Final 15/02/10

IPA – Putting Better Regulation into Practice

Reforming Debtor Petition Bankruptcy and Early Discharge from Bankruptcy - The Insolvency Service Consultation Paper: IPA Response

1. Key Conclusions

1.1 The IPA [Appendix I] agrees that:

- The court could be removed from the debtor bankruptcy application process.
- The early bankruptcy discharge provisions should be repealed.

1.2 However, while the government has launched various proposals for addressing issues in and about personal insolvency stemming from its multi-departmental Tackling Overindebtedness initiative, there is now something of an impression that these are proceeding as separate, rather than joined up, streams with elements of overlap – for example individual voluntary arrangements, statutory debt repayment plans and administration orders [Appendix II].

1.3 There is a compelling need now to join up all the dots on the debt relief/repayment landscape; and in the IPA's view, that can only be achieved if the different procedures are brought within the responsibility of a single agency – The Insolvency Service – to achieve a coherent and comprehensive framework.

1.4 The debtor bankruptcy application proposal provides the opportunity to, but it singularly fails to, address a more fundamental issue – a continuing gap between the government's broader objectives for and its delivery of a modern insolvency system, oft-stated by Ministers and The Insolvency Service, that "where debtors can pay, they will pay"; that it should provide "fair returns for creditors"; and that "bankruptcy should be the last resort".

1.5 The single insolvency "gateway" approach outlined here would direct the debtor into the procedure which delivered on those objectives – fair returns to creditors but without any diminution in the protection, relief and rehabilitation for debtors. And it should be possible to do so in a way which, taken in the round, could reduce the overall costs of insolvency.

2. The Debtor Application Process

2.1 The debtor bankruptcy application proposal is aimed at two important, but nevertheless in the overall context of personal insolvency limited, purposes of eliminating/reducing:

- delays in debtors obtaining protection from their creditors; and
- public sector expenditure – that is, the current difference between court costs in handling bankruptcy petitions presented by debtors and the fees paid by them.

2.2 For a debtor, there is in place or proposed an increasing number of statutory procedures, all of which provide what he/she needs, and what the government wants for him/her – protection from creditors, together with relief and rehabilitation. But what about his/her creditors? A debtor having secured protection, it is still he/she who chooses the route which he/she will take towards relief and rehabilitation, but which may not optimise the outcome for his/her creditors or indeed for him/her, where for example he/she has surplus income but goes down the bankruptcy route when an individual voluntary arrangement would provide a higher return and avoid the stigma of bankruptcy [Appendix III].

2.3 The Paper puts considerable weight on successfully encouraging debtors:

- to take responsibility for themselves and their affairs;
- to seek advice (and being able to readily access good advice); and
- to come to an informed decision.

However, the responses to the earlier consultation from the funded advice organisations, such as Citizens Advice, cast considerable doubt on whether a debtor, under pressure financially and very frequently personally, is capable of analysing in an objective and logical way his/her position and what may appear to him/her to be a confusing range of solutions.

2.4 There is the opportunity here through building on the proposal to achieve a fairer balance between individual relief/rehabilitation and the broader societal need for debt to be repaid to the extent that it is possible and reasonable to do so. The government should therefore take a wider ranging look at, and should "join up", debtor entry into statutory debt relief/repayment procedures – more particularly, it should re-visit the Insolvency Law & Practice Review Committee Report 1982, and carry out a detailed study into the creation of a single insolvency "gateway" by which debtors could access any of the procedures, and would then be directed to the solution consistent with its (the government's) insolvency objectives.

2.5 The government should, as part of that, take forward the recommendation in the just published National Audit Office *Helping Over-Indebted Consumers* Report that it should engage with the commercial sector on how its already significant contribution to debt advice and solution provision can be more effectively used to support the government's overall aims for the over-indebted and its insolvency objectives.

3. The Single Insolvency "Gateway" for Over-Indebted Individuals

3.1 The Procedure:

(i) Since when seeking protection, relief and rehabilitation under whatever statutory procedure, a debtor is required (or might reasonably be required if/when the forms are updated/modernised and aligned) to provide essentially the same information [Appendix IV], he/she would complete a common form of insolvency application, incorporating a statement of affairs, through an approved insolvency intermediary.

(ii) Insolvency intermediaries would be from the funded and commercial sectors; would be approved on the basis of experience and qualification covering both statutory and non-statutory solutions; and would be regulated by the government and/or by one or more designated bodies.

(iii) The insolvency intermediary would provide, or would ensure that a debtor had been provided with, information about both statutory and non-statutory debt solutions [*vide* the requirement imposed on insolvency practitioners when accepting appointment as nominee of a statutory individual voluntary arrangement and expected to be imposed on debt management supervisors when accepting administration of a proposed statutory debt repayment plan]; and would assess whether his/her choice to go down the statutory route was appropriate.

(iv) The completed form of insolvency application would provide the basis for consideration and assessment of whether, depending on his/her liabilities, assets and surplus income, the debtor should be subject to an individual voluntary arrangement, a (proposed) debt repayment plan or an (amended) administration order; or a bankruptcy order or a debt relief order; or where his/her difficulties were short term, a (proposed) enforcement restriction order: the insolvency intermediary would accordingly recommend, consistent with the government's objectives, and certify that the debtor's centre of main interest was in England & Wales [*vide* a petition for bankruptcy presented by a creditor].

