests seems set to continue, with the European consumer policy strategy 2002–2006 having set out its objectives of inter alia 'high levels of consumer protection' and 'effective enforcement of consumer protection rules'.²³

It would seem that parliamentary concerns for borrowers have always emanated from situations in which borrowers may be susceptible to some form of unjustified detriment.²⁴ When Parliament was considering the Usury Laws, arguments both for and against the control of interest were based on the resultant disadvantage that would be suffered by land-owners who had taken credit via secured borrowing. The customer of the pawnbroker and more emphatically the client of the money-lender aroused the interest of Parliament because they found themselves in a situation where they experienced disproportionate disadvantage due the credit they had taken on. The same can be said for the consumer targeted by the hire-purchase and current consumer credit legislation—the idea behind consumer

¹⁸ For example the White Paper (n 1) 6.

¹⁹ Commission Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers COM 2002 443 final (11 September 2002) [2.1].

²⁰ Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22.

²¹ This means there is no room for manoeuvre for Member States in terms of imposing more stringent terms than those provided for in the Directive.

²² Arts 2 (e), 5–8.

²³ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions [2002] OJ C 137/2.

²⁴ One reason for the reform of the CCA is given as the fact it made inadequate provision against consumer detriment (although it is accepted this itself is hard to measure). DTI 'Consumer Credit Bill, Regulatory Impact Assessment' [4].

protection here has been and is that a consumer merits greater protection the most when susceptible to unfair treatment due to undesirable circumstances.

This in essence has vulnerability as its basis. The idea of the vulnerability of consumers however has changed during the development of the consumer credit legislation. Initially, as shown by Parliament's approach to the Usury Laws, the borrower's vulnerability, as such, simply occurred when they were susceptible to unnecessary and extreme financial inconvenience.²⁵ When Parliament came to consider the pawnbroking regulation however, a distinction was starting to be made between those borrowers who might need basic protection, whether through market competition or regulation, and those who justified greater legislative intervention. There was an understanding by the Select Committees and MPs of this period that pawnbroking was not only important but also a necessary form of credit for the poorest in society, providing as it did small, short term loans. These loans were however more expensive for the pawnbroker to service. Originally this had been recognised in Parliament by the fact that the rates allowed to pawnbrokers were always higher than that allowed by the Usury Laws (at least for lower amounts). Once the Usury Laws had been repealed however, the smaller loan provided for by the pawnbroker was in fact more heavily regulated than any other loan. At this point the idea of protection for the vulnerable was becoming a recognisable issue, with only those less so being left to the mercies of market forces. Vulnerability here was regarded as synonymous with poverty, the poorest in society being most likely to use the pawnbroker as a necessity. It was being recognised that borrowers could come from different groups, with differing needs; pawnbroking was a distinct form of credit required by a particular section, primarily the lower section, of the market. Because of their position, the customers of pawnbrokers and later those of money-lenders, were seen as being more susceptible to unscrupulous behaviour and costly credit—this was something against which they needed to be protected.

With the development of the hire-purchase legislation there was a noticeable change in emphasis. Parliament no longer saw vulnerability as primarily based on the

²⁵ At this stage it was the law itself that was regarded by the majority as causing this situation to arise. By the 1850s the Government was referring to the Usury Laws as the inconvenient remnants of a law. *Parl Debs* (series 3) vol CXXXV col 1347 (4 August 1854).

economic straits of the borrower. Now the consumer was seen as 'vulnerable' in any situation where he/she might be subject to unconscionable conduct or terms, or suffer undesirable consequences from being in a weaker bargaining position, for example when informational deficiency was a factor.²⁶ The most obvious illustration of this was the concern for the plight of the housewife, seen by Parliament as a "captive" customer for the more unscrupulous doorstep trader, selling goods on hire-purchase.²⁷ These conditions of course (although not necessarily through the medium of doorstep sales) often existed with regard to those who made use of the facilities provided by the pawnbroker or money-lender. Many borrowers from these sources were those who, due to their circumstances, did not enjoy parity of bargaining power.²⁸ The difference with hire-purchase is that it was felt the vulnerability itself to these possibilities raised the question of protection, regardless of why it occurred in the first place. The fact the borrower felt "pressured" into taking the loan, for whatever reason, was enough to merit protective action.

