THE INSOLVENCY SERVICE

Consultation

Reform of the Process to Apply for Bankruptcy and Compulsory Winding Up

November 2011

A BIS SERVICE

Contents

Foreword

When people fall into financial difficulties, as some inevitably will, I want them to be empowered to make the right decisions for themselves about their finances and for them to have access to appropriate debt advice and assistance at the time they need it. This desire is reflected in the government response to the call for evidence about personal insolvency.

It is also important that they have appropriate routes available which work effectively and fairly both for them and for their creditors. Bankruptcy is one of those options. It is apparent from earlier consultations on proposals to reform the way debtors petition for their own bankruptcy that people see clear benefits in removing the court from that process, while still providing necessary safeguards.

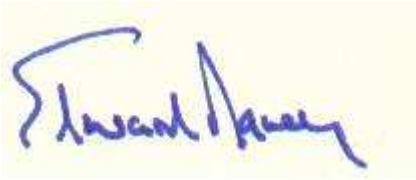
I also want to ensure that the most appropriate route is provided into bankruptcy when it is on the application of a third party. This means involving the court where there is a dispute between the parties about whether bankruptcy is the proper outcome. That is an important protection for those who are most vulnerable and, clearly, courts are best placed to weigh up competing interests and determine where the balance lies. But where there is essentially no disagreement between the parties, I believe a more streamlined route into bankruptcy can be found.

Similarly, I consider that a new route could be used for compulsory winding-up of companies where there is no dispute involved.

These proposals are very much in line with the wider proposals on Transforming Justice to focus the role of the Courts on cases where there are disputes to settle, and to encourage parties to resolve difficulties without recourse to the Courts where possible. However, the proposals also need to make sense financially for HM Courts and Tribunals Service and, as a result, the question of whether and how the proposals are taken forward will be considered, not just in the light of responses to this consultation, but also in respect of a detailed business case showing how benefits might be realised.

The important changes proposed in this consultation document about petition reform are designed to encourage debtors and creditors to communicate with each other, and thereby reach a solution that is satisfactory to both of them, without recourse to a bankruptcy or winding up application if there is a real possibility that this can be avoided. If the result of such dialogue is that bankruptcy or winding up is the right way forward, the new process would enable the parties to reach that end in the most efficient way that is ultimately in both their interests.

It is essential that we get the detail correct, for example on the levels of safeguards required, so that the new processes can lead to better results, particularly for debtors, whilst also respecting creditors' rights. That is why I strongly encourage all interested parties to respond to this consultation, and I very much look forward to hearing your views.



Edward Davey, Minister for Employment Relations, Consumer and Postal Affairs

Executive Summary

The proposed reforms build upon proposals to reform the debtor petition bankruptcy process by removing the court from the application stage where there is no dispute between the parties about the outcome. Clearly if a debtor is applying for his/her own bankruptcy, there is only one party's interests to consider. But the same principle can also be applied where there is another party involved - if there is no dispute between them for a Judge to arbitrate.

This new process should deliver better outcomes by providing a more appropriate route specifically for undisputed cases, thus facilitating a more efficient service in these particular circumstances which could lead to saving valuable public and private resources. For example, under an administrative process, there would no longer be a requirement to make an application to court or to appear in person at court in routine applications. Unlike now, creditors and others entitled to make applications may no longer need to employ solicitors to help make applications for bankruptcy and winding up where there is no dispute about the outcome of such applications, thus potentially providing savings for business. But the main thrust of these reforms is to provide the most appropriate route into these procedures.

Application fees will be set at a level that ensures full cost recovery and should also be lower than the current court fees for all applicants[1]. Please see the draft Impact Assessment at **Annex C** for more information about potential costs and savings.

In order to ensure that the interests of debtors in particular, but also of creditors, are protected, the court will still have an important role to play in the application process by determining the outcome of any dispute between the two parties over a debt, and directing the Adjudicator how to proceed with the bankruptcy or winding up application. This consultation document sets out the detail of how the proposed new system would operate, including why prospective third party applicants and debtors should communicate with each other during the early stages of the process so that every opportunity is taken to resolve the matter before it results in a bankruptcy or winding up application.

An electronic process will also facilitate other efficiencies, such as allowing for much speedier notification of bankruptcy orders and winding up orders to the official receiver's office, enabling official receivers to start administering bankruptcy and liquidation cases more swiftly. This further builds on the efficiencies that will flow from the proposal that the official receiver automatically becomes trustee on the making of the bankruptcy order[2].

[1] Depending on what processes are associated with determining each type of application and the number of applications made per year

[2] See the consultation on the official receiver becoming trustee of the bankrupt's estate on the making of a bankruptcy order and removal of the requirement to file a "no meeting notice" in certain company winding up cases, available to view on our website at www.bis.gov.uk/insolvency

The reforms proposed to the bankruptcy application process apply to England and Wales only. The winding up proposals also apply to England and Wales. Additionally, and if the Scotland Bill that is currently before Parliament is passed in its current form, it will be for the UK Parliament and Government (in conjunction with the Scottish courts and appropriate stakeholders) to make decisions for Scotland about the issues relating to winding up that are discussed in this document.

Section A: General Information

How to respond

When responding please state whether you are doing so as an individual or whether you are representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

This consultation was published on **07 November 2011**. The consultation period will run for 12 weeks, and the closing date for responses is **31 January 2012**. However, we encourage responses as early as possible to assist us in accelerating the process of considering replies.

A response can be submitted by letter, fax or email to:

Maria Isanzu
Policy Directorate
The Insolvency Service
Zone B, 3rd Floor
21 Bloomsbury Street
London
WC1B 3QW

Tel: 020 7291 6733
Fax: 020 7291 6746

Email: policy.unit@insolvency.gsi.gov.uk

This consultation will be of interest to: individuals, business; trade organisations and advisers; banks and other providers of business finance; representative and regulatory bodies; employees and academics.

We will be holding a number of consultation events and meetings with interested parties during the

consultation period to discuss the proposals. Please contact us if you would like to be involved.

Additional copies

This consultation can be found at: www.bis.gov.uk/insolvency. You may make additional copies of this document without seeking permission.

Confidentiality and data protection

Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide, to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidentiality.

In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic disclaimer generated by your IT system, will not, of itself, be binding on The Insolvency Service.

The Insolvency Service will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Help with queries

Questions about the policy issues raised in the document can be addressed to Maria Isanzu, The Insolvency Service (contact details as above).

If you have any comments or complaints about the way this consultation has been conducted, these should be sent to:

Sameera De Silva
Consultation Co-ordinator
Department for Business, Innovation and Skills
Better Regulation Team
1 Victoria Street
London. SW1H 0ET

Email: Sameera.De.Silva@bis.gsi.gov.uk

Tel: 020 7215 2888
Fax: 020 7215 0235

A copy of the Government's Code of Practice on Consultation is attached at **Annex F.**

What happens next?

The Government will consider the responses received alongside a business case for the proposed reforms, and thereby reach a view about whether it is necessary to legislate on this matter when Parliamentary time allows.

Decisions taken in light of the consultation will be published along with a summary of the responses.

Stakeholders will be able to follow developments on these proposals following the consultation on The Insolvency Service website at www.bis.gov.uk/insolvency

Section B: Background to the proposals

The effective use of court services has been the subject of much discussion over recent years[3], and as far back as 1986[4]. A rise in debtor petitions over the last decade has resulted in the court services experiencing high demands on their resources in areas where there is no point of contention. Since 2007[5], we have been examining the implications and benefits of removing the courts from the debtor petition process, and the cost and resource savings which could flow from these changes. Responses from stakeholders have shown that these proposals are both a feasible and a welcome means of facilitating the efficient operation of the court services[6].

Consultation on the detail of an administrative process for debtor-initiated bankruptcies closed in February 2010[7]. We have since been looking again at our proposals in the context of recent wider civil justice reforms proposed by the Ministry of Justice[8].

Litigation can often be costly, time-consuming and is not always the most efficient route to resolving civil problems. This can lead to others experiencing delays in accessing the court services, including those who really do need the court's help. In considering the reforms proposed by the Ministry of Justice, we have identified an opportunity for government to encourage better outcomes for both business and individuals specifically where there is no dispute between the parties, that will also facilitate the delivery of a better service to users and thereby lead to significant savings.

So the challenge for Government is to deliver improved outcomes for the public and business at the lowest cost to the tax payer. The proposals contained in this document seek to meet this challenge by setting out the detail of a streamlined, proportionate and efficient application system with safeguards - not just for debtors seeking bankruptcy, but also for creditors and other third parties seeking an individual's bankruptcy or a company's liquidation - specifically where there is no dispute between the parties that formal insolvency is either the appropriate or only realistic outcome of the debt situation.

