Response to the Insolvency Service Consultation:
Reform of the Process to Apply for Bankruptcy and Compulsory Winding Up
Consultation Issued: November 2011

INTRODUCTION

There follows our response to "Consultation on Reform of the Process to apply for Bankruptcy and Compulsory Winding Up", as prepared by the Personal Insolvency Committee of the IPA; a committee comprised of IPA members with particular interest and expertise in the field of personal insolvency. Further information about the IPA may be found at the end of this document.

This response is not intended to reflect the views of every member of the Association, who are themselves at liberty to submit their own responses, but rather to reflect the broadly agreed views of the Association and its Personal Insolvency Committee (PIC).

OVERVIEW OF RESPONSE AND GENERAL REMARKS

As a precursor to our detailed response, we consider that the consultation is somewhat narrowly focussed upon the detail of the proposed reforms to the petition system, rather than some of the broader issues surrounding the merits of the proposals. Specifically, we note that section 2 of the consultation, concerning the role and functions of the proposed Adjudicator, contains no consultation questions whatsoever.

We have serious concerns that the current proposals fail to address a number of the broadly-held views expressed in response to previous consultation on this subject (in October 2007[1] and November 2009[2]), particularly concerning the fundamental importance of advice provision to debtors when considering bankruptcy. We comment further on the specifics of these deficiencies below.

Additionally, we are of the opinion that the proposals do not adequately balance the needs of the debtor with the broader and oft-stated government objectives that "where debtors can pay, they will pay" and that "bankruptcy should be the last resort".

Notwithstanding these reservations, the IPA's response to the consultation may be characterised as broadly supportive and summarised as follows:

- The IPA broadly supports the proposals for reform of the debtor-initiated process, subject to some significant concerns about ensuring debtors receive appropriate advice and assistance to ensure that they are a) making an informed decision; and b) that avenues which would produce a better return to creditors are properly considered.

- The IPA does not oppose the proposed extension of the reformed process to third-party initiated applications, subject to the introduction of a number of suggested safeguards. We have some additional reservations about the proposed application of the reformed process to winding up proceedings.

[1] http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/deptorpetresp.pdf
[2] http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/DPRefResponses/DPrefIndex.htm

- In both personal and corporate insolvencies, the IPA is concerned that there exists perceived, if not actual, conflict of interest between the role of the Adjudicator and that of the Official Receiver, in the event that both are located within the oversight of the Insolvency Service.

- These concerns could be partially addressed in relation to debtors' applications by utilising approved intermediaries in the application process and extending the existing statutory powers to refer debtors to an insolvency practitioner prior to an order being made.

- The IPA is not persuaded that the impact assessment contains an accurate assessment of the costs/benefits of the proposed reforms.

To elaborate upon our concerns:
(The following should be read in conjunction with our responses to the specific questions posed by the consultation)

1. Appropriate levels of advice provision to debtors

1.1 Agreement on the importance of advice provision

We are concerned that the proposed reforms fail to address a widely expressed view voiced during the two preceding consultations, that providing debtors with good quality advice about the alternatives to bankruptcy is of paramount importance. Respondents to the prior consultations were in almost unanimous agreement in this regard:

In October 2007, the Insolvency Service consulted on proposals to reform the debtor petition process[3]. That consultation considered whether Court involvement should be removed from the debtor-initiated process, rendering it an ostensibly administrative one comparable to that currently proposed. The "Summary of Responses" to the 2007 consultation was published in July 2008[4] in which 96% of respondents (the largest majority expressed in response to any of the questions posed), considered that *"debtors should be asked to confirm that they have had access to information that explains other debt solutions and their implications"* [5].

In November 2009 the Insolvency Service consulted on more specific proposals for reform of the debtor-initiated process[6], introducing the concept of a "Decision Maker" taking over the Courts' role and consulting upon whom that Decision Maker ought to be. The Ministerial Statement outlining the responses to this consultation reported that *"An overwhelming majority of 97% of respondents who expressed a view (31 of 32) also agreed that debtors should be encouraged to consider alternative debt resolution procedures before submitting an application of bankruptcy".*[7]

Given the apparent importance placed upon the consideration for alternative debt solution by a broad spectrum of stakeholders, we are concerned that the current proposals seemingly fail to provide any adequate safeguards to ensure that debtors have received appropriate professional advice enabling them to make a properly informed decision.

[3] Accessible at: http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/registerindex.htm
[4] http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/deptorpetresp.pdf
[5] http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/deptorpetresp.pdf at p.45.
[6] http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/Debtor%20Petition%20Reform%20Final%20Nov%2009.pdf
[7] http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/DPRefResponses/DPrefIndex.htm at p.7

The proposed reforms specifically limit the Adjudicator's role to one of establishing if the criteria for bankruptcy have been met and appear to assume that debtors will have sought advice prior to application. Whilst the proposal envisages a pre-action process for creditors which *"… may involve signposting to sources of free debt advice, including on-line and telephone debt advice services."* p.28, no comparable signposting is proposed in debtor-initiated cases.

We are of the view that the proposals provide inadequate safeguards in this regard and are insufficient to address the concerns expressed by the overwhelming majority of respondents to the previous consultations.

We believe that these failings (in addition to a number of our other concerns expressed below) could be ameliorated by a) requiring applications to be made via approved intermediaries in a manner similar to the DRO system; and b) extending the powers contained in Sections 273-274 of the Insolvency Act 1986 to the Adjudicator.