(v) The application would be submitted to the decision maker; on the basis of the insolvency intermediary's involvement, he/she should be able to be readily satisfied as to the debtor's insolvency, centre of main interest and, where applicable, "qualification" for a particular procedure; and he/she would indorse by an appropriate order the insolvency intermediary's recommendation unless he/she considered that there were good reasons to determine the application in some other way.

Note (1): There would be a need for consequential legislative amendments – see para 4.
Note (2): A debtor would continue to be able to seek advice and proceed to resolve his/her financial difficulties through non-statutory debt management plans, credit re-organisation/debt consolidation loans, re-mortgages, second mortgages, informally negotiated agreements and write-off.

3.2 Meeting the Costs of Single Insolvency "Gateway" and Insolvency Intermediaries

(i) The Paper envisages a narrow role for the decision maker – that of determining only whether the debtor qualifies for a bankruptcy order on the basis that he/she is insolvent and that his/her centre of main interest is in England & Wales; and that the costs of that would be covered by the application fee which would be not more than the present debtor petition deposit of £150, and might expect to be less.

(ii) Government accounting may not always readily lend itself to the sort of exercise which would be involved here in re-allocating current and future resource and cash savings from one area of its activities to another within or across departmental budgets. Nevertheless, it is an exercise which would be an essential part of a study of the "gateway" approach.

(iii) Looking at the costs and impacts of debtors using bankruptcy rather than a procedure more appropriate to their debts, assets and surplus income -

- The more debtors use procedures other than bankruptcy, the less the call on scarce skilled public sector resources to enable The Insolvency Service to focus on the role set out for it at the time of the passing of the Insolvency Act 1986 – that of investigation of conduct through, for example, requiring to court to refer debtors with assets to an insolvency practitioner to consider an individual voluntary arrangement; removing the right of creditors to vote for the OR as trustee; and extending the power of the Secretary of State to appoint an insolvency practitioner as trustee in place of the OR.
- The more debtors with surplus income use an individual voluntary arrangement or a statutory debt repayment plan or, if their debts are below the statutory limit, an administration order rather than bankruptcy, the more avoid the stigma of bankruptcy.
- The more debtors with debts, assets and surplus income below the statutory limits use procedures other than bankruptcy, the less the call on public sector funding; or the less cross-subsidisation of asset/income-less cases by those bankruptcies with assets/income, for the benefit of creditors of those bankruptcies with assets/income.
- The more debtors with debts, assets and surplus income below the statutory limits use a debt relief order rather than bankruptcy, the more accessible is protection, relief and rehabilitation for them.
- The more debtors with surplus income who use an individual voluntary arrangement or a statutory debt repayment plan or an administration order rather than bankruptcy, the less creditors have to write off. Two examples:
  - While The Insolvency Service has actively pursued income payments orders/agreements against those bankrupts who can pay – and around one in five bankrupts are currently making payments – those orders/agreements are limited to three years whereas individual voluntary arrangements are generally for five-six years; and the costs of undertaking a bankruptcy generally exceed those of dealing with straight forward arrangements. Taken together – the longer period of payments and the lower costs – creditors see a fairer return from arrangements while debtors are protected from action by their creditors, are relieved of the balance of their debts at the completion of the arrangement and do not face the stigma of bankruptcy, with less impact on their credit rating and therefore on their future access to financial markets [Appendix III].

- A debtor can only apply for a debt relief order through an approved intermediary who invariably has provided information on the different debt relief/repayment solutions and been satisfied that the debtor qualifies for an order: the costs of administration by The Insolvency Service as a debt relief order are covered by the fee paid by the debtor of £90. Yet a debtor can apply directly for a bankruptcy order, and would continue to be able to do so under the proposal, even if he/she would in fact qualify for a debt relief order; but without assets or surplus income, the costs of administration by The Insolvency Service as a bankruptcy, after taking account of the deposit paid by the debtor of £350, would show a shortfall of the order of £1,300 - currently borne by creditors of bankruptcies with assets/income.

(iii) Submitting applications through insolvency intermediaries would result in significant savings for The Insolvency Service:

- All applications would be submitted electronically [*vide* debt relief order applications].
- All applications would have been checked for completeness without the need for the decision maker to undertake a review and to ask for further information – a distinct possibility with applications submitted in paper form: and where a bankruptcy order was made, electronic submission would reduce the need for official receivers to carry out further checks and require further information, and eliminate the need to input debts, assets, income and expenditure into The Insolvency Service databases.

Note: While the government has sought to increase public access to computers and the internet, how realistic is it to expect a debtor to walk into a public library and sit down with a complete and organised file of all the information required about his/her debts (including addresses and references), assets and income and expenditure, not just for himself but for his household, and be able to work through those with almost no desk space on which to put his/her file (or more likely plastic bag of papers)? Will he/she not need/want to check items with his/her spouse/partner? Will he/she want to have all that open to even casual public gaze? And if the proposed "pop ups" do suggest that he/she should consider some other route, is it likely that he/she will then sit there for some time in contemplation, but without anyone alongside him/her to offer some further advice or guidance? Or go away for advice, and then return and start again?