We recognise that separate processes will be needed to reflect the specific nature of each of these three procedures – that is to say, debtor initiated bankruptcy applications, creditor and other third

[3] http://www.justice.gov.uk/consultations/docs/cp2207.pdf

[4] http://www.dca.gov.uk/civil/final/index.htm

[5] See the consultation entitled *'Bankruptcy: proposals for reform of the debtor petition process'*, http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/Initialstageconsultationpaper.doc

[6] See the response paper to the consultation entitled *'Bankruptcy: proposals for reform of the debtor petition process'*, http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/deptorpetresp.pdf

[7] See the consultation on *'Reforming Debtor Petition Bankruptcy and Early Discharge From Bankruptcy'*, http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/Debtor%20Petition%20Reform%20Final%20Nov%2009.pdf

[8] http://www.justice.gov.uk/downloads/consultations/solving-disputes-county-courts.pdf

party initiated bankruptcy applications, and creditor and other third party initiated winding up applications. This consultation document builds on the proposals in the earlier consultation about debtor petition reform and sets out new proposals for third party petition processes. Specifically, we build upon the previously published proposals for debtor petition reform, taking account of the views expressed in response to the last consultation. This document therefore sets out some important decisions that this government has taken about the way the debtor petition process should be reformed, and also sets out, in broad terms, proposals to expand those reforms to undisputed third party bankruptcy and winding up petition processes.

Anecdotal evidence from HM Courts and Tribunals Service is that most debtors do not dispute in court bankruptcy proceedings brought by creditors, as only about 5% choose to defend them in court. In all but these few cases, there is therefore no dispute for a court to arbitrate. The main thrust of our proposals is therefore to extend the proposed administrative route into insolvency so that it applies - with appropriate safeguards - not just to debtors seeking their own bankruptcy[9] but also in undisputed cases where creditors and certain others are seeking the bankruptcy of an individual or the winding up of a company.

The policy intention is to ensure that the system delivers better outcomes by focusing the court's role and resources very firmly on matters of dispute that rightly require judicial intervention and expertise, and that non-contested matters are dealt with in the most efficient and cost effective way, and in a way that works for the debtor in particular.

[9] See the consultation on *'Reforming Debtor Petition Bankruptcy and Early Discharge From Bankruptcy'*, http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/Debtor%20Petition%20Reform%20Final%20Nov%2009.pdf

Section C: The proposals

Introduction

The current route into bankruptcy for those who choose to make their own application is through the courts. There have been delays getting hearings and this, together with a drive to focus courts on dispute resolution, resulted in consultation (between November 2009 to February 2010) on detailed proposals to replace the court, in these specific circumstances, with an administrative process. The consultation proposed that an application would be submitted electronically (where possible) to persons appointed by the Secretary of State, and that those persons would make decisions on the applications.

Responses to the consultation, published on 28 October 2010, show that there is an appetite for removing the courts from the debtor petition procedure, provided that appropriate safeguards are incorporated into the replacement process.

The majority of bankruptcy petitions (around 85%) are presented by debtors themselves. In effect, because the applicant is applying for relief for him/herself, the petition is not in dispute. Removing debtor petitions from the courts would therefore free up judicial time to deal with matters that do involve a dispute and that properly require the court's consideration, such as applications for bankruptcy restrictions orders or suspensions of discharge.

But whilst these reforms would lead to improved outcomes and efficiencies, the courts would still have to keep in place the same infrastructure in order to deal with the much lower numbers of creditor and other third party petitions. Yet anecdotal evidence from the courts suggests that only around 5% of third party petition bankruptcy and winding up cases involve a contested court hearing. This means that the vast majority of creditor petition cases do not involve a dispute, yet they must still all go through the court process.

There is already a type of debt relief that is delivered without involving the court - Debt Relief Orders (DROs) were introduced in April 2009 to provide help for those who are burdened by relatively low levels of unmanageable debt, without the need to approach the courts.

Based on a very strict set of criteria, an applicant must owe no more than £15,000, have a disposable income of no more than £50 per month and must not own assets of more than £300. Unlike any other form of debt relief that had preceded it, DROs are delivered by means of a formalised partnership between The Insolvency Service and the professional debt advice sector - skilled debt advisers can be authorised by a competent authority as approved intermediaries. This official status renders them qualified to assist debtors to apply to The Insolvency Service for a DRO. From here, an official receiver considers and administers that application.

Although DROs have only been available for just over two and a half years, the early indications are

that they have been very successful in reaching those in need[10].

Changes brought into effect from 6 April 2011 allow access to DROs to those previously excluded because they had accrued some rights to an approved pension. This barrier to debt relief had been real for many, and this important change is good news for some of the most needy and vulnerable members of society who find themselves in inescapable financial difficulties.

In this consultation, we set out proposals for removing the courts from the order-making process, not just in debtor petition cases, but also in creditor and other third party instigated bankruptcy and compulsory liquidation cases but, importantly, only where there is no dispute between the parties that formal insolvency is either the right or only viable option to resolve the debt owed. The proposed reforms insofar as they relate to bankruptcy applications only extend to England and Wales. This is because bankruptcy is a matter that is devolved to the Scottish Parliament. We discuss how the reforms as they relate to company winding up applications might apply in Scotland on page 43 below.

These proposals seek to ensure that both parties have maximum opportunity to reach an agreement about how the debt is to be resolved before bankruptcy or winding up is considered. We invite stakeholders and interested parties to offer their views on these proposals.

Detailed Proposals

1. The court's role

It is important to emphasise, before setting out the detail of the proposals, that we intend that the court will still have a crucial part to play in deciding all applications from third parties for either bankruptcy or company winding up where there is a dispute. However, we want to maximise the opportunity for the two parties to work out a mutually acceptable resolution of the debt, whether that is amended payment terms or an agreement that formal insolvency is the only viable solution. And we set out later in this document how a pre-action process, possibly involving mechanisms such as mediation and alternative dispute resolution, might be used to good effect to resolve these debt issues. But we recognise that this may not be possible in all cases and that there may be issues about which the two parties, despite best efforts, are unable to reach an agreement. In all cases where there is a dispute between the parties, we believe that it is essential that the court becomes involved, in order that it may weigh up the competing interests of the two parties and determine where the balance lies.

[10] See for example http://www.cccs.co.uk/Portals/0/Documents/media/pressreleases/Debt-Relief-Orders-Anniversary-press-release.pdf

Equally importantly, the court will continue where necessary to arbitrate between the parties after the order is made, for example, by hearing applications from official receivers for bankruptcy restrictions orders and public examinations, and from official receivers and trustees for income payments orders and suspensions of discharge, and from bankrupts for annulment of bankruptcy orders. But the court will no longer routinely accept documents for filing at court in all bankruptcy and compulsory winding up cases.

The current law requires an insolvency office holder (either the official receiver or an appointed insolvency practitioner) to file at court various documents pertaining to a bankruptcy or compulsory winding up. This is because a new court file is opened for each bankruptcy and winding up petition that is presented to the court. However, under these proposals, the court will have no role whatsoever in many such cases, and it is inefficient to require one person to create a document which is then sent to another, just so that it can be filed.

We therefore propose that, other than in respect of those applications where there is a dispute that the court needs to resolve, documents relating to bankruptcies and compulsory liquidations (such as Notice of Release of the official receiver as trustee[11]) will no longer be filed routinely in court, as they are now. Instead, we propose that **the person who is required to produce the document (either the official receiver or an appointed insolvency practitioner) should also be the person who is required to keep a copy for inspection by anyone who is so entitled.**

We have considered whether insolvency practitioners should instead be required to file documents with the official receiver. But this still involves one person sending a document to another person whose sole job in relation to that document would then be to file it. It would also keep the burden of maintaining such files with the public sector. It is important to note that insolvency practitioners are members of a regulated profession. As such, they are monitored to ensure their compliance with statutory duties and obligations, which would include creating documents and allowing creditors and others to access them.

Question 1: 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.

2. The Adjudicator

Our core proposal is that, where - and only where - there is no dispute between the parties, the court should be removed from the process by which bankruptcy and winding up orders, whether on

[11] Rule 6.136 of the Insolvency Rules 1986

the petition of the debtor, or his/her creditor(s), or certain other third parties, are granted[12]. Equally, we want to ensure that parties' interests are protected where there is a dispute, which will require the intervention of the court.