When the Crowther Committee undertook its extensive review of the law in the late 1960s and early 1970s²⁹ the distinction between borrowers, first recognised during the reform of the pawnbroking legislation, was acknowledged. When considering the policy basis for consumer protection, the Committee differentiated between the underlying purposes of a loan obtained by an individual; it was recognised that financial accommodation given to help an individual in need, as a result of unforeseen events, was quite different from that given to someone who merely wished to anticipate future income as a means of maximising his/her resources. It would appear the contrast between susceptibilities of different types of credit customer was acknowledged. Whilst the capable and more prosperous individual was still seen as being more able to adequately protect his or her interests, the vulnerability of other consumers was regarded as a problem that required action.³⁰ However the Crowther Committee still regarded consumer protection as

²⁶ Eg Hansard HL (series 5) vol 109 col 842 (2 June 1938); Hansard HC (series 5) vol 650 cols 1740, 1804 (8 December 1961).

²⁷ Hansard HC (series 5) vol 689 col 1124 (18 February 1964).

²⁸ See text to n 81 ch 4 of this study; text to nn 53–57 ch 3 of this study.

²⁹ Committee on Consumer Credit 'Consumer Credit: Report of the Committee' (Cmnd 4596, 1971).

³⁰ This was especially with regard to those more likely to become over-committed eg the poorly educated or those on lower incomes.

appropriate not only against unscrupulous behaviour, but also where there was an inability to make a proper choice due to, for example, a lack of information i.e. an unequal bargaining position. The aim was to provide a fair balance between lender and borrower, and protection for the consumer was enunciated as based on three principles: redress of bargaining inequality (primarily through adequate information) the control of trading malpractices (through licensing and the extortionate credit provisions) and the regulation of remedies for default.³¹

The approach of recognising the distinction between more vulnerable consumers and those capable of protecting their interests is amply illustrated in the latest legislative reforms. Whilst the Consumer Credit Act 2006 will, once implemented, provide further consumer protection in terms of more stringent regulations with regard to information and licensing and a new unfair relationship test, some consumers are given the ability to exempt themselves from the Act's protection. Individuals³² who are worth more than a certain amount, or who borrow for business purposes over a certain amount, can, by making the appropriate statement, gain voluntary exemption from most of the Act's provisions. This has been introduced not only to provide a less restrictive and more convenient forum for transactions of large amounts³³ but also because it is perceived these customers can look after themselves, either because they can afford good quality advice or they have the necessary knowledge or business acumen.³⁴

Vulnerability is an integral factor in one of the most important modern concerns with regard to consumer credit, namely over-indebtedness. In parliamentary debate over-indebtedness is regarded as a danger for individual consumers, especially the poor or those who struggle to cope with their credit commitments because of a lack of experience, knowledge or mental ability. These individuals are regarded by Parliament as vulnerable consumers as they run a greater risk of falling

³¹ Crowther Committee Report (n 29) [6.1.15–6.1.16].

³² Whilst the CCA applies to a credit agreement made by an individual, which may include a partnership (to be restricted to two or three partners by the 2006 Act) or other unincorporated body, the exemption for high net worth individuals is only available for those debtors who are natural persons—clause 16A (1).

³³ The fear being that otherwise large business would be driven off shore—Consumer Credit Bill RIA (n 24) [50.3].