1.2 Use of approved intermediaries

There are clear parallels between the proposed system for bankruptcies and the existing Debt Relief Order (DRO) process, which is reportedly operating well. In the DRO process, an approved intermediary is required to check the information supplied by the debtor prior to submission.

We would question why a comparable process to the DRO system of intermediaries could not be employed (whilst noting in our response that we do not, however, consider post Office Counter Staff to be suitable persons to perform such a task.) Such a system would also provide an opportunity for debtors to access advice services prior to submitting their application.

1.3 Referral to an insolvency practitioner under s.273 prior to the making of an order

s.273 is a little-used power, currently given to the Court when considering a debtor's petition for bankruptcy, to refer the debtor to an insolvency practitioner for them to report on the possibility of an IVA. The power could feasibly be extended to the Adjudicator when considering bankruptcy applications .

The power contained in s.273 exists in cases where the level of unsecured debt is below £40,000 and the "minimum potential value of the bankrupt's estate" is £4,000.[8] Although not historically interpreted in this manner, we can see no reason why surplus income could not be considered as falling within the term "minimum potential value" calculation, as s.310(5) and s.310A(4) of the Act provide for income collected pursuant to an Income Payments Order or Arrangement to form part of the bankrupt's estate.

A debtor with a surplus income of £111 per month, which could otherwise be made available by way of a three-year Income Payments Order or Arrangement, would thereby qualify for referral under s.273 as having an estate with a "minimum potential value" of £4,000. We understand this level of surplus income could render an IVA commercially viable.

s.274 goes on to require the appointed practitioner to inquire into the debtors affairs and submit a report stating whether the debtor is willing to propose an IVA. There is further statutory provision for annulment of the bankruptcy in the event that an IVA is approved.

[8] The Insolvency Proceedings (Monetary Limits) (Amendment) Order 2004

There would be multiple advantages to the adoption of such a referral system:

- It would enable debtors who have not previously received professional advice about this alternative to be afforded a subsequent opportunity to obtain assistance. It should be noted that Statement of Insolvency Practice 3, places a mandatory requirement upon insolvency practitioners to fully discuss alternative debt solutions when advising on the suitability of an IVA and practitioners are monitored and regulated in their compliance, promoting the delivery of high quality and balanced advice;

- Referral via a local rota system could ensure access to locally delivered, face to face advice, which the debtor may not have appreciated was available to him. Practitioners could elect whether to be on such a rota, as is currently the case;

- The system is fair in that the IVA process remains voluntary on the part of the debtor, so there is no element of compulsion upon them to propose such an arrangement;

- The position of creditors will be improved by ensuring that debtors with the ability to pay have at least considered the alternative of an IVA;

- There is no additional cost to the debtor in obtaining this advice as there is pre-existing statutory provision for payment of a fixed fee of £360, payable from the deposit of £525 already paid by the debtor upon the presentation of their application;[9]

- Any subsequently appointed trustee, whether the Official Receiver or a trustee from private practice, will be better informed about the debtors' affairs as a result of the reporting process, thereby reducing subsequent administrative costs.

2. Balancing of debtors' and creditors' interests

It is reasonable to assume that if access to the bankruptcy system is improved, both in terms of direct costs and ease of application, there will be a resultant increase in the number of debtors who avail themselves of the process.

Whilst rehabilitation from debt is undoubtedly a laudable goal, we would question whether easing entry to the bankruptcy system is entirely consistent with the mantra that "those that can pay, will pay", or indeed whether it is in the broader interests of society to facilitate an increase in the numbers of those who seek relief from the repayment of their debts.

We accept the inherent difficulties in endeavouring to balance the oft conflicting interests of creditors and debtors, however, would suggest that this end is more readily achievable when the principle that debtors should pay their debts to the extent that they are able to do so is *actively* pursued.

Evidence suggests that in like-for-like cases, an IVA will produce a better return to creditors than the alternative of bankruptcy, where there is sufficient income available to fund a monthly contribution, even at relatively low levels of contribution. This is partly due to the longer duration of an IVA (typically 5 years), but also due to the associated cost savings when compared to the fees charged for the administration of a bankrupt estate.

[9] Insolvency Proceedings (Fees) (Amendment) Order 2009

IVAs are voluntary in nature and many debtors who enter into them do so with a desire to repay as much of their debts as they are able and to avoid the "stigma" and potentially lasting implications of bankruptcy.

We are of the opinion that in neglecting to encourage a full consideration of alternatives to bankruptcy (whilst accepting that these alternatives are necessarily voluntary in nature and cannot be imposed upon a debtor), the suggested reforms not only fail to address the needs of debtors and the clearly expressed views of stakeholders, but they also fail to adequately take account of the legitimate interests of creditors in maximising the levels of debt repayment.

3. Conflict of Interest within the Insolvency Service

3.1 Operational separation of functions

The consultation document proposes that the Adjudicator should sit within the Insolvency Service but be completely operationally separate from the Official Receiver. The consultation suggests that the Adjudicator's independence is maintained by virtue of the limitation of the Adjudicator's role to determining whether or not the criteria for the making of a bankruptcy order have been met.

We are not convinced that this represents a sufficient safeguard, given that the personnel involved in the making of the order and subsequent administration of estate (an activity which generates a fee of £1,715 per case if sufficient funds are available) will be subject to the same departmental oversight. We would further comment that there is a paucity of detail as to how it is proposed that this separation be achieved in practice.