We propose that an applicant will complete an on-line form and then submit it electronically, together with payment, to the Adjudicator. Debtors will have the option of applying by post. The Adjudicator will be a person appointed to this new office by the Secretary of State to receive and make decisions based on those applications.

As already discussed, taking the courts out of the order making process specifically in those cases that are uncontested will enable the court to focus on the matters that rightly require its judicial expertise, delivering better outcomes and improving overall efficiency. These reforms should also reduce reliance on taxpayers' money and result in significant savings, for government, for private individuals and for business (see Impact Assessment at **Annex C**). But important decisions will still have to be made about whether bankruptcy or winding up should be granted, and these decisions have serious consequences. The role of the Adjudicator is clearly therefore a very responsible one.

In the November 2009 consultation, interested parties were invited to comment on the skills and experience of the person appointed to determine debtor applications for bankruptcy; whether this person's role should sit within The Insolvency Service or elsewhere; and what links there should be between this person and other bodies.

A summary of responses was published on 28 October 2010[13]. In total, 37 businesses, individuals, and representative bodies responded to the consultation document. 90% of the 31 respondents who commented on the role of the person making decisions on debtor bankruptcy applications thought that this person should sit within The Insolvency Service, although some concern was expressed that the Adjudicator's role should be operationally separate from the official receivers who administer cases once orders have been made.

Respondents agree that it is important that the person making bankruptcy orders should be suitably qualified and have the relevant expertise, skills and experience to determine bankruptcy applications. The majority of those who commented suggested legal knowledge, insolvency background, and practical experience would be important requirements for the new official. Some also added that it would be desirable for him/her to have an understanding of wider financial and money advice issues[14].

---

[12] For more details specifically about the debtor petition process, please see the consultation document on *'Reforming Debtor Petition Bankruptcy and Early Discharge'* published in November 2009 and the Government's response to that consultation http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/registerindex.htm

[13] See the Ministerial Statement and summary of responses on *'Reforming Debtor Petition Bankruptcy and Early Discharge'*, http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/registerindex.htm

[14] For full details of respondents' views, see the Summary of Responses: http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/DPRefResponses/DPrefIndex.htm

We propose that The Insolvency Service takes on the role of Adjudicator, as it already has some experience of receiving electronic applications and making orders administratively when dealing with applications for debt relief orders[15], and employs staff with the right expertise and experience to carry out the necessary work. IT would have to be developed specifically to deal with uncontested bankruptcy and winding up applications. We also recognise the importance of ensuring that there are proper systems in place that will enable the Adjudicator to operate, and make his/her decisions, completely independently of official receivers. We therefore propose that **the Adjudicator should sit within The Insolvency Service but be completely separate operationally from Official Receivers**. We discuss in more detail later in this document exactly how to ensure such separation.

3. Application fees

Our objective is to avoid the costs of bankruptcy falling to the tax payer. We therefore propose that **the costs incurred in processing an application will be met in full from fees charged.**

At present, the court fees payable are as follows:

	Court fee[16]
Debtor petitioning for own bankruptcy	£175
Creditor petitioning for someone else's bankruptcy	£220
Creditor petitioning for the winding up of a limited company	£220

These court fees would be replaced by application fees, which would be set at a level to recover the costs of administering the relevant application but would be less than the current court fees. The cost to debtors who make applications for their own bankruptcy could be substantially less than it is currently. Please see figure 11 in the initial impact assessment at **Annex C**, which suggests possible fees for debtor applications of between £69 and £121, depending on various levels of case numbers.

Although there is some scope currently for the courts to offer remission of court fees, it is very unlikely that a person petitioning for another person's bankruptcy or for a company's winding up will meet the qualifying conditions. This is because those entitled to remission of court fees are individuals in receipt of means tested benefits or very low incomes. In contrast, creditors and others petitioning for bankruptcy and winding up are more likely to be businesses. And whilst under our

[15] For further information on debt relief orders, visit The Insolvency Service website - www.insolvency.gov.uk

[16] Civil Proceedings Fees (Amendment) Order 2011 from 4 April 2011

proposals there would be no remission of court fees for debtors on very low incomes, debt relief orders for a one-off payment of just £90 would still be available as an alternative to bankruptcy, thus ensuring that the most vulnerable members of society can still access debt relief.

In all cases of bankruptcy and compulsory liquidation, the deposit that is payable as security against the official receiver's administration fee will still be payable as now[17]. The Insolvency Service currently collects these deposits from petitioners via the courts, and this money goes towards the cost of administering the bankruptcy estate or liquidation. We propose that **an applicant would have to pay in full both the fee for processing the application and the deposit before his/her application form can be considered by the Adjudicator**.

Debtors who both owe and own little, and are therefore able to apply for a Debt Relief Order instead of bankruptcy, have the option of paying the Debt Relief Order application fee by instalments. Specifically, debtors are able to make payments towards the full application cost of £90 over a period of six months after the application has been submitted, although the application will only be considered once full payment has been made.

In the previous consultation about reforming the debtor petition process, we suggested that one amount that covers both the cost of administering the application and the deposit must be paid in full in order for the application to be deemed to have been submitted. But we heard from stakeholders, both in written responses to the consultation document and during consultative meetings we held with interested parties, that a facility to make payment by instalments would both meet a need and be welcome. We therefore propose that **debtor applicants for bankruptcy should be able to pay the application fee and deposit in instalments.**

A debtor could be asked when he/she submits an application form whether he/she wishes to pay the full sum and proceed with the application immediately, or pay by instalments in which case the application form would only be considered by the Adjudicator when full payment (of both the application fee and deposit) is finally made. In order to pay by instalments, a prospective applicant would have to register on the system and be issued with a unique barcode against which any payments would be recorded.

A maximum time period could be specified during which all instalments have to be paid. This would ensure that the information provided in the application form is still up to date and relevant when it is considered by the Adjudicator. Alternatively, debtors could be given the option of paying instalments over any length of time, but would only be able to complete and submit an application form once full payment had been made. Again, this is to ensure that the information the Adjudicator is required to consider is up to date. In any event, in order to ensure we meet our objective of full cost recovery,

[17] See The Insolvency Proceedings (Fees) (Amendment) Order 2010; and The Insolvency Proceedings (Fees) (Amendment) Order 2011, the latter of which came into force on 1 June 2011

the Adjudicator will not be able to carry out any work, and therefore incur any cost, until there has been full payment of the application fee.

Question 2: 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?

Question 3: 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?

The proposal to allow payment by instalments raises the question about what happens when some instalments have been paid but the debtor either changes his/her mind about making or proceeding with the bankruptcy application, or is unable or unwilling to make any further payments.

There are two aspects to this issue. The first is whether the payments that have been made should be forfeit and therefore non refundable, as is the case under the DRO application process. This would have the advantage of keeping administrative costs to a minimum but, given that the amount payable to apply for bankruptcy would be higher than the fee for a DRO, might be considered unfair to the debtor, who may still be struggling with unpaid debts.

The second aspect is that, if it is considered more appropriate for the payments that have been made to be refunded, who should bear the associated administrative costs, which may be significant in relation to the amount of instalments that have been paid? Should the costs be deducted from the aggregate amount of instalments paid, with only the balance being refunded? Or, in order to further contain administrative costs, should a refund be payable only in circumstances where the debtor has paid more than a certain proportion of the total cost, such as 50% or 75%? In either case, we propose that **any instalment payments made should first be applied towards paying the application fee and that any charges associated with administering a refund are made against, and to the extent of, the application fee paid**. This will ensure that if an applicant decides not to go ahead with his/her application, the deposit will be repaid in full (to the extent that it has been paid).

Question 4: Should instalment payments be non refundable?

Question 5: If not, how should the administrative costs of handling the refund be recouped?

In order to keep administrative costs as low as possible for all applicants, the Adjudicator will not want to keep hold of any money which has been paid by way of instalments towards the cost of an application if it is clear that the prospective applicant no longer intends to proceed with his/her application. We therefore propose that, if full payment has not been made in respect of an application and there has been no activity on that account in respect of any further payments within a period of say, 6 months, the Adjudicator will proceed to issue a refund (subject to deducting any administrative charges as outlined above).

The requirement to register before submitting an application (see page 21) should ensure that the Adjudicator knows to whom to send a refund. It would, however, be useful to explore whether applicants should be subject to any additional requirements when registering - perhaps to prove identity - in order to deter abuse of the process.

For example, is there a real risk that some might register with the intention not of proceeding with an application but of requesting a refund as a way of laundering the money they have paid in instalments? If so, would a requirement to submit some proof of an applicant's identity address that risk? Or alternatively, is there likely to be no such risk, or only minimal risk, such that any additional requirements would impose unnecessary burdens on debtor applicants?