(iv) Having a common electronic form would enable a system to run on the same or a parallel platform to that used for debt relief orders; and result in significant savings for HM Court Services in developing and building separate platforms for administration orders and enforcement restriction orders – development of which is delaying introduction of the amended/new procedures which are integral to a coherent and comprehensive framework for dealing with personal over-indebtedness.

(v) Using a common form for insolvency applications would itself achieve savings in time –

- Some debtors find themselves filling in more than one form because they have started down a route for which they do not in fact qualify or is otherwise inappropriate, or where they have consulted more than one advice organisation.
- Those who provide advice and assistance to debtors start the process with annotating in different formats details of the debtor and their debts, assets and income and expenditure which have then to be re-transcribed/entered in another format appropriate for the route which it is finally concluded the debtor will take.
- It would be feasible for an insolvency application to, for example, be attached to a proposal for a individual voluntary arrangement, rather than it being necessary to re-present information about debts, assets and income and expenditure within the arrangement proposal itself.

(vi) The extensive scope for savings over what is currently in place and is proposed for dealing with the over-indebted should enable the costs of the single "gateway" procedure and use of insolvency intermediaries to be fully covered – to the extent that debt advisors in funded organisations are not already covered by government funding.

4. Consequential Legislative Amendments

4.1 Currently it is the debtor with surplus income who chooses whether to go down, for example, the bankruptcy order route rather than proposing an individual voluntary arrangement. That may be driven by more than one factor, but might well be because he/she would only be required in a bankruptcy to make payments for three years rather than five-six years in an arrangement; and, at least it has been suggested, because the amount paid each month in a bankruptcy might be rather less than in an arrangement where his/her expenditure to be allowed against income is subject to closer scrutiny by the nominee and by the creditors. But as the legislation currently provides, a debtor cannot be compelled to put forward a proposal for an IVA; nor can his/her creditors be compelled to accept. So, under the "gateway" approach, it would be necessary:

- to introduce elements of the US Chapter13 procedure by which a debtor who has surplus income can only proceed under protection of the Bankruptcy Code through a repayment plan, usually for five years – around 40% of US Code filings proceed under Chapter 13; and
- to align the procedures for administration orders (which envisage a period of five years for payments) and those for statutory debt repayment plans (which are as yet unclear whether they envisage payment in full or in part, and whether they envisage a maximum period for payments) by which an order or plan would be imposed on creditors; or alternatively
- to provide that in the event that creditors reject a proposal, the insolvency would proceed as a bankruptcy.

4.2 The power to make administration orders and enforcement restrictions orders would need to be passed from the court to the decision maker.

5. Advice Provision and Acting as Insolvency Intermediary

5.1 Notwithstanding that the government has committed funds for additional debt advisors in the funded advice organisations, there are shortfalls in their numbers; and it seems highly likely that can only be exacerbated with consumer debt now having reached a record level of some £1.5 trillion and with significant pressures on government spending. By way of repetition of para 2.5, there is a very clear need for the government to recognise the role of, and to fully engage with, the commercial debt advice and solution provision industry which probably handles at least as many debt enquiries as the funded advice sector, and does so invariably without charge; and which is positioned to act as insolvency intermediaries on a basis that might expect to be broadly comparable to funded advice organisations

5.2 To the extent that there are concerns that the commercial sector might direct a debtor into procedure in which it might act and therefore profit – albeit there have been very few specific complaints of that –

- The existing statutory regulatory regime for insolvency practitioners and the proposed regime for debt management companies being put in place by the Debt Resolution Forum [Appendix I] with the IPA specifically cover the provision of advice and, for example, staff pay structures to ensure that incentives are not biased towards particular solutions.
- The "gateway" approach, using only approved insolvency intermediaries and with determination of applications by the decision maker, would bring further assurance of the independence of advice provided and the route taken.

6. EC Regulation

The Service has presumably satisfied itself that the EC Regulation on Insolvency Proceedings 2000 would continue to have full effect: there is, for example, no commentary in the Paper on territorial proceedings – it refers only to main proceedings where the debtor's centre of main interest is in England & Wales.

7. Consultation Questionnaire

The responses here are directed to the proposals as set out in the Paper. But they should be read as being qualified – heavily qualified – by the IPA's proposals set out at paras 1-5.

7.1 The Decision Maker (DM)

1.	What skills and experience do you think it is appropriate that a Decision Maker should have in order to make bankruptcy orders administratively? The DM carries out quasi-judicial functions. He/she should therefore have demonstrated competence in insolvency law and practice and in procedures for dealing with arguments of fact and of law – for example in relation to issues in and about a debtor's centre of main interest and "forum shopping" which has recently attracted a considerable amount of interest in the media (although that may be disproportionate to the actual "problem"); and he/she should have a demonstrated knowledge and understanding of the full range of statutory and non-statutory debt relief/repayment solutions.
2.	Should the Decision Maker role sit within The Insolvency Service or elsewhere? Within The Insolvency Service, but clearly separate from and independent of the official receiver management and organisational structure.
3.	What links should there be between the Decision Maker and other bodies? It is unclear quite what this question is aimed at: there is nothing in the Paper to indicate what other bodies The Service might have in mind.