We consider that the potential for conflict would be reduced if applications for bankruptcy were made via an intermediary and the Adjudicator was also empowered to refer the debtor to an insolvency practitioner, as detailed above.

The arguments for such an approach are reinforced by the consultation in that it accepts they are likely to result in an increased, if unquantified, burden on the free debt advice providers flowing from the proposed reforms. We believe that there is a valuable contribution to be made by the private sector in this regard, with many thousands of hours of free advice already being provided by insolvency practitioners.

3.2 Automatic appointment of Official Receiver as trustee in bankruptcy

Proposals that the Official Receiver will automatically become trustee upon the making of the order would seem likely to result in an increase in the number of cases being retained for administration by the Insolvency Service (the same government department that will have responsibility for granting the orders in the first place).

Whilst the responses to the 2009 consultation indicated 90% of respondents favoured the role of the "Decision Maker" being conducted by the Insolvency Service, 88% also indicated that the Decision Maker did not need the power to appoint a trustee.[10]

[10] http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/DPRefResponses/DPrefIndex.htm

A consultation on the automatic appointment of the OR was opened in March 2010[11], separately from that which considered the role of the Decision Maker. The outcome of that consultation proposed that the OR should be automatically appointed trustee *"unless or until such time as an insolvency practitioner is appointed in his or her place*" [12], a statement which suggests that there will be an active consideration to the appointment of an alternative trustee. However, despite the concerns expressed in response to that consultation, there has been no subsequent discussion of the criteria for retention of cases within the Insolvency Service.

No timescale for implementation of this proposal was given, although the summary of responses stated *"… the proposal will be put forward (legislative vehicle permitting) while ensuring the official receiver's duty to report to creditors within the statutory timeframe remains"*. [13]

The Official Receiver's report to creditors, sent prior to the appointment of a trustee, is vital step in informing them of their rights and their recovery prospects. However, no detail has been provided in the current proposals as to whether this report will be retained. (It should be noted that unlike trustees from private practice, when the Official Receiver acts as trustee he is not required to send subsequent annual reports to creditors about the conduct of his administration.)

We assume that under the reformed system, creditors will retain the right to requisition a meeting to appoint a trustee, but the decision as to whether to do so will need to be based on the information with which they are supplied. Furthermore, there are a number of barriers to requisitioning a meeting; namely that the creditor must represent 10% in value of the known creditors of the estate (which may not be known at all in the case of a debtor who has ignored the proceedings and/or failed to supply accurate information), and the payment of a refundable deposit against the cost of the meeting.

The proposal for automatic appointment of the Official Receiver as trustee is the subject of a single sentence within the consultation document contained on page 7. We would suggest that further detail should be supplied about the circumstances in which creditors will be invited to select a trustee of their choosing. We would also question whether the automatic appointment of a trustee in this way reinforces the potential for a conflict of interest between the role of the Adjudicator and that of the Official Receiver, if these roles are located in the same government department.

4. Concerns re: debtors' applications

The following remarks should be read in conjunction with the comments made above about the need for debtors to receive appropriate levels of advice.

The consultation anticipates that the implementation of the proposed reforms will improve debtors' access to the bankruptcy system. However, given that no reduction in the deposit of £525 is proposed, we are unconvinced that the suggested reduction in the application fee alone (from £175 to between £69-£121) will result in a significant improvement in the accessibility of the system.

The impact assessment further estimates that the average fee paid in 2010, after the currently available fee remission system is £75 (p.77). If this is correct, a fee of £77, estimated in the impact assessment (p. 80-82) would represent an increase in the average fees payable. This, albeit small,

[11] http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/ORTrusteemarch10/ORtrusteeConsultationDoc.pdf
[12] http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/ORTrusteeResponses/ORTrusteeIndex.htm
[13] http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/ORTrusteeResponses/ORTrusteeIndex.htm at para 17.

increase would be effectively borne by those least able to meet it; namely, those that would currently qualify for full fee remission.

We do accept that the removal of the requirement to attend Court and the anonymity provided by the on-line process is likely to improve the accessibility of the system, and consequently, increase debtor take-up. It is also logical to assume that improving accessibility to bankruptcy will not only increase the total number of debtors using the system, but will also increase the proportion of them who do so without fully understanding the alternatives which may be available.

In response to the 2007 consultation, a number of respondents, including those from the funded sector, cast considerable doubt on whether a debtor, under pressure financially and very frequently also 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. 52% of respondents considered that debtors should attend the actual making of the bankruptcy order in person; largely to either a) ensure that the process was being taken seriously by them and/or b) to confirm the debtor's identity and/or c) to prevent abuse of the system.

Concern in this regard was broadly expressed in previous consultations. 61% of respondents to the 2009 consultation did not agree that a requirement to confirm that the consequences of bankruptcy had been read and understood would be sufficient to ensure that the debtor had understood the seriousness of entering into bankruptcy. [14] We believe that this reinforces the need to provide a mechanism where alternatives can still be considered, even after the application has been made.

This illustrates that the desirability of improved accessibility needs to be carefully balanced against the need for debtors to fully understand the implications of bankruptcy and appreciate its potentially serious and lasting consequences.

On an associated point, some of our practitioner members have voiced concerns about the quality and reliability of the information that is provided where the debtor initiates the bankruptcy process. We believe that these deficiencies may be exacerbated where the debtor completes an online form in isolation, rather than after having received face to face advice and assistance. This further reinforces the need for pre-application advice and assistance.