³⁴ Ibid [51.5].

foul of unfair practices and unmanageable debt. The concern, essentially, is consumer's financial difficulty, inability to meet debt and vulnerability to these circumstances. Vulnerability for the purposes of the consumer credit legislation has therefore gone through another metamorphosis. At the time the CCA was passed, it was accepted some consumers were more prone to experiencing problems with credit than others. Yet to some extent all consumers were seen as vulnerable where they did not enjoy equality in bargaining power; this was the basis of the general consumer protection. Now that the underlying consumer protections are in place, it seems the vulnerable consumer is once more seen in terms of those on low incomes or at an intellectual or educational disadvantage, thus associating vulnerability once again with the social and economic conditions that cause the susceptibility in the first place.

Over-indebtedness provides a clear illustration of this. The legislative methods for dealing with the problem do not however differ that greatly from those of the Crowther Committee: further requirements for information, a new unfair relationship test and tighter licensing regime are all provided for in the Consumer Credit Act 2006.³⁵ Although over-indebtedness itself has never been universally defined, it appears that its individual elements have been the focus of much of the consumer credit reform. Concerns about over-indebtedness have not only highlighted the vulnerable but also their exposure to unfairness. Whilst it has been implicitly accepted that legislation is not the key to preventing over-indebtedness/financial difficulty, MPs agree with the Government that contributory elements such as lack of transparency and unscrupulous lenders (in other words unfair practices) can be controlled by regulation. Protection of the vulnerable therefore, born at least partly out of the desire to minimise over-indebtedness and its consequences, emerges as one of the major influences behind the unfairness and transparency provisions of the new legislation.

³⁵ In terms of proposed changes to default regulation, whilst covered by the White Paper, they are not included within the consumer credit legislation. These developments are dealt with under the auspices of the DCA and the Insolvency Service, which have produced their own suggested reforms, including the introduction of a debt relief scheme and reform of the court based Administration Order Scheme. DCA 'A Choice of Paths: better options to manage over-indebtedness and multiple debts' Consultation Paper (July 2004).

Fair treatment of the borrower is an issue that has been present throughout parliamentary debate on consumer credit. From the land-owner in the 1800s, through to the over-indebted consumer of today, unfair behaviour of creditors has been a factor in reform. The nature of control has however changed as the legislation has developed. The perhaps most easily recognised form of control has been that of capping interest rates. This was certainly the method used by the Usury Laws and also by the Pawnbrokers Acts although by the Act of 1872 other ways of ensuring a degree of fairness for borrowers were also introduced. An interest rate cap does however have disadvantages. The major argument against it is that it can have the effect of excluding certain consumers i.e. those who constitute high risk custom, from the regulated market.³⁶ Yet these are the borrowers that in the main are most in need of protection from unfair behaviour. This problem is the most prevalent for poor borrowers, those who obtain their credit from the lower end of the market. Inevitably such credit is more expensive than that of the mainstream lender, due to the increased risk of non-payment and costs of servicing the type of loan required, usually small short-term credit. This was tacitly recognised by the pawnbroking Select Committees, as allowable pawnbrokers' rates were higher than those allowed by the Usury Laws. In the later consideration of the regulation of money-lenders, a maximum interest rate was openly rejected by the 1898 Select Committee;³⁷ they did however introduce the concept of being able to re-open a bargain if it was harsh and unconscionable and within this they suggested levels above which the rate was *prima facie* unreasonable.³⁸ Many MPs objected to this because it did not allow for the nature of small loan accommodation or risk assessment. In the end however a rate of 48% was provided by the Moneylenders Act 1927,³⁹ Parliament allowing the courts a benchmark when considering what was harsh and unconscionable.

It is in the approach to this element of unfair treatment of consumers that a divergence in approach between Government and the rest of Parliament can be found in modern consumer credit reform. Whilst the Crowther Committee suggested

³⁶ Eg D Cayne and M.J Trebilcock 'Market Considerations in the Formulation of Consumer Protection Policy' (1973) 23 University of Toronto Law Journal 396.

³⁷ HC Select Committee on Money-lending 'Report of the Select Committee on Money-lending HC (1898) 260.