7.2 Steps to encourage debtors to seek advice and information before submitting an application for bankruptcy

According to research carried out by The Insolvency Service in 2007, some 94% of debtors had sought advice prior to presentation of their petition. But the Paper does not say what proportion of bankrupts who were surveyed responded – it may be that it was primarily those who had obtained advice who felt inclined to respond. Secondly, there is no reference as to who provided the advice, nor seemingly any test of its validity. That is in stark contrast to:

- The requirement that Insolvency Practitioners (IPs) putting forward an Individual Voluntary Arrangement (IVA) should provide, or should be satisfied that the debtor has been provided with, information on and advice about all solutions. Indeed, such were the concerns of Ministers that debtors should be directed to the most appropriate debt relief/repayment procedure that changes were made to the IP-qualifying examination, the Joint Insolvency Examination, to encompass both statutory and non-statutory solutions.
- The requirement that those seeking a Debt Relief Order (DRO) should have to apply through intermediaries approved by a competent authority designated by the Secretary of State, and meeting strict competence and experience criteria.
- The emphasis in the recent Debt Management Schemes consultation on the competence and experience of those providing advice on debt repayment/relief solutions; and in the event of statutory debt repayment plans being introduced, plan providers/operators and the advice they give being subject to monitoring and regulation.

The Paper focuses on free and impartial debt advice; the work going on with the funded debt advice sector and local authorities to develop wider strategic approaches to increase the capacity of advice provision; and the funding by government of free face-to-face debt advice,

but which will run out in 2011. While there is detailed analysis of court delays in hearing debtor petitions and which provides the central rationale for the proposal here, there is no information in the Paper about delays in providing debtors with face-to-face and telephone interviews by citizens advice bureaux and other funded advice organisations; and neither the Citizens Advice last Annual Report 2008-09 nor its Strategy Document 2008-11 contain any measures of waiting times. The just published National Audit Office *Helping Over-Indebted Consumers* records that two of the 39 individual advice agencies which responded to its survey said they were not taking new clients onto their waiting list; one had a waiting time of six weeks; and six had waiting times of four weeks.

There are no estimates of the numbers of debtors seeking advice from, and invariably provided free by, the commercial sector; but it is suggested that those numbers at least equal, if not exceed, those approaching the funded sector. As recommended by the National Audit Office, any further initiatives directed to ensuring that debtors have ready access to advice should look to encompass the commercial sector – that is, the reputable and effectively regulated commercial sector: otherwise debtors will either not wait to get advice or will look to more readily available unregulated advisors.

4.	Would a requirement on debtor applicants to confirm both that the consequences of bankruptcy have been read and understood and that they still want to submit the application, be sufficient to ensure that those who apply for their own bankruptcy appreciate the seriousness of taking this step? No. The responses to the initial consultation on this proposal, including those from funded advice organisations with extensive experience of dealing with debtors, cast considerable doubt on whether this would be sufficient.
5.	Would information about other debt relief mechanisms, provided as part of the application process, be enough to ensure that debtors have sufficient opportunity to consider whether opting for bankruptcy is the right decision for them? No. The responses to the initial consultation on this proposal, including those from funded advice organisations with extensive experience of dealing with debtors, cast considerable doubt on whether this would be sufficient. Should the government maintain its view that it would be sufficient, then should it emphasise "…information about *debt repayment and* other debt relief mechanisms…"? The Paper provides by way of example information about debt relief orders: it would be crucial that the proposed pop up boxes fully cover, and encourage those with surplus income to positively consider, IVAs and other debt repayment solutions. But would pop up boxes, by themselves, provide sufficient guidance and direction towards other solutions and to solution providers? Would a debtor who has steeled him/herself to do something and go down the bankruptcy route really be persuaded by pop ups to, in effect, start again down some other route? In the terms of the proposal set out in the Paper, there would still seem to be an opportunity for The Service to re-enforce the desirability of the debtor having sought advice and having properly explored the range of solutions – *Debtors should be asked whether they have sought advice before submitting their application; from whom and when; and what that advice was.*

7.3 Referral to other procedures

Advice for debtors is clearly crucial – see para 7.2. But there remains a curiosity that a debtor can only file an application for a DRO through an approved intermediary while he/she can file an application for bankruptcy direct – with at least as serious consequences, if not more so where he/she has assets and/or surplus income. If the court is to be removed, then the government should really be looking not just at eliminating or at least reducing delays but whether the role of the proposed decision maker should be enhanced so that bankruptcy really is the last resort.