5. Concerns re: third party applications

5.1 Creditor initiated bankruptcies

The concerns expressed above about the importance of debtor's to be appropriately signposted to advice apply equally, if not more so, to instances where a creditor makes an application for bankruptcy.

When canvassed at our Personal Insolvency Conference in December 2011, opinion amongst our members about the advisability of extending the proposed on-line system to creditor petitions was divided. A number of our members expressed concern about the potential for abuse of a simplified system for creditor petitions, particularly by trade and expense creditors. On a balance, we support the proposal to reform the petition process for both debtors and creditors, however, we have suggested some additional safeguards within our responses to the specific questions.

[14] http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/DPRefResponses/DPrefIndex.htm at para 2.5

A number of our members have also expressed a view that the level of debt required in order to form the basis of a creditor's application should be increased to £5,000 (or indeed significantly more). We note that the consultation does not contain proposals to increase the petition threshold and we would suggest that further consideration should be given to doing so.

5.2 Winding up proceedings

It is reported in the consultation that only 45% of winding-up petitions result in an order to be made (p.66). However, it is also suggested that anecdotal evidence supports the proposition that only 5% of such petitions are "disputed" (p.12). These figures do not sit together comfortably, but if accurate, would indicate that 50% of petitions are withdrawn prior to them being heard, or dismissed with the consent of the parties. This would indicate that the current system is already effective in precipitating settlement.

As with creditor bankruptcy applications, whilst not opposed to the extension of the reforms to the winding up process, we would suggest that there is perhaps less justification for doing so, particularly in the light of the additional set-up costs (upon which we have commented further below in the context of the impact assessment.)

6. Cost / benefit of the proposed reforms

The impact assessment estimates the proposed reforms will generate a total annual recurring benefit of £75.8m, comprised as follows:

		£m
Savings to HMCTS	Re: Debtor Petitions	22.3
	Re: Creditor Bankruptcy Petitions	4.4
	Re: Winding-Up Petitions	1.2
Savings to HMRC	Re: Legal costs of petitioning	14.0
Savings to other petitioners		33.1
Savings to Debtors		0.8
TOTAL		**75.8**

The IPA has reservations about the methods by which these savings have been calculated, which are elaborated upon below, and consequently is concerned that these estimated savings may be substantially overstated.

The IPA is not convinced of the economic arguments made that the Insolvency Service will necessarily be able to process applications more cost effectively than an alternative service provider, such as but not necessarily limited to, the Court Service. Our concerns are expressed in detail within our response to the impact assessment.

We would question why a competitive tendering process was not considered as an alternative.

RESPONSES CONSULTATION QUESTIONS

The Court's role (Q1)

Q1	Should documents relating to a bankruptcy or winding up case remain with the party who created them and be open to inspection there by persons so entitled? If not, please explain your answer.
	We consider that the Adjudicator should retain a record of all applications made and their outcome. We consider a subsequently appointed Trustee, whether the Official Receiver or Licensed Insolvency Practitioner could retain the subsequent record of the proceedings.

The Adjudicator

[No consultation responses sought. See general comments above about the perceived conflict of interest between this role and that of the Official Receiver]

Application fees (Q2 – Q10)

Q2	Do you think that a debtor should be able to pay instalments within a specified period of time after submission of his/her application, or that there should be no such time constraints but only when full payment has been made would a debtor be able to complete and submit an application form?
	We are sceptical about the desirability of allowing payment by instalment, although accepting that it may improve access to the system, we would be comfortable if it were limited to payment over a relatively brief period.
Q3	If you favour a limit on the period of time during which instalments could be paid, what do you think should be the maximum period? Less than 3 months? 3 months? Or more than 3 months?
	Maximum of 3 months.
Q4	Should instalments be non-refundable?
	We are ambivalent about this.
Q5	If not, how should the administrative costs of handling the refund be recouped?
	See Q4 above.
Q6	Should there be any additional requirements for registration in order to deter abuse? If yes, please outline what you think those requirements should be.
	We believe that all applicants should be supplied with the "In Debt?" leaflet. For the reasons outlined at length above, we believe that debtors should be required to confirm whether they have taken advice about the alternatives to bankruptcy (not merely that they understand the implications of bankruptcy).

	In cases where there are assets or surplus income and advice has not been sought, they should be referred pursuant to s.273 to an insolvency practitioner in order that consideration can be given to the alternatives. Consideration should also be given to increasing or removing the s.273 limit of £40,000 of debts, to ensure that all those with available assets receive appropriate advice.
Q7	Do you think it would be useful for the Post Office Ltd (or another business that provides a similar service) to offer a "check and send" service?
	No. We consider that debtors should be encouraged to actively seek advice and assistance. The risk of a checking service is that it "validates" the debtor's decision to opt for bankruptcy without an informed decision necessarily having been made. Furthermore, we not believe that Post Office Counter staff have the necessary training or experience to respond to a debtor's enquiries. We consider that the existing system of DRO intermediaries would be a more suitable alternative for a checking service.
Q8	Do you think that there should be a fully electronic process for third parties who submit applications for individuals' bankruptcy or for companies to be wound up? If you think not, can you explain why not?
	Whilst not fundamentally opposed to such a system, we have a number of reservations, as set out above; primarily that the system may be open to abuse and there appear to be only limited operational cost advantages in making such a system available to third parties (beyond those estimated to HMRC as a petitioner).
Q9	Do you think that there should be differential pricing according to whether an application is submitted by a third party in paper form or electronically? Please explain your answer.
	No. We consider that this is an unnecessary complexity that would result in smaller creditors effectively subsidising the application costs of larger petitioners, such as HMRC.
Q10	Do you think that third parties should only be able to pay application fees electronically? If not, can you say why not and suggest alternative or additional means of payment?
	No, for similar reasons of accessibility to those expressed above.