³⁸ Although this was removed from the Bill which followed the Select Committee's Report.

³⁹ 17 & 18 Geo c 5.

retaining 48% as a benchmark for harsh and unconscionable conduct, the Government did not include it in the CCA, citing the diversity of loans covered by the Act as the reason.⁴⁰ There was however a difference in MPs' reaction compared to earlier reform. Now, extortionate credit being seen as a burden on the most vulnerable in society, interest rate caps were seen as a convenient and practical way of keeping the cost of credit down. This divide in parliamentary approach is still very much in evidence today, with many MPs expressing a desire to have control over the charging of high interest rates. High credit cost is seen as the epitome of unfairness. The Government however disagrees and has resisted all calls so far for the return to an interest rate maximum.⁴¹

The issue of interest rate capping is demonstrated as having a connection with another major form of protection against unfairness—the ability to re-open an unfair agreement. This question first arose when Parliament considered the regulation of money-lenders under the Moneylenders Act 1900. The argument centred on whether or not freedom of contract, up until this point a dominant philosophy, was appropriate for money-lending transactions, bearing in mind the abuses that were taking place in the market place. Parliament's reaction, by supporting the courts' ability to re-open harsh and unconscionable contracts, illustrates a move away from the dominance of laissez-faire and the freedom of contract ethos.⁴² It could be said the Pawnbrokers Act 1872,⁴³ and its retention of an interest rate, was a first indication of a retreat from the belief in complete autonomy of the individual to contract on any terms, but it was the Moneylenders Act 1900⁴⁴ which signalled the real change of direction. It seems that now the legislature was firmly of the opinion that freedom of contract should not be the maxim upon which consumer credit transactions were based, an opinion later echoed by the Crowther Committee.⁴⁵

⁴⁰ 'Reform of the Law on Consumer Credit' (Cmnd 5427, 1973).

⁴¹ Consumer Minister 'No Interest Rate Ceiling For Now' Press Release 2004/315.

⁴² Freedom, as part of the general laissez-faire creed, up until the late 1800s had been the pre-eminent doctrine dictating the law of contract. D Sugarman and GR Rubin 'Towards a New History of Law and Material Society in England 1750–1914' in GR Rubin and D Sugarman *Law and Economy in Society* (Professional Books Limited Abingdon 1984); R Stevens *Law and Politics, The House of Lords as a Judicial Body 1800–1976* (Weidenfield and Nicolson London 1979) 139.

⁴³ 35 & 36 Vict c 93.

⁴⁴ 63 & 64 Vict c 51.

⁴⁵ [6.1.12].

Sanctity of contract, initially regarded as important as freedom of contract, also received similar treatment in the 19th century. In terms of the debt that resulted from the original credit provision, sanctity of contract was the overriding principle. To become bankrupt or to fail to pay amounts due in effect was a breach of contract and regarded as highly undesirable, as is demonstrated by the fact that non-payment of a debt was, under the insolvency procedure, a criminal act for at least the first half of the 19th century. The approach to the issue of the payment of debt had an underlying idea of 'commercial morality'. Honouring a contractual term was an ethical matter, particularly between parties in business relationships. Commercial morality, however appeared to be less of an issue for the 'consumer,' as the idea of rehabilitation of the 'honest' debtor gained momentum. The morality of honouring credit commitments, nevertheless, was and still is regarded as relevant to the law of default as a whole. By continuing to condemn fraudulent and wilful refusal to pay debt through current debt recovery legislation, parliamentary attitudes illustrate that credit attracts both a moral and legal duty, a duty which, enforced appropriately, forms an indirect means of credit control. It supports responsible borrowers, who through no fault of their own find they cannot honour their credit commitments, thus allowing them the freedom to take calculated risk, whilst discouraging the irresponsible borrowing and ultimate default of the careless consumer.