6.	Should debtors be encouraged to consider alternative debt resolution procedures before submitting an application for bankruptcy? The oft-stated, by Ministers and The Insolvency Service, broader objectives for a modern insolvency system are that "where debtors can pay, they will pay"; that it should provide "fair returns for creditors"; and that "bankruptcy should be the last resort" - presumably not just for debtors but also for creditors? Something of the order of 13,000 bankrupts each year (and in fact some 14,800 in 2009) are subject to Income Payments Orders/Agreements (IPOs/IPAs); and yet only a handful have entered into post-bankruptcy Fast Track IVAs, in very large part because of The Insolvency Service's own restricted administratively-determined criteria (there are some debtors who are subject to IPOs/IPAs in relation to "tax holiday" payments arising only in the year of the bankruptcy). Thus, with: • IPOs/IPAs limited to not more than three years while IVAs are generally for five-six years, and with • IP nominee/supervisor fees being lower than those charged by the OR for a bankruptcy administration (£1,715 + 17% of realisations + time/rate distribution fee), it is evident that creditors are being denied fairer returns through bankruptcy compared with an IVA. Further, it has been suggested that the income and expenditure of debtors are not subject to the same level of close scrutiny in bankruptcy as in an individual voluntary arrangement, and certainly not by the creditors. A debtor cannot be compelled to put forward a proposal for an IVA; nor can creditors be compelled to accept. The IPA has set out at para 4 how that might be addressed.
7.	Is there a need for the Decision Maker to be given power to direct someone into an alternative debt relief mechanism? Yes, to alternative debt relief/*repayment* mechanisms. As set out at paras 1-3, the better course would be to provide for a single insolvency application, submitted electronically through the equivalent of an approved intermediary, which would direct the debtor to the debt relief/repayment procedure which optimised the outcomes for him/her by avoiding bankruptcy if at all possible; and for his/her creditors by a fairer return and reducing their debt write off. However, in the terms of the proposal set out in the Paper - Section 274 of the Insolvency Act 1986 gives the court the power, on the presentation of a petition by a debtor with assets worth not less than £4,000 and liabilities of not more than £40,000, to refer the matter to an IP to report on whether the debtor is willing to make a proposal for an IVA: it is understood that the power is rarely exercised, if at all. As set out in the Review of the IVA Protocol, published by The Insolvency Service in December 2009, IVAs are sustainable with relatively low levels of income - 45% of the debtors responding to the Review survey had total household income below £20,000 per annum and a further 35% had income between £20,000-£30,000 per annum.

	There would seem to be no compelling reason why that power could not be exercised by the DM who should also be able to take into account a debtor's surplus income. For where there is surplus income, it is evident that creditors are disadvantaged if a debtor is made bankrupt compared with if he/she enters into an IVA. Consideration should also be given to other debt repayment/relief mechanisms which might be appropriate to the debtor's circumstances. The references in the Paper to putting mechanisms in place that facilitate the obtaining of advice, and thus in the government's view avoiding the need for the DM to have such powers of referral, are not elaborated on. That the debtor may have obtained advice does not mean that he/she is following it by applying for bankruptcy or otherwise that bankruptcy is the appropriate solution – for him/her and/or his/her creditors. The Paper goes on to say that "referrals could also confuse and complicate the role of the DM and thereby increase the overall cost of the process, defeating one of the key objectives in making bankruptcy an affordable option for those in need." First, such issues will not arise in every case. Secondly, and importantly, there appears to be no consideration here of the benefits for creditors of an IVA over a bankruptcy. The DM should also have the power to refer debtors with assets, surplus income and liabilities below the relevant statutory levels to an approved intermediary for a debt relief order application or to the court for an administration order.

7.4 Ensuring that the debtor application process is self-financing

8.	Should there be any exemptions or remissions of the application fee? No: that is, there should be no exemptions or remissions.
9.	If yes, how would you suggest that the cost of any fees forgone could be met in order to keep the application process self-financing? See Q/A 8.
10.	Do you think that there should be differential pricing of a bankruptcy application, according to whether it is made electronically or on paper? No. It would seem unfair that debtors who do not have access to the internet and/or are not sufficiently confident in its use and/or would not wish to use a public computer to record their personal details should have to pay some further amount for submitting their application on paper.

4.5 Making the application

11.	Should there be a facility to enable debtors to make their bankruptcy applications on paper forms? Yes: see Q/A 10. If insolvency applications were made through intermediaries, then all applications would be made electronically.

12.	Should there be a facility to enable payment to be made on line at the same time as the application form is submitted? Yes
13.	Is a maximum of 10 days an appropriate period of time to allow between receipt of acknowledgement of the application and payment of the fee that covers both the cost of administering the application and the deposit? Here the government proposes 10 calendar days. Elsewhere in relation to, for example, the time for providing additional information and for asking that the decision maker's determination of his/her application be reviewed, it refers to 14 days – but calendar days or "working" days? There would seem to be some benefit in using the same basis of calculating the number of days; and in using common numbers of days. Why not put all matters beyond the need to establish what counts as a day, and counting those days on fingers, and have a consistent 14 calendar days – that is, two weeks. But does that include the day on which the DM received the completed application form and statement of affairs, or…?
14.	If you have answered "no" to the previous question, what period do you consider appropriate and why? See Q/A 13.
15.	Should the application form automatically expire if payment is not made within a specified period of time? A more appropriate term would be that the application had been rejected – rather clearer than expired. A letter (or e-mail if the debtor has his/her own e-mail address) should be sent at the end of the period of time setting out clearly that the application has been rejected, and that if he/she still wishes to proceed he/she will need to make a fresh application (and if he/she has paid the application fee, that he/she will need to pay a further fee as well as the deposit).

7.6 Powers and duties of the DM

16.	Have we suggested any powers for the Decision Maker that you think are unnecessary? If so, which powers and why might they be unnecessary? No
17.	Are there any additional powers that the Decision Maker should have? If so, what powers and why do you think these are necessary? Power equivalent to that currently given to the court under section 274 on the submission of an application by a debtor to refer the matter to an IP to report on whether the debtor is willing to make a proposal for an IVA – see Q/A 7. Power where the debtor appears to meet the criteria for a DRO to refer the debtor to an approved intermediary: alternatively, the DM should him/herself have power to make a DRO. It would seem to make no sense to put a debtor through the more expensive bankruptcy procedure and require him/her to find the deposit (albeit the deposit is currently set at an amount above the level of debt relief order assets) where he/she could be appropriately dealt with through a DRO.