Pre-Action Process (Q11 – Q15)

Q11	Do you think that there is scope for a pre-action process to encourage greater settlement of debt claims before a creditor resorts to bankruptcy or compulsory liquidation?
	Yes, subject to this process not generating undue delays. Indeed, if the process incorporates signposting to sources of advice and assist debtors in making informed decisions, then this would be a positive step. Mandatory provision of the "In Debt?" guide may be an option.
Q12	Is 21 days an adequate time period within which debtors can respond to a pre-action notice? If not, please suggest a more suitable period and explain your reasoning.

	Yes. Provided that there is sufficient availability of advice provision with the system within this 21 day period. This is particularly so as the process which follows does not currently anticipate a process of adjournment being available. It is our understanding that some funded service providers have waiting times of 4-6 weeks in appointment availability. We consider that the private sector has a valuable role to play in this regard.
Q13	Can you suggest any additional matters that you think ought to be included in the pre-action process? Is there anything listed that should not be included? Please give reasons for your answer.
	Yes. There is a well reported tendency of people with debt problems to "bury their heads in the sand". The benefits to both the debtor and their creditors (as a group) of them receiving advice about the alternatives are also widely recognised and understood. We would suggest that, as a minimum, the "In Debt?" guide could be provided by third party petitioners.
Q14	Do you think that the pre-action process should be mandatory or discretionary?
	Mandatory.
Q15	Do you think that there should be sanctions for a creditor who indicates it has complied with the pre-action process when it has not? Do you think those sanctions should be civil (such as costs or more onerous requirements for filing future applications) or criminal or do you think there should be the option of both?
	Yes. However, we are sceptical about how sanctions can be effectively applied outside of a Court-based system. Failure to comply with the pre-action process could perhaps be defined within statute as grounds for an annulment application under the heading of "the order ought not to have been made", but this will incur delay and cost to the debtor, who may already have been subjected to a number of the adverse consequences of insolvency. Unless this can be adequately addressed, it may mitigate in favour of third party petitions remaining with the Court.

Third Party (such as creditor) applications for bankruptcy (Q16 – Q27)

Q16	Do you think that these questions would be helpful to applicants in deciding whether they are entitled to make an application on the grounds of a debtor's COMI?
	We consider this question to be ambiguous, both with regard to the "questions" to be addressed and who is expected to determine them.
Q17	Can you suggest any other matters that the guidance could usefully cover to further help applicants?
	The guidance should cover the importance of providing debtors with the opportunity to seek advice, explore alternatives and reach appropriate settlements.

Q18	How likely is it that a third party such as a creditor will know, or be able to find out with reasonable accuracy, a debtor's email address and/or mobile telephone number?
	It is not within our knowledge to respond to this question.
Q19	Is it reasonable to require a creditor to re-serve a statutory demand if more than 4 months have elapsed between service of the demand and making the application?
	No. Existing provision that creditors are required to explain the reason for any delay beyond 4 months should be retained within the reformed process.
Q20	Who do you think should be responsible for sending a copy of the bankruptcy application to the debtor and eliciting his/her response?
	We are largely unconcerned about who effects delivery of the application. Our concerns are whether the costs of doing so have been properly accounted for in the costing (which is unknown), whether adequate checks are performed and who will bear the costs of those checks.
Q21	Do you think that a prompt by text message (which would only be sent if a debtor consents to the use of his/her mobile telephone number in this way) would be an effective mechanism to help alert the debtor to the imminent arrival of further information by post and/or email? Please explain your answer.
	We do not perceive that any harm will flow from doing so. However, we would question whether the costs of such a system in a) establishing the debtor's number; b) obtaining their consent to use it and c) establishing the infrastructure to send such messages have been properly accounted for within the impact assessment.
Q22	Do you agree that the only dialogue between the debtor and the Adjudicator should be to confirm correct contact details, and to establish whether the criteria for making a bankruptcy order are met. e.g. whether the application process has been complied with by the creditor; whether there is a debt that exceeds the bankruptcy level; and whether the jurisdiction criteria are satisfied. If not, can you suggest what other dialogue might need to take place and why?
	We believe that it should be incumbent upon the Adjudicator to emphasise the importance of the debtor taking advice and should ensure that they receive a copy of the "In Debt?" guide; delivered in the same manner as the application has been made (i.e. in either electronic form or hard-copy form, as appropriate). We believe that the Adjudicator should be required to ask if advice about the alternatives to bankruptcy has actually be taken, not merely that the implications of bankruptcy are understood. We further believe that, for the reasons detailed at length above, the Adjudicator should have the same powers as the Court pursuant to s.273 of the Insolvency Act 1986 to refer debtors to an insolvency practitioner. Where the criteria of s.273 have been met by either assets or surplus income, and advice has not previously been taken, we believe that the Adjudicator should (as a matter of policy) be required to make such a referral.