Question 6: 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 do not propose that third party applicants for either bankruptcy or company winding up should have the facility to make payments by instalments. As mentioned earlier in this document, our analysis shows that most are likely to be businesses and therefore are not expected to suffer the same issues around access to these procedures as individual debtors. However, we welcome comments from stakeholders about the usefulness and practicality of extending the option to pay by instalments to these third party applicants.

In order to keep the application fee as low as possible, we want to encourage **applications and payments to be submitted electronically**. But, equally, we recognise that not all debtors will have ready access to a computer or the necessary IT skills to complete an on-line application. 90% of the

29 respondents who commented on this issue during the previous consultation thought that a debtor should be able to make an application for bankruptcy on paper and 76% of the same number thought that the same fee should be charged regardless of whether the application is submitted on line or on paper.

We have listened to these majority views and agree. As a result, we propose that **all debtors should have a choice about whether to make their application electronically or on paper and, in either case, they would pay the same application fee**.

One way to encourage debtors to submit applications electronically might be to arrange for the Post Office Ltd (or another business that provides a similar service) to offer an assisted applications service. Post offices already provide a similar service for passport applications and, like that service, the check carried out on a debtor's application would be limited to making sure that all the questions are answered, rather than checking the accuracy of the detail supplied. The completed paper form could then be scanned by the post office and sent electronically by secure network to the Adjudicator.

Question 7: 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?

According to data held by The Insolvency Service about petitioning creditors, the vast majority of applicants are businesses. It is therefore reasonable to assume that most, if not all, would have access to a computer and the internet. We could therefore require all applications by third parties for either bankruptcy or company winding up to be made electronically. But we have also challenged our assumption about internet access, and explored how these proposed changes might impact on protected groups of creditors (and indeed debtors). The detail is set out in an Equality Impact Assessment (see **Annex D**). The results indicate that it is unlikely any particular group would be disenfranchised by such a requirement. A fully electronic process for third party applications should ensure that the costs, and therefore the application fee for applicants, are kept as low as possible.

Question 8: 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?

Alternatively, the application fee that third parties are required to pay could be set at a different level according to whether the application is submitted electronically or on paper by post. The fee could then be set at a level to reflect the costs associated with processing an application in a particular format. The administration costs of a paper application are likely to be higher because of the additional handling cost. Those third party applicants who choose to make an application electronically would therefore qualify to pay a lower fee.

The advantage of such differential pricing is that it empowers applicants by offering them a choice about how they want to make applications. Those who choose to communicate in a way that maximises efficiency will share the benefit of the savings. Unlike debtor applicants, it is unlikely that such a pricing policy would risk disenfranchising third party applicants, as most will be businesses and therefore very likely to have easy access to computers.

Question 9: 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.

Ultimately, the fee for each type of application would have to be set at a level that enables all of the costs of processing those applications to be recovered.

The most efficient way of making payment, both for the applicant and the Adjudicator, would be using on-line electronic processes with one payment made covering the full amount of the application fee and deposit. Payment by other means, such as cheque, is likely to result in higher administration costs that, under our objective of recovering costs in full, would have to be reflected in the fee payable.

A broad range of respondents to our earlier consultation on debtor petition reform, including creditors and their trade associations, thought that debtors should to be able to make payment using debit cards and pre-paid cards, but not credit cards. We understand the concern that debtors could incur further credit in order to pay for the costs of bankruptcy and appreciate that many will think that this is unacceptable. In any event, allowing debtors the option of making payment by instalments should facilitate access to bankruptcy for those who consider this to be their best option but who do not immediately have access to sufficient funds to cover the costs of the application fee and deposit.

We therefore propose **that payment of the application fee and deposit by third parties should be made electronically. Debtors will be able to pay in cash at a post office or at an approved**

agent such as Payzone, or by debit card or pre-paid card, but not by credit card or Paypal. Third parties should have the additional options of paying by credit card or by PayPal.

PayPal is a secure online account that stores and safeguards bank, credit card or debit card details, thus allowing individuals to make payments without sharing any personal financial information with payees. The reason why we suggest that this is not a suitable payment method for debtors is that a PayPal account may be linked to a credit card. Payzone provides access to a network of payment agents and is already used by some individuals to pay for DRO applications.

Question 10: 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?

4. Pre – application process

Background

Our intention is to introduce a bankruptcy and winding up application process that is proportionate. This means that it should provide the most appropriate route to a bankruptcy or winding up determination according to the circumstances of each case. That will require safeguards, but it should lead to efficiencies.

It is generally agreed that those in financial difficulties, particularly individuals, do benefit from seeking advice early - before their financial position becomes unmanageable. At the other extreme, we want to avoid a situation wherever possible that debtors only engage in the process at a very late stage, for example, after the bankruptcy or winding up petition has been served, when their financial situation may be beyond recovery and when the possibility of avoiding formal insolvency is therefore much lower.

Various studies have examined why there is a low rate of debtor participation in legal proceedings. For example, The Eire Law Reform Commission's interim report into Personal Debt Management and Debt Enforcement, published in May 2010[18], noted the general problem of a lack of engagement of debtors. The report refers to a study of the Free Legal Advice Centres, which found that the formal legal language used in enforcement proceedings and the lack of awareness of the assistance available were two of the reasons for this lack of engagement. In particular, the study

[18] http://www.lawreform.ie/_fileupload/Reports/irDebt.pdf

found that early referral to advice services substantially increased the chances of a settlement to the debt dispute being reached which was satisfactory to both the creditor and debtor.

More specifically, HM Courts Services (HMCS, now HM Courts and Tribunals Service) launched a Pre-Action Notice pilot scheme in England and Wales in 2005, which sought to explore the reasons for low levels of debtor engagement and to assess the impact of the court providing debtors with a Pre-Action Notice (PAN) before the commencement of court proceedings. The notice offered the debtor three options – pay immediately; contact the creditor to discuss rescheduling the debt; or obtain free independent money advice from organisations listed in the notice.

The conclusions that could be drawn from this pilot were not straightforward, but it did reveal some information about the reasons why some debtors do engage in a pre-action debt enforcement process, and why others do not. For example, those with no financial resources whatsoever were found to be more likely simply to ignore warnings and accept court proceedings. These debtors believed that they would be unable to renegotiate any repayment arrangements with their creditors and thought that the court would consider their other debts and treat them more sympathetically. The most common response (of those who did open letters sent to them) was to contact their creditor. In terms of seeking debt advice, the pilot scheme found that people tended not to seek advice unless the situation seemed completely unmanageable.

Following this pilot, the University of Exeter was commissioned in 2007 to undertake an evaluation of the Pre-Action Notice pilot scheme to test whether the receipt of communication from a court had a greater impact in getting debtors to engage communication than a creditor's letter (pp 18)[19]. More specifically, the evaluation aimed to compare basic statistics on engagement of debtors collected by creditors with debtors' own reports of their behaviour; understand the differences between those who do and do not engage; investigate in more detail how debtors respond to warning of court action; and investigate what influences whether or not debtors will take independent advice about their financial situation. There was a low response rate to the questionnaires sent out as part of the evaluation process, as a result of which the results cannot be said to represent the behaviour of all debtors. Some points, however, were validated by agreement with HMCS data of the pilot scheme.

It was found that communications from the court or about court action were salient even to people with severe financial problems. However, the conclusions drawn from the evaluation also suggested that those creditors who were involved in the pilot were already following their own pre-action processes to engage with debtors. This was because the pre-action notice did not seem to increase engagement with creditors significantly - the inference being that such engagement was already taking place between those debtors who were willing to engage with their creditors.

[19] Evaluation of Pre-Action Notice (PAN) Pilot Summary report by Stephen Lea, Avril Mewse and Wendy Wrapson , 5 September 2007

This sentiment was echoed by interested parties who responded to a consultation on Pre-Action Notices carried out by the Ministry of Justice in the same year (reference pp12). Indeed, most of the creditors who responded to the Ministry of Justice's consultation indicated that they were either regulated (e.g consumer credit and utility sector) or operate under codes of practice which include, among other things, pre-action behaviour' [20]. Importantly, the consultation revealed that there was support for creditors issuing a pre-action letter containing prescribed information about how debts could be paid and sources of advice.

We have therefore been considering ways to encourage and incentivise debtors to engage in the petition process at an earlier stage; and about ways to encourage and incentivise creditors to engage more with debtors before resorting to formal insolvency applications. Overall, we want to encourage all debtors and creditors (and those other third parties who can apply for bankruptcy and winding up) to communicate with each other early on in the process, and before the court or the Adjudicator becomes involved. Whilst this overall objective has been explored in the previous studies, and in the pilot and consultation referred to above, the key difference between those and our proposals is that, under our proposed petition reforms, the court may not become involved even if the debtor is unable to pay.