	Power where the debtor has not sought advice from a recognised debt advisor and that his/her interests and those of his/her creditors might be better served through one or more alternative debt relief/repayment mechanisms to refer the debtor to an approved debt advisor, including IPs and debt management companies which are subject to a recognised regulatory regime. It is unclear whether it is envisaged that the DM should have the power to open territorial proceedings in relation to a debtor who has his/her centre of main interest in another EU country but also has an establishment within England & Wales.
18.	Within what set period of time should a debtor be required to provide further information, after which time the application will be deemed withdrawn? Please provide reasons for your choice. The proposed period of 14 (calendar?) days would seem to be reasonable: see also Q/A 13. The more appropriate term would be that the application was rejected – see also Q/A 15.
19.	Should the Decision Maker have a general power to stay a bankruptcy application? If yes, would you please explain your reasons and outline the circumstances in which you think such a power would be useful. No - but see Q/A 28 where there is reference to a power to "stay" where the DM considers that further information is required of the debtor before he/she (that is, the DM) can determine the bankruptcy application.
20.	Should the Decision Maker have the power to appoint a trustee? If yes, would you please explain your reasons and outline the circumstances in which you think such a power would be useful. No: the appointment of a trustee should be a matter for the creditors
21.	Do you think that assets may be at risk in the period between a bankruptcy application being accepted and a bankruptcy order being made? The Paper envisages that the DM will determine the debtor's application within two days; but, as is noted in the Paper, where there are assets which might be at risk the DM could immediately make the bankruptcy order. That said, it is clearly envisaged that the DM would be available only on working days, and presumably during normal working hours: judges are available around the clock to deal with urgent matters. For those, likely to be very few, cases where assets are in immediate jeopardy of action and the DM is not available, there needs to continue to be access to a judge for the purpose of a stay or other protective measure.
22.	In order to ensure that assets at risk are protected, should the Decision Maker have the power to appoint an interim receiver in the period between a bankruptcy application being accepted and a bankruptcy order being made? No: see Q/A 21.
23.	If you have answered "no" to the previous question, can you describe a better way of ensuring that such assets are protected? See Q/A 21.

7.7 Duties of the Decision Maker

24.	Do you agree with the duties we have outlined for the Decision Maker? The "duties" of determining a debtor's application, considering whether a debtor "qualifies" to apply and allowing a debtor time to submit further information are essentially descriptions of his/her powers/functions. The DM should be required to provide reasons for all his/her decisions, and to do so in a timely manner – not just where he/she has refused a debtor's application (para 23 (b) of the Paper) but also where for example he/she has reached a view on the debtor's establishment for the purposes of the EC Regulation; or as suggested at Q/A 17, he/she decides that the matter should be referred to an IP for the purposes of an IVA or to an approved intermediary for a DRO application (or he/she makes a DRO) or to an approved debt advisor for advice. There should be an expressly stated duty that the DM will act fairly, impartially and independently, supported by a description of how his/her independence of The Insolvency Service and its policy and operational objectives are to be secured.
25.	Have we suggested any duties that you consider are unnecessary? If so, which ones and why? See Q/A 24.
26.	Are there any other duties the Decision Maker should have? If so, what are they and why do you think they are necessary? See Q/A 24.

7.8 Making the Bankruptcy Order

27.	Do you think that two working days, from when an application is deemed to have been submitted, is an appropriate period of time within which to require the Decision Maker to make a decision? Yes.
28.	Do you think that the two working days within which the Decision Maker is required to make a decision should be stayed if the Decision Maker stays his or her consideration of a bankruptcy application pending receipt of further information and/or evidence? Would the more correct words be "extended/extend" rather than "stayed/stays" (per the text preceding the question in the Paper)? Subject to that, then yes - it would seem to logically follow: see also Q/A 19.
29.	Should failure to respond to a request for further information be treated as the application being withdrawn by the debtor? Yes, although the term rejected would be clearer than withdrawn – see Q/As 15 and 18.
30.	Would 14 days be sufficient time to give to the debtor to ask the Decision Maker to review his/her decision? If not, why? How long do you think it should be? The 14 (calendar?) days should run from the time that the DM has provided his/her reasons for his/her decision.

	The assertion that the debtor should have to meet the costs of the review in any event seems (a) unfair if on review the original decision is overturned; and (b) unreasonable where the debtor is likely not to have any funds. It would be helpful to see some comparisons with other procedures involving the review of administrative decisions as to an applicant's liability for the costs.

7.9 Early Discharge

31.	Do you think that early discharge should be repealed? Yes.
32.	If you do not think that early discharge should be repealed, what specific benefit do you think there is in keeping early discharge? Please provide figures if you can. -

8. Impact Assessment – Costs/Benefits: Debtor Application for Bankruptcy

8.1 The case for reforming the debtor application for bankruptcy is based essentially on costs and resources, and the impact on the court's capacity to deal with those matters expeditiously.