	Similarly, the provisions of s.274A (the Court's power to refer a debtor to an approved intermediary) should also be extended to the Adjudicator, enabling those debtors that would qualify for a DRO to be directed down that path as a cost-effective alternative to bankruptcy. On a minor, more technical point, we consider that the appointment of an Interim Receiver by the Court should trigger the automatic transfer of any bankruptcy application currently before the Adjudicator to the jurisdiction of the Court.
Q23	Is there any other way in which a dispute might be resolved before the court becomes involved? Or do you think that it is appropriate that a judicial decision is given at this stage in the proceedings?
	None that is apparent. Any dispute which has not been resolved between the parties should be determined by the Court.
Q24	Do you agree with the way we suggest that applications to which there is neither consent nor opposition should be handled? If not, can you explain why not and suggest an alternative solution?
	We are concerned that the proposals fail to actively encourage the debtor to seek professional advice. As stated above, we think that debtors should always be supplied with a copy of the "In Debt?" guide and signposted to sources of professional advice.
Q25	What period of time would it be appropriate to allow the debtor to communicate his/her response to the Adjudicator? 14 days? Less? Or more?
	At a minimum, this period should be 21 days. However, we would suggest that 28 days would be a more appropriate period, to cater for instances where the debtor may be absent on leisure or business and moreover, to provide debtors with sufficient time to obtain professional advice.
Q26	Do you think a third party applicant should be able to request to withdraw its application at any time up to the point at which it is determined?
	Yes.
Q27	Should any appeal against the decision of the Adjudicator be made in the first instance to the county court, or is there a benefit in retaining the existing provision that allows an appeal to be made in the first instance, in certain circumstances, to the High Court?
	We have no objection to County Courts determining appeals against the Adjudicator's decision and consider that any appeal should be heard by the court that would otherwise have dealt with the petition.

Application for compulsory winding up of a company (Q28 – Q39)

Q28	How important is it for the reforms proposed in this document that there is a Liquidator of Last Resort for Scotland?

	We feel there is a need for a Liquidator of Last Resort for Scotland, as we believe there are instances of directors leaving zero asset companies, sometimes serially, and creditors (for example, local authorities with non-domestic rate claims) have no real incentive to expend costs in pursuing highly uncertain recoveries.
Q29	If you think that it is important that there is a Liquidator of Last Resort, which organisation do you think should provide that office and how should it be funded?
	The process in Scotland in calling on the expertise and resources of the private sector to assist in low asset insolvencies already operates well in relation to Sequestrations contracted out to insolvency practitioner agents for the Accountant in Bankruptcy. This system may represent a relatively low cost, and importantly an efficient, method of dealing with these Liquidations. The Insolvency Service may seek to engage with insolvency practitioners, who already have proven skills and resources in dealing with Scottish Liquidations, to act as agents by means of tendering and contracting processes, much as the Accountant in Bankruptcy conducted a few years' ago for personal insolvencies. Whilst, of course, there would be some costs attributable to the process of engaging with insolvency practitioners, it would avoid the set-up and running costs that would be necessary if the work were to be carried out by the Insolvency Service or Official Receivers themselves, who at present are not equipped to conduct Scottish insolvencies. An alternative to the agency arrangement would be to operate a rota system with practitioners willing and able to accept Scottish appointments.
Q30	Do you think that the Adjudicator's role should be limited to determining applications for winding up on the grounds that the company is unable to pay its debts or where the company has passed a valid special resolution that it be wound up? If not, would you please explain your reasoning.
	We can see no reason why the Adjudicator could not determine an application on any grounds other than "just and equitable", which is clearly a matter requiring judicial determination. The other grounds contained in s.122(1) are ostensibly questions of fact, capable of being readily evidenced, and which an Adjudicator ought to be able to determine.
Q31	Are you able to suggest the proportion of petitions that are currently presented to the courts on grounds other than the company's inability to pay its debts; the company having passed a valid special resolution that it be wound up; and that winding up is just and equitable?
	No.
Q32	Who do you think should be responsible for communicating notice of the winding up application to the company and eliciting its response to the proceedings?
	See response to Q20.
Q33	Who should send notice to specified interested parties?

	The same person as is required to send notice to the company
Q34	When should notice be sent to these interested parties?
	At the same time as notice to the company.
Q35	Do you think that a winding up application should be advertised under these new proposals? If yes, please provide reasons for your answer.
	Yes. Given the class nature of insolvency proceedings, we consider that the advertisement of winding up proceedings (or applications) should be retained.
Q36	Can you foresee any circumstances in which it would be appropriate for the Adjudicator to seek further information from the applicant? If yes, please provide details and suggest how frequently this might occur.
	We are of the view that in the interests of accuracy and cost efficiency, the onus should be exclusively upon the applicant in corporate cases. If an application is deficient, then the applicant will not obtain the desired order.
Q37	What period of time should be sufficient for a company to communicate to the Adjudicator its opposition? 14 days? More? Or less?
	See Q25 above. The period should be a minimum of 21 days, but we would consider 28 to be appropriate.
Q38	Do you think that a creditor should be able to request to withdraw its application at any time up to the point at which it is determined?
	Yes.
Q39	Should any appeal against the decision of the Adjudicator be made in the first instance to the county court, or is there a benefit in retaining the existing provision that allows an appeal to be made in the first instance, in certain circumstances, to the High Court?
	See response to Q.27. Appeals should be heard by the court that would otherwise have dealt with the petition.