We have therefore been looking at practice directions, which are issued by courts and incorporated into Civil Procedure Rules to supplement rules by setting out procedures that are designed to achieve uniformity in practice. Practice directions inform the parties of what the courts expect of them and what could happen if they fail to comply. For example, there is a practice direction about pre-action conduct[21]. The aims of that practice direction are to enable the parties to settle the issue between them without the need to start court proceedings, and to support the efficient management by the court if such proceedings cannot be avoided. These aims are to be achieved by encouraging the parties to both exchange information about the issue, and consider using a form of Alternative Dispute Resolution ('ADR').

There are also various pre-action protocols relating to different potential areas of dispute, which set out the behaviour the court expects to see from the parties before a claim is brought before the court. For example, a pre-action protocol about possession claims based on mortgage arrears[22] was introduced in November 2008. The aims of this protocol are to ensure that the lender and borrower act fairly and reasonably with each other and to encourage more pre-action contact between these two parties in an effort to seek agreement between them. The Ministry of Justice report that this pre-

[20] HMCS and MOJ, *'The debt claim process: helping people in debt to engage with the problem, summary of responses'*, 2007

[21] http://www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_pre-action_conduct.htm

[22] http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/protocols/prot_mha.htm

action protocol has played an important role in encouraging a noticeable dip in the numbers of possessions.

But there are currently no pre-action protocols specifically for other debt or insolvency claims. We hear that instead, some creditors follow or incorporate into their own debt collection processes the kinds of pre-action conduct that is specified in other pre-action protocols. This may include, for example, a creditor applicant sending a letter to the debtor that outlines what the debtor must do to reach a settlement, and allowing the individual debtor a reasonable amount of time in which to reply before the bankruptcy proceedings are instigated.

Also, whilst pre-action protocols have been shown to be very useful, we have considered whether there is scope to improve on current examples.

In that regard, we refer to the consultation document issued earlier in the year by the Ministry of Justice entitled **"Solving Disputes in the County Courts: Creating a simpler, quicker and more proportionate system"[23].** This document noted that while pre-action protocols are generally effective, they are reliant on the behaviour of the parties and rarely result in court sanctions. The consultation therefore raised the issue of whether new mandatory pre-action directions should be developed.

The idea behind these proposals for transforming civil justice, like those for replacing the courts with an administrative process specifically to determine those bankruptcy and company liquidation applications that are uncontested, is to put management of the dispute into the hands of those involved, and clearly signposting options by which a resolution might be reached. Whilst the idea of a mandatory pre-action protocol for debt claims was included as part of the consultation carried out by the Ministry of Justice in 2007, it was not considered in the context of an administrative system for making decisions about undisputed bankruptcy and winding up applications.

The civil justice proposals for mandatory pre-action directions were to involve a staged approach starting with an analysis of the initial options, followed by evidence gathering, then negotiation and settlement. Only where the matter could not be resolved through this process, would it be referred for a court trial. The Mortgage Pre-Action Protocol referred to above was updated on 6 April 2011 in order to require that the parties *must* take specified steps.

We propose that there is a pre-action process that applies specifically to pre-bankruptcy and pre-winding up applications.

[23] http://www.justice.gov.uk/consultations/docs/solving-disputes-county-courts.pdf

The details that are included in this document about how pre-action processes work are principally about the concept. We recognise that some of the examples we use apply in England and Wales, and that these provisions do not extend to Scotland. Our proposal is that that similar concepts to those which we have identified would apply to a new administrative procedure.

A pre-action process would encourage the parties to attempt to resolve the matter before an application is submitted to the Adjudicator. It would enable the Adjudicator (and the court, if it becomes involved in settling any dispute between the two parties) to see what efforts both parties had made to reach a resolution of the matter before the Adjudicator (or the court) becomes involved.

Question 11: 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?

Under our proposals to reform the creditor bankruptcy and winding up petition processes, we recognise that one of the outcomes of proper engagement between debtor and creditor might be that the debtor consents to, or at least does not oppose, the creditor instigating bankruptcy or winding up proceedings. Another outcome might be that the debtor opposes the proceedings, setting out their specific reasons, and this creates an opportunity for the creditor and debtor to settle the matter before it turns into a bankruptcy or winding up application. We recognise that it is of paramount importance that there are proper safeguards in place, in order that the new process delivers the right outcome in appropriate cases.

We propose that the pre-action process should operate alongside the existing pre-petition requirements (such as those relating to the statutory or written demand) but, rather than focusing on warning the debtor of the consequences of not paying, the pre-action process would set out in clear and plain English what steps the debtor can now take – such as the benefits of entering into discussions with the claimant and/or seeking debt advice – in order to resolve the situation. In this consultation document, we will refer to this information as the pre-action notice.

The pre-action notice would therefore either follow an execution (or other process in respect of the debt) being returned unsatisfied in whole or part, or be combined with service upon the debtor of a statutory demand or (where the debtor is a company) a written demand. Service of the pre-action notice, like service of a statutory or written demand, would be in accordance with Part 6 of the Civil Procedure Rules (CPR).

Whether or not the pre-action notice is served together with a statutory or written demand or

following an unsatisfied execution, it will help the debtor to consider what might now be the best course of action, including whether there are any possible alternatives to bankruptcy or liquidation. For an individual debtor, this may involve signposting to sources of free debt advice including on-line and telephone debt advice services. The pre-action notice would also stress the importance and benefits to the debtor as well as the creditor (or other third party) of communication between the two parties.

If the debtor does wish to seek advice, it is important that he/she does so immediately upon receipt of the pre-action notice. This would be flagged up in the pre-action notice. This is key because, if the pre-action notice is served together with a written or statutory demand, the debtor will have the 21 days following service of that demand within which to consider his/her/its options in accordance with the pre-action process. In effect, the statutory demand is a document that sets out that the debtor must now pay, and the pre-action notice will clearly explain what the debtor can do to work out if there are alternative ways of resolving the debt.

The reason why we propose that **the pre-action process and procedure for serving any statutory demand should run concurrently** is so that the proceedings are not extended over a longer period of time, unless there is a way of resolving the matter.

Debtors will already be receiving communication from the creditor before the matter reaches this stage and will already have had an opportunity then to enter into dialogue with the creditor, and seek advice. If the matter reaches the stage of a statutory demand and pre-action process, and the debtor is taking or starts to take steps to engage with the creditor and seek debt advice, the creditor will be able to weigh up whether allowing more time might facilitate a settlement that satisfies both parties. But the important point is that the whole process will not be extended beyond the current timescales if a debtor has no realistic way of resolving the debt.

Question 12: 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.

It is proposed that the pre-action notice will be served on a debtor by the creditor (or other third party who is entitled to and intends to apply for bankruptcy or winding up). The pre-action notice is a means by which a creditor can encourage a debtor to communicate before the creditor (or third party) starts the application process. So we propose that, in order to help the debtor to reach agreement with the creditor about how the debt is resolved, the pre-action notice could contain the following sort of information:

- Clear statements in plain English about the importance of seeking free, independent debt advice; and where to go in order to get such advice;

- Sufficiently **detailed information about the basis of the debt owed**, but expressed in a way so that is reasonably clear to the debtor why the creditor is claiming the specific amount owed;

- **A clearly identified connection with the debtor**, for example by specifying agreement numbers or account numbers that have given rise to the debt owed, so that the debtor can reasonably understand why the creditor is communicating with him/her. This may be especially relevant where a debt is sold on to company that specialises in buying debts, and therefore where there is a greater risk that the debtor may not immediately recognise why he/she is being contacted;

- The **extent to which the creditor is willing to amend the terms** under which repayment is required, and the circumstances under which an agreement to amended terms might be reached[24]

- Clear statements in plain English about the **next steps that the creditor may take,** and details of what such steps may entail. For example, if the debtor does not engage in the pre-action process, the creditor may proceed with an application to the Adjudicator for bankruptcy or winding up;

- If appropriate, an invitation to the debtor to participate in mediation or other **Alternative Dispute Resolution** process;

- Reasonable and clearly stated **dates** by which a response is required from the debtor;

- A request that the debtor explains why the debt will not be paid, if this is the case. For example, does the debtor dispute the existence or amount of the debt being claimed, or can the debtor not afford to pay the debt?