8.2 As to the figures given –

- The stated annual benefits (savings) to HM Court Services do not take account of the income it derives from the fee paid by debtors which, allowing for exemptions/remissions, would seem to total not less than £4.8million.
- In calculating the savings, court staff time is "billed" at £2.42p per minute, whereas District Judge time is "billed" at £2.78p per minute. It must be that those "billings" are calculated on different bases (although that it is not clear). But it does raise a question about the reliability of the HMCS figures. And assuming that the DM is paid at the equivalent of OR level, the current chargeable (full cost recovery?) provincial hourly rate is £69 per hour – that is, marginally over £1 per minute, and less than half that of court staff?
- The expectation is that dealing with debtor applications administratively will reduce costs which will be covered fully by the fee – currently £150 but expected to be lower; but no estimates are provided for the DM time/cost: the draft Impact Assessment accompanying the first Consultation Paper issued in October 2007 suggested that the cost would be around £50. If court staff and District Judge time together amount to some two hours, is it expected that the DM will deal with applications each in less than half that time, and how?
- It is difficult to follow the argument that delays in hearing petitions by the court is somehow forcing debtors to live off further credit – they might be "robbing Peter to pay a rather more pressing Paul", but *further* credit?

Insolvency Practitioners Association
15 February 2010
Tel: 020 7623 5108
E-Mail: dirgen@insolvency-practitioners.org.uk

Appendix I

About the Insolvency Practitioners Association (IPA)

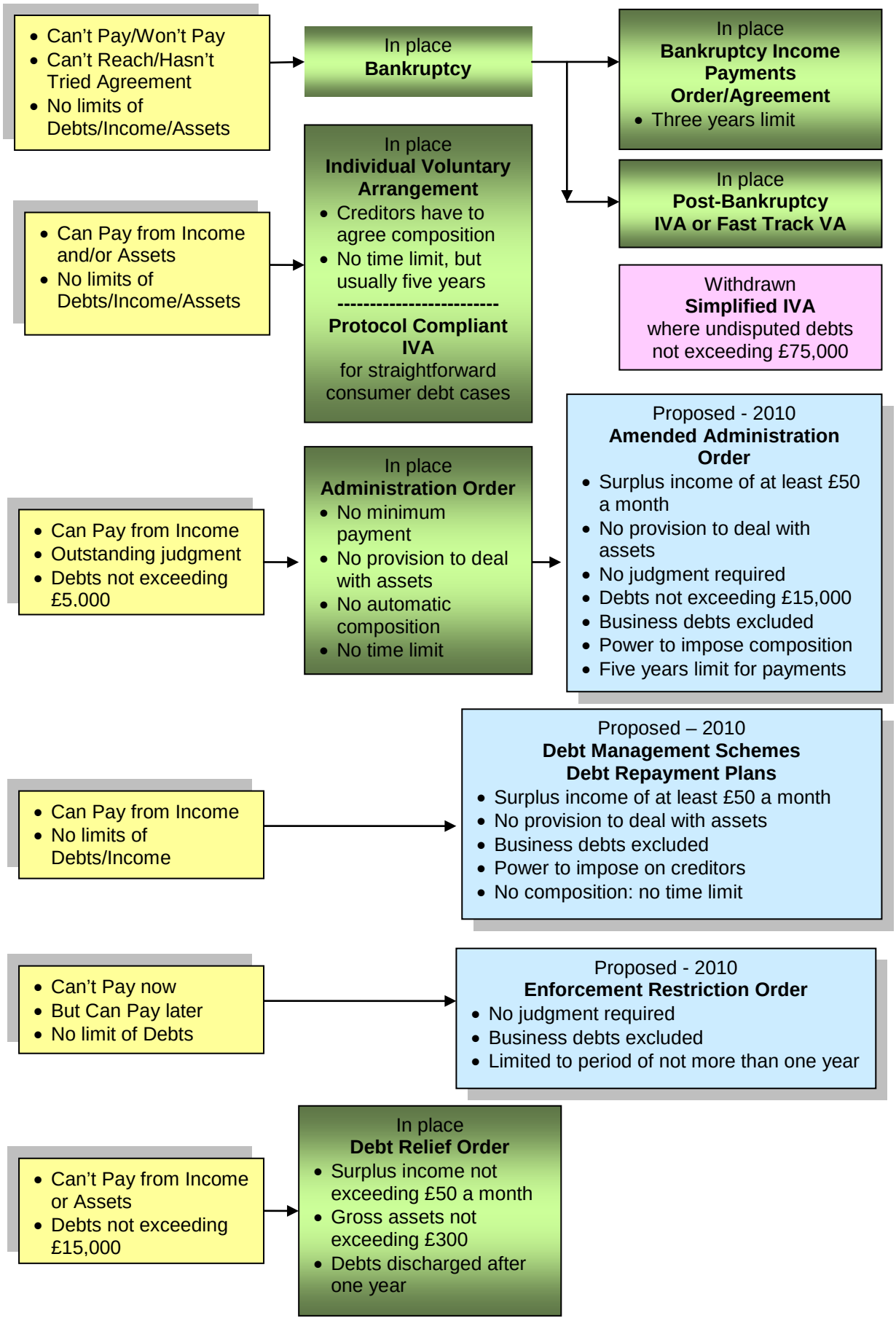
1 The IPA is a membership body for those in insolvency practice, engaged in insolvency related work or with an interest in insolvency.