It appears therefore that the sanctity of contract, as freedom of contract, now has a reduced role to play in consumer credit agreements. Whilst the Crowther Committee supported freedom of choice for the individual, freedom of contract was felt to be inappropriate when it came to protection of the consumer.⁴⁶ Under the hire-purchase legislation Parliament had given the consumer the right to cancel a contract within a certain amount of time. This effectively allowed the borrower to cancel an agreed bargain and extricate himself from a commitment that may have been entered into in unfair circumstances. The Crowther Committee and the CCA retained this consumer power. They also preserved the courts' ability to re-open credit bargains provided by the Moneylenders Act 1900, by encompassing the principle in sections 137–140 CCA under which agreements could be re-opened where they were

⁴⁶ [6.1.12]

extortionate i.e. where charges were grossly exorbitant or the agreement grossly contravened the principles of fair dealing.⁴⁷

These modern developments appear to suggest that Parliament was now pinpointing unfairness itself as a separate concept rather than simply controlling particular elements of the market that might lead to unfairness. It is not clear however that at this stage Parliament actively wished to establish a general policy of regulating unfairness at the time of the CCA. In terms of procedure, whilst unfairness was controlled indirectly by the consumer's right of withdrawal, unfair creditor behaviour was regulated by a licensing system with sanctions for malpractice. In terms of substance, Parliament allowed the direct regulation of unfair contract terms by allowing the court to re-open extortionate credit bargains. These methods can however perhaps be explained as a means of remedying market failure, rather than having the conscious aim of regulating unfairness per se;⁴⁸ certainly the control of lenders through licensing demonstrates control of market behaviour. It is however possible to regard the extortionate credit provisions as an indication that regulating unfairness was now the aim. Nevertheless, it should also be borne in mind that the main thrust behind the Crowther Committee's reforms was to provide protection by tackling lack of competition and incidence of inequality by reducing consumer ignorance through targeting asymmetries of information—in other words dealing with market imperfections. The way forward was seen as a 'properly conducted and efficient consumer credit industry', the objective being to 'create a competitive environment which will provide the maximum scope for future development, promote the efficient use of resources and offer the incentive for innovation and experiment'.⁴⁹

It could be argued then that the approach of Parliament and the Crowther Committee up to this point was to regulate market behaviour as a means of protecting the consumer rather than a desire to regulate unfairness as an individual

⁴⁷ CCA 1974 ss 137–140. These sections will be repealed and replaced by the unfair credit relationship test in s 19 of the Consumer Credit Act 2006, although transitional provisions do allow for their continued use for certain agreements already in force.

⁴⁸ It has been suggested there is some doubt whether legislative control of substantive fairness has in fact as its underlying basis the regulation of market failure. H Collins *Regulating Contracts* (Oxford University Press, Oxford, 1999) 257.

⁴⁹ Crowther Committee (n 29) [3.8.14].

issue. That being said, whether or not the real aim was to control unfairness as a separate concept, fairness to the consumer was now a key factor in parliamentary attitude to any measure designed to protect the consumer in credit transactions. This has been never more so than in relation to the present, though yet to be implemented, consumer credit reforms produced by the Government. The new unfair relationship test envisages both unfair agreement terms and the behaviour of the creditor as within its ambit, but now with much greater latitude than the original extortionate credit provisions of the CCA.⁵⁰ In section 19 of the Consumer Credit Act 2006, procedure is more clearly identified and is given wider scope and emphasis as a factor of unfairness. A further question might be posed at this point—whether the refined target is in fact procedural unfairness rather than matters of substance. There is certainly some focus on procedure, and this approach is not only apparent in section 19 but also in other areas of reform provided by the White Paper. There are further information requirements, such as those relating to information to be supplied during the course of the agreement, on default and those provided by the secondary legislation.⁵¹ A large portion of the Consumer Credit Act 2006 is devoted to the licensing regime and the new ADR procedure. These all help to give the impression of an emphasis on fairness in procedural matters. It is true that substantial unfairness is in effect given a wider term of reference in section 19. The seeming orientation towards price in the extortionate credit provisions in effect narrowed its application; this restriction is not carried through to the new test. However, even the test in section 19 relates to the relationship between the creditor and the borrower, in other words the circumstances surrounding the contract; agreement terms are only one factor in establishing if the unfair relationship exists.⁵²

Although price as a factor seems to carry less relevance in terms of reform, it is still regarded by MPs as incredibly important and to all intents and purposes as an indicator of fairness. This tendency to narrow the concept of unfairness to clearly demarcated situations is also apparent with regard to the question of a legislative

⁵⁰ Sections 137–140.