In summary, a debtor might be able to reach agreement with the creditor about paying the debt either immediately following the sale of assets, or over a period of time, but an agreement between the two parties could equally be based on a mutual recognition that bankruptcy or winding up is the

[24] The amended terms will be subject to regulation by the Financial Services Authority if the original agreement was so regulated.

only realistic or viable way of resolving the debt. Reaching such a resolution may involve mediation or another dispute resolution process.

If the outcome of following the pre-action process is that both parties agree that formal insolvency is the only realistic or viable option, or if the debtor doesn't respond to the pre-action notice, the creditor (or other third party applicant) can submit a bankruptcy or winding up application to the Adjudicator. The conduct of both parties may, however, be taken into account by the court if an application is subsequently made for judicial determination of the dispute. Such conduct might include the extent to which each party has complied with or engaged in the pre-action process.

Question 13: 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.

Compliance with the pre-action process could be made mandatory. In order to be properly effective, a mandatory process would have to be compulsory for both creditors and debtors, with non-compliance resulting in consequences for the non-compliant party. Compliance with a mandatory protocol would therefore not be just a creditor's responsibility. There would be obligations on debtors too.

Those debtors who fail to face up to their problems under a mandatory pre-action process may find themselves with a bankruptcy or winding up application being made against them. It is important that this new process works for debtors. There should therefore be further safeguards built into the process to ensure that the pre-action process has been correctly followed by the creditor (or third party applicant). The Adjudicator will not make a bankruptcy order where he/she is not satisfied that there are proper grounds for making the application.

A mandatory pre-action process would give certainty for both creditors and debtors. For example, information would have to be presented to debtors in a clear and standardised format, making it more comprehensible to debtors. Creditors would have to point debtors to sources of free, independent debt advice. The consequences of a debtor ignoring this communication from the creditor could potentially be serious, which is why the safeguards will be crucial, but it should encourage debtors to appreciate at this earlier stage the seriousness of their situation and to take the step towards seeking help. If, as the earlier study suggests, responsible creditors already incorporate such measures within their own pre-action process, a mandatory requirement to do so will impose little or no additional burden on them.

There would also be reassurances for debtors because if a creditor indicates that it has complied with a mandatory pre-action process when in fact it has not (for example if the debtor has not been provided with the required notice highlighting the importance of seeking prompt debt advice or the creditor has proceeded despite a debtor's reasonable attempts to settle the claim) then sanctions could be taken against the creditor.

The alternative option is to make the pre-action process discretionary. This may neither lead to increased levels of engagement above those currently achieved, nor might it incentivise significantly more debtors to seek early advice. This is important because if a debtor has less incentive to engage with a creditor during a discretionary pre-action process, there will likely be more applications for bankruptcy or winding up in cases where matters could have been resolved during the pre-action process.

We therefore propose that, in order to be effective, **the pre-action process should be mandatory for both creditor and debtor**. **A creditor will not be able to submit an application to the Adjudicator for a debtor's bankruptcy or winding up unless it has first taken the required pre-action steps**.

For many creditors, compliance with the pre-action process may simply be a formal recognition, within the bankruptcy and winding up processes, of steps that they already take to resolve matters with a debtor. For others, it should ensure that every reasonable opportunity is taken to resolve debt issues early and before a bankruptcy or winding up application is made.

Question 14: Do you think that the pre-action process should be mandatory or discretionary?

Although it is recognised that most creditors and lenders operate under a code of practice or licensing regime, the intention is for the pre-action process to apply to all debt claims, including those from one-time and occasional applicants. This would ensure a consistent approach for all indebted individuals and would provide certainty and clarity for advisors in identifying the stage of the debt claim process.

Sanctions that could be taken against a creditor which wrongly indicates its compliance with the pre-action process could include costs awards. Alternatively or in addition, more onerous requirements could be imposed in respect of any future applications to the Adjudicator from that creditor, such as

requirements to submit documentary evidence of compliance with the pre-action process, and it could be made a criminal offence for a creditor to submit false information in support of an application. Such an offence might be similar to that set out in respect of DROs in section 251 of the Insolvency Act 1986 in that a person guilty of such an offence would be liable on summary conviction to 12 months imprisonment.

Question 15: 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?

5. Third party (such as creditor) applications for bankruptcy

Other requirements before submitting a bankruptcy application to the Adjudicator

We propose to replicate the current requirements as to who is entitled to petition for bankruptcy. The Insolvency Act 1986 entitles a single (or more than one on a joint application) creditor for a debt of more than the bankruptcy level, currently £750, a supervisor of an individual voluntary arrangement, and the Financial Services Authority[25] to file a petition for an individual's bankruptcy[26].

If the application is to be made by one (or more) creditors, the creditor(s) will have to show in their application the country in which the debtor has his/her Centre of Main Interest (COMI). The purpose of this requirement is to demonstrate whether the debtor is entitled to bankruptcy relief under the law of England and Wales.

Based on the information provided in the application form, the Adjudicator would determine COMI and therefore the eligibility for bankruptcy in accordance with the law. But because identifying an individual's COMI can be difficult, we propose that **the application form will be accompanied by clear guidance to help applicants decide whether they are entitled to make an application**.

Question 16: 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?

[25] Being the organisation currently appointed to regulate the financial services industry in the UK

[26] See section 264 Insolvency Act 1986

Question 17: Can you suggest any other matters that the guidance could usefully cover to further help applicants?

A creditor applicant will be required, as now, to provide information in its application that identifies the debtor[27] and the debt. Reflecting the way in which many people conduct their business nowadays, **we propose that there will be a new requirement on third party applicants to provide details of a debtor's email address(es) and mobile telephone number(s) where known**. This will enable communication to take place between the Adjudicator and debtor in an efficient and user friendly manner.

Question 18: 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?

Very easy to obtain	Easy to obtain	Not easy	Difficult	Very difficult to obtain	Don't know

We propose that **the existing grounds for a creditor's petition[28] will continue to apply to applications for bankruptcy from creditors submitted to the Adjudicator. The Adjudicator will only make a bankruptcy order in cases where he/she is satisfied that the application has been complied with; and that the COMI and debt criteria are met**. More specifically, this means that the requirements set out in sections 267 and 268 of the Insolvency Act 1986 will remain. In addition to complying with the pre-action process, a creditor applicant will therefore need to confirm (and produce evidence) of the debtor's inability to pay his/her debts in accordance with section 267(2)(c) and section 268[29]. That is to say that either 21 days have elapsed after service of a statutory demand and its terms have not been complied with, or that execution of a judgment or order in respect of the debt has been issued and returned unsatisfied prior to the application being made.

[27] Rule 6.7 Insolvency Rules 1986

[28] As set out in section 267 and 268 Insolvency Act 1986. The provisions of section 269 regarding a creditor who holds security will also continue to apply

[29] This does not apply if the applicant for bankruptcy is the supervisor of the debtor's individual voluntary arrangement .

There is also a question about what happens when there is a delay between a statutory demand and bankruptcy application. Under the current rules[30], if more than 4 months have elapsed between service of the demand and presentation of the petition, the petition must include a statement explaining the reasons for the delay. This enables the court to consider, in respect of each such case, whether the delay is acceptable in all the circumstances. The only other requirement about timing that relates to the statutory demand is that at least 3 weeks must have elapsed since service of the demand.

It is not proposed that the Adjudicator should have the same ability as the courts to exercise such wide discretion. It is therefore proposed that there should be a new legal requirement that **a statutory demand cannot form the basis of an application to the Adjudicator for bankruptcy if there has been a delay of more than 4 months between service of the demand and submission of the application**. But we welcome views on whether this is the right approach

Question 19: 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?

We propose that **the application process will require a third party applicant to confirm the truth of the application's contents** and, where a creditor has served a statutory demand on the debtor in order to establish the debtor's inability to pay debts, the creditor must provide the Adjudicator with a copy of either the Certificate of Personal Service of the Statutory Demand[31] or Certificate of Substituted Service[32]. An application that is made without such accompanying documents will be rejected by the Adjudicator, and the creditor will be warned of these consequences as part of the application process. Where the creditor has levied execution or instigated another legal process, the application form will require the creditor to state the date that the execution levied was returned unsatisfied.

In order to maintain an appropriate balance between debtors and creditors, we propose that **any creditor (or other third party applicant) who has reason to believe that there is a serious possibility that either a debtor's assets may be at risk or that the debtor is about to abscond should still be able to make an application to the court for the appointment of an interim receiver .** Those proceedings would take place in parallel to the bankruptcy proceedings.