- It has some 2,000 individual and firm members and students.
- It is the second largest of the professional bodies recognised for the purpose of authorising and regulating insolvency practitioners (IPs) under the Insolvency Act 1986: as part of that it carries out comprehensive monitoring and inspections of its IPs, who include some of the large volume individual voluntary arrangement providers, as well as investigating complaints and taking disciplinary proceedings.
- It has recently been awarded a contract by the Solicitors Regulation Authority to undertake the monitoring and inspection of IPs authorised by the Law Society (England & Wales).
- As the only recognised body solely involved in insolvency, it has been at the forefront in developing professional and ethical standards; widening access to insolvency knowledge and understanding; and promoting the principles of better regulation.
- It introduced what has become the Joint Insolvency Examination which is the required qualification for IPs; and has developed an intermediate Certificate of Proficiency in Insolvency and Certificate of Proficiency in Personal Insolvency Examinations, primarily for those involved in case administration.
- It jointly administers a voluntary scheme for the registration and regulation of those specialising in fixed charge receiverships which fall outside the statutory framework, and for which it undertakes monitoring and inspection.

2. The IPA has been instrumental in establishing, and drafting Standards for, the **Debt Resolution Forum** (DRF), an organisation of some thirty companies providing debt management plans and other non-statutory debt solutions (as well as statutory individual voluntary arrangements); and having around 60%-70% by case numbers of the debt management plan market.

3. The DRF is currently seeking OFT approval for a Code encompassing the Standards, for which the IPA will provide annual inspections of DRF members and their compliance with the Code/Standards; and in respect of which the IPA has developed a comprehensive inspection plan and has already carried out a first pilot inspection.

Debtor Statutory Solutions Chart [England & Wales] **Appendix II**



Appendix III

Example Comparison of Outcomes for Creditors between a Bankruptcy and an Individual Voluntary Arrangement (IVA), based on Surplus Income only of £250 per month and excluding VAT where applicable

Bankruptcy			**IVA**	
	£			**£**
Surplus Income £250 a month x 3 years	9,000		**Surplus Income** £250 a month x 5 years	15,000
Fees			**Fees**	
Case Administration Fee	1,715		Nominee Fee (average for income only cases)	1,250
Collection Agents Fee @ 10%	900			
Secretary of State Fee @ 17% of Surplus Income Payments of £9,000, but excluding the first £2,000	1,190		Supervisor Fee @ 15% of Surplus Income Payments of £15,000	2,250
Distribution Fee (average based on time/rate per The Insolvency Service Manual)[Note 1]	160			
Total Fees	3,965		**Total Fees**	3,500
Available for Creditors	£5,035		**Available for Creditors**	£11,500

Note 1: Based on a single distribution whereas an IP as supervisor of an IVA would be expected to make distributions quarterly, and which would be included in the Supervisor Fee.

Appendix IV

Forms Completed on Seeking Protection and Debt Relief/Rehabilitation under Statutory Procedures

Bankruptcy Petition	Sample IP IVA Proposal	Debt Relief Order Application	Administration Order
Names	✓	✓	✓
Date & Place of Birth	✓	✓	Age
		Ethnicity & Disability	
National Insurance Number/ Tax Reference	Tax Returns/Assessments	✓	
Address and Contact Details	✓	✓ and whether in E&W	Address
Status – Single/Married/Etc	✓	✓	✓
Divorce/Separation in last 5 Years	✓		
Previous Bankruptcy/IVA	✓	Current or Previous Insolvency Proceedings	
	Current Debt Management Plan	Current Debt Management Plan	
Any Other Legal Proceedings	✓		
Director or Involved in Management of Company in last 5 Years	✓		
Name, Type, Status and Address of Business	✓	Businesses in E&W in last 3 Years	Type of Business (Self-Employed)
VAT Registration	✓		
Business Started/Stopped	✓	✓	
Accounting Records	Accounts	But required to deliver up records	
Accountant	✓		
Solicitor	✓		
Employees	✓		
Assets [List] & Values	✓	✓	
Disposal of Assets in Last Five Years	✓	Disposal of Assets in last 2 Years	
		Preferred Creditors in last 2 Years	
Motor Vehicle Disposals in last 6 Months	Motor Vehicle Disposals in last Year		
Use of Motor Vehicle			
Enforcement/Distress	✓		
Creditors [List] & Amounts	✓	✓	✓
Bank Accounts & Credit Cards	✓		✓
Employment & Income	✓	✓	✓
Contributions from other Members of Household	✓	Unusual Income	✓
Attachment of Earnings Orders		✓	
Outgoings [List] & Amounts	✓	✓	✓ and Arrears
Properties and whether Owned/Leased/Rented	✓	✓	✓
Properties Disposed of in last 5 Years	✓	Properties occupied in E&W and Other Addresses in last 6 Years	
Members of Household and Dependents	Dependents	Dependent Children	Dependents
	Events Leading to Financial Position		
Causes of Bankruptcy		Reasons for Debt Problems	
Betting or Gambling Losses in Last Two Years		But may be ground for DRO Restrictions Order	