⁵¹ Eg The Consumer Credit (Advertisements) Regulations 2004 (SI 2004/1484) and The Consumer Credit (Agreements) (Amendment) Regulations 2004 (SI 2004/1482).

⁵² There is discussion about whether substantive fairness can be distinguished from procedural fairness as a separate concept; for example S Smith 'In Defence of Substantive Fairness' (1996) 112 LQR 138.

definition. Whilst backbench MPs and peers are keen to see consumers protected against unfair conditions and behaviour, they require this to be provided within clear parameters. It is evident from parliamentary debate that there is support for a legislative definition of unfairness, yet this is resisted by Government, who would rather leave the finer detail to the judiciary under the auspices of the unfair credit relationship test. This situation is in fact nothing new. When the 1898 Select Committee on money-lending first introduced the idea of allowing courts to re-open agreements, it declined to specify the criteria within which this power would operate. As in the current debates on the Consumer Credit Act 2006, MPs did not approve of this approach, feeling that it would produce dangers of inconsistency and uncertainty.

One other way in which Parliament has strived to protect the consumer against unfair treatment, is by addressing the overriding likelihood that inequality of bargaining power will have contributed to these circumstances. Indeed the Crowther Committee saw the task of the law as maintaining a fair balance between creditor and debtor.⁵³ An essential element in rectification of such inequality has been regarded by Parliament as a matter of correcting informational deficiencies—in other words transparency. In the late 19th century there was already a developing idea of information as an efficient means of borrower protection. This predominance of information as an essential tool has remained with Parliament throughout the subsequent development of the consumer credit regulation. During the progression of the hire-purchase legislation it is quite apparent that an educated and knowledgeable consumer was deemed to be able to protect himself more efficiently against exploitation and/or unfairness. When it came to further reform, although other protections were introduced and more stringent provisions favoured by some MPs, it was ‘truth-in-lending’ which united Parliament in their attitude towards protection of the borrower.

It is clear then that ensuring transparency was a paramount concern at the time the CCA was passed and it is still recognised as an important factor today. Information however, whilst remaining the most effective tool in ensuring

⁵³ Crowther Committee (n 29) [6.1.16].

competition,⁵⁴ is no longer seen as adequate on its own when considering protection of vulnerable consumers. This may be in part because what is seen as vulnerability has changed. When Parliament was considering the hire-purchase legislation and the Crowther Committee's recommendations, it was felt inequality in bargaining power seen as a major cause of consumer vulnerability at all levels, could be rectified by ensuring adequate information. However the idea of vulnerability now has at least part of its basis in the consumer's position in society, whether economic or social. As the concern for such borrowers has increased, so the focus has changed from simply ensuring freedom of choice and equality, thus maintaining a healthy competitive market, to directly targeting unfair treatment, particularly for those whose individual circumstances make them susceptible to undesirable terms and/or creditor behaviour. Fairness within the market place is no longer seen purely as an aspect of ensuring competition, it is now seen as something to be valued in its own right.