<u>Ensuring that the debtor knows about the bankruptcy application and its consequences</u>

[30] Rule 6.12(7) of the Insolvency Rules 1986

[31] Form 6.11

[32] Form 6.12

We want to design a system that provides for the efficient administration of bankruptcy applications specifically where there is no dispute that bankruptcy is either the most appropriate or the unavoidable outcome. The proposed pre-action process is an important element of that system. But we need to consider how a debtor is told that a bankruptcy application has been made, and how the Adjudicator finds out about how the debtor intends to respond to that application.

Currently, a petitioner is required to serve a copy of the bankruptcy petition on the debtor, usually by personal service, and then file a statement of truth with the court as confirmation of such service. The court's role is then to ensure, on a case by case basis, that the petitioner has taken sufficient steps in order that it can be reasonably satisfied that the petition has been brought to the attention of the debtor.

The key distinction under an administrative system is that there is no hearing. As a consequence, there is a greater need for the Adjudicator to be informed of the debtor's reaction to the application. This is in contrast to a court based process, where the emphasis is on ensuring that all reasonable steps have been taken to bring notice of the hearing to the attention of the debtor so that he/she has the opportunity to attend or be represented.

Reflecting these differences, **we propose that the creditor (or other third party) petitioner will not be required to serve the debtor with the application, but rather that the Adjudicator will send a copy of the application to the address at which the Adjudicator reasonably believes that the debtor resides, and will attempt to ensure that the debtor responds.** It should also then be clear to the debtor that bankruptcy proceedings have in fact been commenced.

Question 20: Who do you think should be responsible for sending a copy of the bankruptcy application to the debtor and eliciting his/her response?

The Adjudicator would then need to be satisfied that a debtor has received a copy of the application.

There are a number of tools that the Adjudicator could use in order to improve the prospects of the debtor receiving a copy of the application and therefore also of the Adjudicator establishing a response to that application from the debtor. The aim is to put a process in place that will ensure that the debtor will receive a copy of the application. For example, upon receipt of the application from the third party, the Adjudicator could carry out checks to verify the debtor's address. If the address does not pass the checks, the application will be rejected and the applicant informed. If the address does pass the checks, the Adjudicator should be confident of the debtor receiving notice of the bankruptcy.

The debtor's response to the application

We propose that **the Adjudicator will ask the debtor whether he/she consents to or opposes the proceedings, and to confirm that the contact details supplied by the applicant are correct (or alternatively, to supply corrections)**. We additionally propose that **the debtor should be asked to indicate the manner in which he/she would prefer to receive further communication from the Adjudicator**.

For example, the Adjudicator could ask the debtor if he/she wishes to receive further communication by post or by email; and whether he/she would wish to be alerted by text message to the arrival (or imminent arrival) of such further communication. In other words, a text message could prompt a debtor to check his/her mailbox for more information. Text messaging would be relatively inexpensive and could help establish contact with individuals in a way that many people now communicate.

Question 21: 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 propose that the debtor is asked to complete a pre-printed statement. The statement could require the debtor to indicate either that he/she has had an opportunity to take advice, understands the consequences of bankruptcy, and consents to bankruptcy or does not otherwise oppose the bankruptcy application; or alternatively that he/she opposes the application.

The Adjudicator's role is limited to determining whether or not the criteria for making a bankruptcy order are met. Information about bankruptcy, including what the consequences might be of the debtor indicating opposition or consent, would have been provided to the debtor during the initial stages of the pre-action process. If a debtor needs other help, he/she could also telephone the Insolvency Enquiry Line, operated by The Insolvency Service, to obtain further information or alternatively access guidance available on The Insolvency Service's website.

Question 22: 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 recognise that some debtors may simply not respond to this notice. Therefore, a bankruptcy application by a third party against a debtor will result in one of three possible outcomes – consent to the application, the application being opposed, or neither consent nor opposition.

The Adjudicator's response to an application

(a) Applications that have the debtor's consent

If the debtor indicates to the Adjudicator that he/she consents to the proceedings or does not oppose them, the Adjudicator will proceed to check that the eligibility criteria are met and, if appropriate, make a bankruptcy order. So a creditor's application by consent will therefore be dealt with by the Adjudicator in much the same way as a debtor's application for bankruptcy[33].

(b) Opposed bankruptcy applications

There will be circumstances in which a debt remains disputed despite compliance by both parties with the pre-action process, even where that process incorporates the use of mediation services. There may also be circumstances that are not suited to mediation or where one of the parties is reluctant to participate in Alternative Dispute Resolution. Where there is a dispute between the parties, this can only be resolved by a judicial decision of the court.

Question 23: 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?

[33] See the consultation document *'Reforming Debtor Petition Bankruptcy and Early Discharge'* published in November 2009 and the subsequent Ministerial statement published in October 2010: http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/registerindex.htm

We have thought very carefully about how to ensure an appropriate balance between the interests of a third party who is applying for a debtor's bankruptcy and those of the debtor who wishes to oppose such proceedings.

A debtor wishing to oppose the bankruptcy proceedings will be required to state the basis for his/her opposition, which could either be that:

- the pre-action process was not followed/ correctly complied with by the creditor; or
- the debtor does not owe the debt, or part of the debt such that the undisputed amount is below the bankruptcy level, currently £750; or
- can pay the debt; or
- does not have a Centre of Main Interest (COMI) in England and Wales and is not entitled to bankruptcy in this jurisdiction; or
- did not receive service of the statutory demand.

The Adjudicator will consider all representations made by the debtor, whether they were made to the creditor during the pre-action process or to the Adjudicator after the application was made.

Where the Adjudicator is satisfied that the criteria for making a bankruptcy order are nevertheless met, a bankruptcy order will be made unless the debtor makes an application to the court. This would have the effect of referring the dispute (but not the whole bankruptcy application) to the court. The relevant court at which the debtor would make an application would be the nearest court to where the debtor resides that has bankruptcy jurisdiction. The court would then notify the Adjudicator of its receipt of the debtor's application and this would have the effect of halting proceedings on the bankruptcy application.

Where the Adjudicator is not satisfied that the criteria for making a bankruptcy order are met, the debtor and creditor will be notified of this fact and of the reasons why the Adjudicator has reached this conclusion. Where the creditor disputes the conclusion reached by the Adjudicator, it will have an opportunity to make an application to the court.

The court will be asked to determine the outcome of the dispute. The court may, in reaching a decision about the dispute, take into account the extent to which the applicant and debtor have complied with the pre-action process . Overall, the dispute would be determined by judicial ruling of the court, which could make whatever order it deems appropriate, including giving directions for the resolution of the dispute or directing the Adjudicator to continue with the bankruptcy application.

(c) Bankruptcy applications to which there is neither consent nor opposition

Some applications may simply not elicit a response from the debtor. Under our proposals, the debtor would already have had the benefit of a period of time during the pre-action process, during which he/she could seek advice and consider what should be his/her response. The only question is then whether or not the Adjudicator is satisfied that the criteria for making a bankruptcy order are met.

Given that the debtor will already have had an opportunity to seek advice in the knowledge that a bankruptcy application might then be made against him/her, there may be little to be gained by allowing a further period of time if the debtor does not respond to the bankruptcy application. We therefore propose **no further delay should be allowed where debtors fail to respond to an application for bankruptcy.**

Having said that, and reflecting the desire is to create a process that is fair for both parties, it clearly would not be right if bankruptcy proceedings could be taken where there is a risk that the debtor is unaware of the proceedings. That is why we ask about what sanctions would deter and/or penalise any creditor who wrongly swears a declaration confirming satisfactory service of the statutory demand and/or wrongly indicates compliance with the pre-action process (see page 31 above)**.**

Questions 24: 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?

Question 25: 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?

Withdrawing a bankruptcy application

The current system requires an application for withdrawal of a bankruptcy petition to be made to the court, which will consider the circumstances in which the withdrawal is requested[34]. This process is designed to protect the interests of both creditors and debtors.

Our proposals are designed so that every reasonable opportunity to resolve the debt is taken before the matter is put before the Adjudicator (or, ultimately, the court) for determination. This also means that, once an application is made, there may be very little delay before the matter is determined. Having said that, we appreciate that, realistically, there may still be some occasions where, despite

[34] See rule 6.32 of the Insolvency Rules 1986 (as amended)

following the pre-action process including mediation, a debtor only offers payment or payment terms that are satisfactory to a creditor once an application has been submitted. But our intention is that this should not be the norm, and that debtors should be discouraged from leaving settlement until this very late stage. For example, if a debtor needs to sell assets in order to pay the debt, the timeframe (or any delays to that timeframe) in which such a sale might take place could be communicated to and agreed with the creditor before the matter reaches the stage where an application for bankruptcy is submitted.

