The City of London Law Society

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Comments on Proposed Reforms to Bankruptcy Legislation

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. **This response to the consultation document dated November 2009 entitled "Reform of Debtor Petition Bankruptcy and Early Discharge from Bankruptcy" (the "Consultation Paper") has been prepared by the Insolvency Law Committee.** The Committee is made up of a number of solicitors from City of London firms who are expert in their field. The Committee's purpose is to represent the interests of those members of the CLLS involved in the insolvency law area. Members of the Committee will be glad to amplify any comments if requested.

PART 1

1. INTRODUCTION

1.1 As outlined above, the CLLS responds to consultations on issues of importance to its members. The majority of our members do not practice in the field of personal insolvency, although some of our members' clients may be adversely affected by changes in law in that field.

1.2 Consequently, the Insolvency Law Committee limits its comments in this paper to matters of general principle, as we consider that there are others more qualified to comment on many of the detailed questions set out in the Consultation Paper. Where we make no comment, it should not be assumed that the Committee is in agreement with the proposals, nor that we consider the questions posed unimportant.

1.3 Where we make a comment of general principle, we refer to the question numbers in the Consultation Paper that are relevant to that comment.

1.4 Except where stated to the contrary, capitalised terms have the same meaning in this response as given to such terms in the Consultation Paper.

2. SUMMARY

2.1 In summary, we broadly welcome the proposal to make it easier for debtors to commence their own bankruptcy, if this is in the interests of the debtor concerned and does not have an additional adverse impact on his or her creditors.

2.2 However, the Consultation Paper raises three points of concern to the Committee:

(a) the payment system that will apply to an online application;

(b) the relative ease with which a debtor could initiate his or her own bankruptcy without any external advice from the CAB or other bodies; and

(c) the lack of a cooling-off period.

2.3 We set out our thoughts in relation to each of these points below.

3. PAYMENT (QUESTIONS 8,9 AND 12)

3.1 The principal matter that will be of concern to our members is the question of payment.

3.2 We are very concerned at the suggestion that fees could be payable electronically online, as an alternative to using a payzone. If a debtor can pay a fee online, this will encourage the use of credit cards and overdrafts to pay such fees, which will be at the expense of lenders that have made such facilities available. It also inevitably results in the debtor acting to the detriment of certain of his or her creditors.

3.3 The suggestion also seems inconsistent with the existing approach in the bankruptcy regime and its alternatives. Bankruptcy deposits must be paid in cash or by third party cheque. Under the debt relief order scheme, fees can only be paid in cash at a payzone.

3.4 Our view is that a debtor's only method of payment should be through a payzone, in cash.

3.5 We make no detailed comment on the other changes to the fee regime, although we note that the lack of discretion on fees will impose an additional burden on those already in financial difficulty.

4. INDEPENDENT ADVICE (QUESTIONS 4 - 7)

4.1 For a debtor, the decision to seek a bankruptcy order will have a significant effect on his or her future financial condition, and the ability to obtain credit and services. For some debtors, it may also have an impact on housing, divorce settlements or child maintenance arrangements. It is therefore critical that adequate protections are put in place to protect the debtor.

4.2 While it is possible for a debtor to petition for his or her own bankruptcy under the current system without seeking professional advice from a voluntary body or other suitable individual, the indication is that the majority of debtors do seek some form of advice before submitting a petition, as highlighted in the Consultation Paper. The concern must be that, if the system is made easier and more accessible (which, of itself, is to be welcomed), it is less likely that a debtor will seek advice before making an application under the new regime.

4.3 We do not consider that the use of "pop-ups" and warning boxes during the online application process is sufficient to ensure that applicants have understood the nature of the bankruptcy process and the alternatives that might be available to them. There is a significant risk that applicants will simply not read the information available and "click-through" to the next screen.

4.4 In our view, it would be more appropriate for the online application process to be operated through approved intermediaries, who could be the same persons as are approved to act as intermediaries in the context of debt relief orders. This would ensure that proper advice has been taken without incurring the cost of creating a parallel system. Additionally, it would make the role of Decision Makers easier: Decision Makers would not be required to refer applicants to other processes. It should also ensure that the time of Decision Makers is not wasted by incorrect or incomplete applications.

4.5 The involvement of approved intermediaries would also provide additional protection against fraud.

4.6 If this option is considered unworkable or too expensive, we suggest that it is compulsory to call the telephone advice line as part of the process, and that the telephone operators should, using a script, highlight the key advantages and disadvantages of bankruptcy and the other options that are available.

5. COOLING-OFF PERIODS (QUESTION 27)

5.1 If an approved intermediary system is used, there is no need for a separate cooling-off period. However, if there is no such system, a cooling-off period is essential. This is a basic protection in online transactions and applies in many other commercial contexts - for example, buying insurance - where the outcome is much less serious than bankruptcy.

5.2 A short cooling-off period (7 days would seem adequate) in which an applicant could withdraw his application should cause no significant cost to be incurred to the Insolvency Service. The Decision Maker would only review the application after the expiry of the 7 day period. This delay would be insignificant compared with the delays that occur in the current court process and would provide additional protection to the debtor.

5.3 We recognise that the requirement for payment may create an in-built cooling-off period if electronic payments are not permitted but a formal period would seem to provide a more consistent approach.

5.4 We also suggest, if it is determined that a cooling-off period is not necessary or practicable, that it is not possible to access the site at certain times of day, for example late at night on Fridays and Saturdays, when there is a risk that debtors may not be in the right frame of mind to complete such an important task.

The Insolvency Committee of the City of London Law Society

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THE CITY OF LONDON LAW SOCIETY
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