Since the Crowther Committee's extensive review and the passing of the CCA, whilst there have been some minor amendments,⁵⁵ until now there has been little in the way of substantive change to consumer credit regulation. It was not until 2001 that a comprehensive reassessment of the consumer credit legislation was undertaken, resulting in the White Paper, some secondary legislation and the Consumer Credit 2006. There is no doubt that there is, at present, one issue that dominates reform: consumer protection, or rather protection of the vulnerable consumer. The personal repercussions of credit and debt for this particular consumer seem to drive the underlying issues, such as transparency, a competitive market and unfairness, thus creating the impression that it is the social aspects of consumer credit that concern Parliament. This conclusion is certainly borne out by the debates on consumer credit and its regulation, particularly with regard to the issue of over-indebtedness. It is not however purely within the confines of consumer credit legislation that this trend can be detected. The provision of consumer credit is, in the main, regulated by one piece of legislation, the CCA as amended. However in the event of the borrower breaching the contractual terms of payment, whilst the CCA

⁵⁴ The information provisions of the White Paper state the reforms are to ensure a competitive marketplace (n 1) [2.1].

⁵⁵ There have been minor amendments that for instance have allowed for changes in the way that the APR is calculated and that have increased the monetary limit of the CCA.

might deal with the initial stages of procedure should the borrower default,⁵⁶ it is the general procedural rules of the County Court, (the Civil Procedure Rules),⁵⁷ the Insolvency Acts 1985–1986 and the Enterprise Act 2002 which provide the detail. From the early days of insolvency and bankruptcy law reform it was clear Parliament felt unhappy with the social repercussions of bankruptcy and insolvency. These could be severe and Parliament did not like them unless they could be truly justified. Social problems that credit and the resultant debt can cause have also been considered as relevant in the various recent reforms that have taken place, as is illustrated by the Enterprise Act with its emphasis on “fresh start.” The latest reforms to the County Court procedures also bear testament to this direction with emphasis on debtor-relief schemes for those who truly cannot pay.⁵⁸

This attitude to consumer credit as a social issue brings the research to the question of where reform may lead next. It is clear that transparency, a competitive market and empowerment of consumers are seen as of vital importance, having developed from a gradual change in emphasis in the approach of Parliament to credit. However it is obvious that within this, protection of the vulnerable consumer from unfair practices and undesirable consequences, particularly those of a social nature, have a dominant influence. There seems no doubt the social aspects of credit provision will remain a leading factor in any debate on reform; this is now an established position in parliamentary attitude. Certainly when the opportunity to consider the more technical aspects of consumer credit has arisen, the Government has been unwilling to respond and Parliament in general has not attempted to take the matter further. Hire-purchase is a good illustration of this. The Crowther Committee was keen to reconsider the legal form of hire-purchase, the Government declined.⁵⁹ During the Consumer Credit Review, again the question of hire-purchase arose, specifically with regard to voluntary termination of agreements.⁶⁰ Again the

⁵⁶ The CCA sets down the initial procedures upon default before recourse can be made to the courts, for example the provision of a default notice, ss 87–93. These provisions will receive some amendment under the Consumer Credit Act 2006, when implemented, relating to information to be provided and extending the period within which any breach of the agreement must be remedied, ss 9–18.

⁵⁷ CPR 40 relates to the enforcement of judgment debts

⁵⁸ DCA Consultation Paper (n 15).

⁵⁹ ‘Reform of the Law on Consumer Credit’ (Cmnd 5427, 1973) [8].

⁶⁰ DTI ‘A Consultation on Voluntary Termination of Hire-Purchase and Conditional Sale Agreements under the Consumer Credit Act 1974’ (2004).

Government shied away from further investigation. This seems to illustrate further the primary aim of consumer credit regulation as being not legal technicalities but protection of the consumer, whose well-being is after all judged on his/her social circumstances.