Impact Assessment (Q40IA – Q41IA)

Q40IA	Is the proposed pre-action process likely to result in any additional costs for creditor petitioners or debtors? If so, how much and why?
	We have no specific response to this question, however, have some more fundamental concerns about the accuracy of the impact assessment, as detailed below.
Q41IA	If you are a creditor, how often do you need to engage solicitors and/or barristers when petitioning for bankruptcy and company winding up? How much does this cost?
	N/A

DETAILED RESPONSE TO THE IMPACT ASSESSMENT

7.1 Anticipated cost savings within HMCTS

The costs to the Court Service, (HMCTS), have been calculated with reference to the estimated time-cost of their attending to petitions received from both debtors and creditors. The assessment assumes that costs are saved in full in the event that these petitions are administered by an alternative service provider; namely the Insolvency Service. We do not consider this to be a credible assumption.

Existing Court Service personnel are the persons currently experienced in checking the information contained within debtor petitions and processing them prior to the hearing. The consultation estimates that this process takes them a total of 174 minutes per application. No indication is given as to the length of time it is estimated that it would take suitably qualified Insolvency Service personnel to perform a comparable task, or indeed, why they might be expected to do so with any greater efficiency or expedience than those currently employed within HMCTS.

It can only be assumed, therefore, that the estimated savings in time are to be generated exclusively by virtue of improvements in the efficiency of the system for processing the applications, rather than in the efficiency of the personnel employed in the utilisation of those systems.

As a precursor to more detailed comments about the calculations within the impact assessment, we would question whether a reformed and more efficient processing system might be more effectively located within the Court Service, where the existing human resources could be utilised.

With regard to the estimated time expended in dealing with individual applications, we have some reservations about the savings to be made. It is not detailed within the impact assessment how the estimated total of 3 hours 45 mins in processing a debtor's petition has been arrived at, although would comment that this appears excessive given nature of the tasks involved. It is further noted that no estimate is provided of the anticipated time savings associated with the reformed system.

Assuming the computation of time expended per petition is reasonably accurate (which is not fully evidenced by the information supplied), the estimated total costs to HMCTS of administering the petition process, calculated as a function of the time expended, is circa £33m. However, the stated "cost per minute" has not be broken down or clarified to any significant degree, other than to state that it "*includes an allocation of overheads, salaries, IT and accommodation*"[15].

No explanation is provided of how, or to what extent, it is envisaged that the cost per minute would be reduced by the proposed reforms.

Additionally, when calculating total costs as a multiple of "time per case" and "cost per minute", even a small divergence in either multiplier could have a significant bearing on the accuracy of the £33m estimated total cost of attending to bankruptcy and winding-up petitions.

It is self-evident that even if the anticipated time savings are made within HMCTS, these would only translate into direct reduction in the costs of the petition process if there were consequent cost

[15] p.74 and footnotes 14 & 15 thereto

savings (e.g. by way of personnel and overhead cost reduction). Such savings are not elaborated upon within the impact assessment, which states that:

> *"…Savings to HMCTS have been calculated, but there are currently no figures for associated cost reductions. Any reduction in costs will flow from wider strategies for transforming civil justice."*[16]

Given that it is proposed to retain the Court infrastructure to deal with both disputed cases and appeals, these figures seem increasingly doubtful. Given that a reported 48% of creditors' bankruptcy petitions and 45% of winding up petitions result in an order being made, (p 66), the suggested percentage of cases which would continue to require resolution by the Courts under the proposed system (only 5%) appears optimistic, and hinged largely on how one defines a "dispute".

Until the work load of the Courts in determining "disputed" cases has been ascertained, there will remain a need to retain the current infrastructure, which will further adversely affect the accuracy of the impact assessment.

7.2 Estimated Set-Up Costs

Set up costs are estimated at £4.5m (p.61), broken down as comprising £0.9m in developing the application system for debtors, based upon the existing DRO system, and £3.6m in developing the system to administer creditors' bankruptcy application and winding-up applications (p.79).

The estimated savings in HMCTS costs in not attending to the creditors and winding-up petitions is £5.6m. Whilst noting our challenge to the accuracy of these figures as detailed above, if accurate, there would seem to be only limited commercial justification in extending the reformed system beyond debtors' petitions. However, we further note that the impact assessment anticipates a saving of £22m to HMRC in streamlining the petition process.

When canvassed, a number of our members expressed a view that the reformed system should only be available to debtors, where it would appear that the primary cost savings would be made in any event.

7.3 Estimated Operating / On-going Costs

In direct contrast to the estimated cost savings to HMCTS (which are estimated by reference to the time cost expended spent in processing them), the basis of estimation employed vis the proposed system is described in vague terms as being *"….based on an assessment of the likely work required to administer these cases, informed by the experience of dealing with applications for debt relief orders".*[17]

Tables illustrating the sensitivity analysis of possible application fees[18], upon which the on-going operational costs of the proposed system are apparently based, provide estimates of the revenue potentially generated from various levels of fees; thereafter, they appear to assume that this revenue will be equal to operational costs, without providing any satisfactory explanation of how this to be achieved.

[16] p.61
[17] p.80 para 56
[18] p.80 - 82

The calculations contained in the tables are further flawed in that the estimates of the number of orders which will result from the various types of application received by the Adjudicator but fails to apply the same percentage "success" rates that are reported earlier in the impact assessment; namely that whilst 97% of debtors petitions result in an order, only 45-48% of third party petitions result in an order being made. [19] This results in an overstatement of the number of orders that would be made in each band of estimated application numbers.