There is, lastly, one other factor that contributes to the tenacity of consumer interests as the essential reason for consumer credit regulation. Europe is at present engaged in a continuing programme of consumer protection reform, the aim of which is to ensure 'high levels of consumer protection',⁶¹ 'effective enforcement of consumer protection rules'⁶² and 'involvement of consumer organisations in EU policies'.⁶³ The Consumer policy strategy 2002–2006⁶⁴ sets out how it is envisaged these objectives are to be achieved, the ultimate motivation being to ensure consumer interests are considered within other EU policies and to make certain consumers receive maximum benefit from the single market.⁶⁵ It is not however just in terms of over-arching policy that Europe may have influence. The approach taken towards the regulation of unfairness is an area in which the attitude of MPs and Europe seems to demonstrate some parallel. The new unfair credit relationship test is drafted widely and as a result MPs in the UK Parliament have continually pressed for a more definitive provision. Europe seems to take this approach to unfairness as is illustrated by a number of consumer orientated Directives. The Unfair Contract Terms Directive⁶⁶ provides some guideline as to unfairness, referring to good faith, a significant imbalance in the parties' rights and obligations and detriment to the consumer.⁶⁷ It also provides a list of terms that may indicate unfairness.⁶⁸ The

⁶¹ Inter alia through harmonisation.

⁶² Inter alia through co-operation on enforcement.

⁶³ Inter alia through improved consultation processes and proper representation of consumer organisations

⁶⁴ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions [2002] OJ C 137/2.

⁶⁵ This is also seen as helping to prepare for enlargement. Ibid [1.1].

⁶⁶ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 095.

⁶⁷ Ibid Article 3. There is some argument about whether good faith is a separate requirement—see eg S Bright 'Winning the Battle against Unfair Contract Terms' (2000) 20 *Legal Studies* 347.

⁶⁸ Unfair Contract Terms Directive Annex.

recent Unfair Commercial Practices Directive⁶⁹ also provides a more definitive approach to unfairness. Here the Directive specifically states that practices which are ‘contrary to the requirements of professional diligence’ and which are or are likely to ‘materially distort’ consumer’s economic behaviour’ are unfair.⁷⁰

The final point to consider, then, is the extent of any influence from Europe over future UK policy concerning consumer credit legislation. European consumer policy is seen as important to the Commission’s objective of creating economic dynamism and modernisation⁷¹—this to some extent mirrors the UK Government’s wish to create a fair competitive environment where legitimate business can thrive. European policy provides some emphasis on information and empowerment of consumers; the ability to make informed choice again reflects the direction of policy in the UK. In terms of unfairness, it is difficult to predict at present what this will constitute within UK consumer credit law. A direction the courts might take would be, reflecting the European approach, to attach considerable significance to good faith, or fair and open dealing, issues that appear to have considerable weight within European consumer protection legislation.⁷² There is certainly some indication from recent case law that these factors and the relative bargaining power of the parties are likely to be highly significant in any consideration of whether a credit relationship is unfair under the new regime. The idea of bargaining power still being an integral element of fairness again suggests an emphasis on procedure. This implicit focus once more indicates some parallel with European law, where the procedural elements of unfairness are targeted more prominently. Many of the Directives that indirectly relate to consumer credit have control of unfair sales practice as their ultimate goal.⁷³

⁶⁹ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149/22.

⁷⁰ Art 5. This refers to the average consumer. Where the question relates to a particular group of vulnerable consumers, assessment is made on the average consumer within that group. Art 5(3).

⁷¹ Consumer policy strategy (n 64) [1.1].

⁷² For example the Distance Marketing of Consumer Financial Services Directive [2002] OJ L 271/16 and the Distance Selling Directive [1997] OJ L 144/19 also include requirements of good faith.

⁷³ For example the Doorstep Sales Directive, [1985] OJ L372/31 and the Misleading Advertising Directive [1984] OJ L250/17.

However in terms of actual control of consumer credit, national legislation has and will probably continue to have wider scope than European requirements, the UK Government only supporting the maximum harmonisation approach to the extent it augments the protective devices of transparency and data-sharing. In other respects, the UK is keen to retain control over the high standards of its prescriptive rules. Conversely, when it comes to the question of unfairness, the Government is not enamoured with an approach that encompasses definitive legislation, something favoured by Europe. Whether this changes remains to be seen.