More fundamentally, it would seem questionable to base the impact assessment upon the assumption that the number of applications for bankruptcy will diminish from the reported total of approximately 70,000 in 2010[20] (upon which the costs to the Court Service have been estimated), to approximately 38,000 under the proposed regime[21], particularly given the stated objective of improving access to the processes involved. Were this reduced number ultimately accurate, it could reasonably be assumed that the objective of improving access to the system to both debtors and creditors had not been achieved; which seems an unusual basis upon which to produce an impact assessment.

Even were this reduction in numbers to prove accurate, simply deducting the total revenue generated from an estimated 38,000 bankruptcy applications made to an Adjudicator, £3.1m, from the estimated total costs of attending to 70,000 bankruptcy petitions per annum, £25.4m, (as are currently received by the Court Service), to produce an estimated saving of £22.3m[22],is patently spurious.

We are also sceptical of the £92,300 estimated recurring costs of establishing the "Insolvency Service Advice Line" to assist debtors with their applications as this has not been itemised and does not appear realistic in the context on an estimated 31,000 debtor applications per annum. The consultation itself notes *"The estimated cost for the operation of the telephone enquiry line, as discussed in paragraph 60, is £92,300. Although this cost has been included in the overall annual running costs of £3.7m, an assumption has been made based on our experiences with the debt relief order process, as to the number and level of staff the new team will need to be fully operational. Due to the fact that this is a new business area for The Insolvency Service, there is a risk that the calculations may not completely reflect the level of assistance debtors will actually need in real terms."*[23]

In light of the above, we are of the view that estimates of savings to be made in operating and on-going costs of the proposed reforms are not entirely credible.

7.4 Estimated cost savings to HMRC

The estimated resultant savings to HMRC of £22m assume a 100% reduction in spending on legal costs.[24] Again, we would question the credibility of this assumption and would query whether HMRC have actually expressed a view as to whether they would intend to dispense with legal representation in 100% of cases?

[19] p.66 Figure 1
[20] p.66 Figure 1
[21] P.81 Figure 11 – See table estimated 40,000 resultant orders, upon which the cost/benefit assessment is thereafter based.
[22] p.83 Figure 12
[23] p.93 para 92
[24] p.87

7.5 Estimated cost savings to other petitioners

The impact assessment estimates benefits of between £25.2m-£41.1m being received by non-government petitioners.[25] These savings are produced upon the assumption that these petitioners will no longer require legal representation in 60%-100% of cases. We would question whether this is either realistic or desirable?

Insolvency proceedings can have grave consequences for the recipient, even if an order is not ultimately made, and the circumstances in which they can be justifiably brought are complex. Whilst accepting that government departments may be sufficiently well resourced to mitigate the potential adverse consequences of their not being legally represented, we would suggest that non-governmental petitioners may not be so well placed to properly assess the risks and consequences of instigating insolvency proceedings.

It is further noted that substantially less Court Service time is expended in the processing of creditor bankruptcy petitions (2 hours 20 mins) and petitions for winding up (1 hour 42 mins), and this is notwithstanding that these processes are only half as likely to result in an order being made. This may indicate that employing legal representation reduces the administrative input subsequently required from those processing the application. Account of this does not appear to have been taken within the estimated benefits of savings in legal costs.

[25] p61 and amplified at pp 89-91

ABOUT THE IPA

The Insolvency Practitioners Association (IPA) is a membership body recognised by the Secretary of State for Business, Innovation & Skills (BIS) for the purposes of authorising Insolvency Practitioners (IPs) under the Insolvency Act 1986. It is the only recognised professional body to be solely involved in insolvency and for over fifty years, the IPA is proud to have been at the forefront of development and reform within the industry.

As of 01 January 2012, the IPA has over 2,000 members, of whom 520 are currently licensed insolvency practitioners (IPs). In addition to its recognition under the Insolvency Act for the purpose of licensing IPs, the IPA is also a Competent Authority approved by the Official Receiver for the purpose of authorising intermediaries to assist with debtors' applications for Debt Relief Orders.

The IPA currently license approximately one third of all UK insolvency appointment takers, who are subject to a robust regulatory regime, applied by the IPA's dedicated regulation teams carrying out complaints handling, monitoring and inspection functions. Additionally, the IPA conducts inspection visits of those appointment-takers licensed by the Law Society (Solicitors Regulation Authority), one of the other recognised professional bodies under the Insolvency Act. The IPA also undertakes monitoring visit work for the Debt Resolution Forum, a membership body which sets standards for its members when involved in providing non-statutory debt solutions to insolvent individuals (such as Debt Management Plans).

The IPA has a longstanding and continuing commitment to improving standards in all areas of insolvency (and related) work. It was the first of the recognised bodies to introduce insolvency-specific ethics guidance for IPs, and the IPA continues to be a leading voice on insolvency matters such as the development of professional standards, widening access to insolvency knowledge and understanding, and encouraging those involved in insolvency case administration and insolvency-related work to acquire and maintain appropriate levels of competence and skills.

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Consultation Closing Date: 31 January 2012

The IPA's responses to the previous associated consultations may be viewed at:

http://www.insolvency-practitioners.org.uk/uploads/DebtorPetitionandDischargeReform_%20IPAResponse.pdf
http://insolvency-practitioners.org.uk/uploads/ResponsetoBIScallforevidenceDec2010.pdf
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