In order to provide effective safeguards for debtors, we think that a creditor or other third party applicant should be able to withdraw its application if it no longer wishes to proceed. However withdrawal will only be possible up to the point at which the application is determined. Examples of where this may occur include, if the creditor cannot provide information to the Adjudicator that is necessary to determine the application or where the debtor submits evidence that disputes the existence of the debt. In cases of withdrawal, the application fee would not be refunded because the application process will have commenced, and therefore work will have been carried out, as soon as the application is submitted.

Question 26: 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?

The Adjudicator's powers

The Adjudicator will have the power to:

(a) make a bankruptcy order

The power to make a bankruptcy order would be exercised by the Adjudicator where the Adjudicator is satisfied that the pre-action process and, if appropriate, the requirements as to service of the statutory demand have been complied with; and that the application meets the qualifying conditions as set out in section 267 and 268 of the Insolvency Act 1986; and that the debtor's COMI is in England and Wales.

Notice of a bankruptcy order made on the application of a third party will be given to the debtor and applicant. The Adjudicator will also instruct the official receiver to proceed with administering the bankruptcy, which will involve, amongst other matters, the official receiver notifying the Chief Land Registrar and advertising the order in the Gazette, as now[35]. The bankruptcy will then commence on

[35] See rule 6.34(2) of the Insolvency Rules 1986 (as amended)

the day that the order is made, although the provisions of section 284 (which impose restrictions on the disposition of property between the presentation of a petition and the making of an order) will apply to bankruptcy applications, albeit that the delay between the two dates should be much shorter.

(b) refuse to make a bankruptcy order

The Adjudicator will refuse to make a bankruptcy order where he/she is not satisfied that:

- the pre-action process has been complied with;
- the requirements as to service of the statutory demand have been complied with;
- the application meets the qualifying conditions as set out in section 267 and 268 of the Insolvency Act 1986;
- the debtor's Centre of Main Interest (COMI) is in England and Wales.

Notice of refusal to make a bankruptcy order will be given to the debtor and applicant.

(c) stay proceedings on the bankruptcy application

The only circumstances in which the Adjudicator would stay the proceedings would be if and when a debtor or third party applicant lodges an application at court. The Adjudicator's actions thereafter would be determined by the order of the court.

Appeal against the decision of the Adjudicator

There may be instances where a third party applicant or a debtor is dissatisfied with the decision of the Adjudicator. In such cases, the applicant and debtor will have the right to ask the Adjudicator to review his/her decision. This review will be based on information that is already in the Adjudicator's possession and will comprise a check to see if there is any relevant information that the Adjudicator didn't take into account in reaching his/her decision.

There will be no fee payable for such a review. Any subsequent appeal against the decision of the Adjudicator, by either a debtor or third party applicant, will then be to the court.

Currently, an appeal of a decision made on a bankruptcy petition is made in the first instance to the county court or, if the bankruptcy was determined by a Bankruptcy Registrar of the High Court of Justice, to a single Judge of the High Court. We propose that, in order to provide a proportionate use of court resources in dealing with appeals, any appeal against the decision of the Adjudicator should always be made in the first instance to the nearest county court to where the debtor resides

that has bankruptcy jurisdiction.

Question 27: 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 propose that an appeal of the decision of the county court will follow the same procedure for appeals as now[36]. And that **the court should be able to direct the Adjudicator either to make a bankruptcy order in circumstances where the Adjudicator has not done so but where the court determines that bankruptcy is the right outcome or to annul a bankruptcy order where the court considers this appropriate.** An appeal may not be made to the court unless and until a review has been requested and carried out by the Adjudicator.

[36] Section 375 Insolvency Act 1986, Civil Procedure Rules Part 52 (appeals) and rule 7.49A Insolvency Rules 1986 (as amended)

6. Application for compulsory winding up of a company

Territorial scope of the proposed changes

Responsibility for winding up is currently split between Holyrood and Westminster. However, the Scotland Bill, which is currently making its passage through the Westminster Parliament, would reserve all matters relating to winding up to Westminster. If the Scotland Bill is passed in its current form, it will therefore be a matter for the Westminster Parliament and UK Government, in conjunction with the Scottish courts and appropriate stakeholders, to make decisions about the issues discussed in the liquidation parts of this consultation document

Under the current law, a creditor of a Scottish company can present a petition to a court in Scotland although there is no official receiver or equivalent office-holder in Scotland. It may be, therefore, that the reforms proposed in this document would work most effectively if there was a Liquidator of Last Resort in Scotland who would be appointed automatically by the Adjudicator when a winding up order is made.

Question 28: How important is it for the reforms proposed in this document that there is a Liquidator of Last Resort for Scotland?

Question 29: 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?

Circumstances in which an application can be made to the Adjudicator for the compulsory winding up of a company

We propose that **in circumstances where it is asserted that the company is unable to pay its debts[37], or where the company has passed a valid special resolution that it be wound up, an application for winding up will be made to the Adjudicator**, rather than as now to the court. A company is regarded as being unable to pay its debts if, for example, a creditor:

- is owed more than £750; and
- presents a written demand in the prescribed form (known as a statutory demand) to the company; and

[37] Section 122(1)(f) Insolvency Act 1986

- the company fails to pay, secure or agree a settlement of the debt to the creditor's reasonable satisfaction[38].

The only exception would be where the petition for winding up is presented by the Secretary of State on public interest grounds, following an investigation into the company or a report of its activities[39]. We propose that these petitions will continue to be determined by the courts. We believe that it is both right and proper that the Secretary of State could thus never be both the petitioner and, through the office of Adjudicator, the order maker.

The provisions that allow a petition to be presented to the court for the winding up of a company in other prescribed circumstances[40] will continue to apply as now.

In other words, a petition may be made to the court (and it will not be permissible to apply to the Adjudicator) where the grounds for requesting winding up are that, being a public company which was registered as such on its original incorporation, the company has not been issued with a trading certificate under section 761 of the Companies Act 2006 (requirement as to minimum share capital) and more than a year has expired since it was so registered; or that it is an old public company[41]; or that the company does not commence its business within a year from its incorporation or suspends its business for a whole year; or, except in the case of a private company limited by shares or by guarantee, that the number of members is reduced below 2; or at the time at which a moratorium for the company under section 1A[42] comes to an end, no voluntary arrangement approved under Part I has effect in relation to the company; or that it is just and equitable that the company should be wound up.

This should ensure that those applications which can be decided administratively by the Adjudicator are dealt with in the most efficient way, thus providing a better service to both applicant and company. By contrast, it is much more a matter of judgement whether it would be just and equitable for a company to be wound up. Given the complexity of some cases in which it might be argued that winding up is just and equitable, and the limitations on the role of the Adjudicator who will not have a Judge's capacity to weigh up competing interests and exercise discretion when making decisions, we suggest that it would be inappropriate, and indeed ineffective, for such applications to be determined administratively.

Although there are no figures available for the number of petitions being presented to the courts in each of the prescribed circumstances, it is believed that the vast majority of petitions are founded

[38] See section 123 of the Insolvency Act 1986

[39] See section 124A of the Insolvency Act 1986

[40] Section 122(1)(b) to (e) and (fa) to (g)

[41] Within the meaning of the Companies Act 2006 (Consequential) Amendments, Transitional Provisions and Savings) Order 2009

[42] The Insolvency Act 1986

either on just and equitable grounds or on grounds that the company is unable to pay its debts. It is therefore unlikely that a more efficient service than that currently provided could be achieved by allowing applications on the other grounds (such as a company not commencing its business within a year from its incorporation or suspending its business for a whole year) to be made to an Adjudicator.

Furthermore, limiting the Adjudicator's role to determining winding up applications specifically where the company is unable to pay its debts or where the company itself has resolved that it should be wound up should provide for a more streamlined service, as the Adjudicator will not need to be concerned with matters other than those that are either related to a company's insolvency or that are easily determined under the proposed administrative system.

Question 30: 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.

Question 31: Are you able to suggest the proportion of petitions that are currently presented to the courts on grounds <u>other than</u> 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?

In the remainder of this document, we shall discuss winding up only insofar as it relates to the proposals for applications to be made to the Adjudicator on the grounds of a company's inability to pay its debts or that the company has passed a valid special resolution that it be wound up.

<u>Ensuring that the company knows about the winding up application</u>

We want to ensure that the administrative entry route into compulsory liquidation is designed in a way that provides an efficient and effective service to both the applicant and the company. The procedure should not therefore be unnecessarily burdensome for either party. Equally, we want to make sure that any potential for dispute between the company and applicant is flagged up early and resolved wherever that is possible, either by negotiation between these parties during the pre-action process or, ultimately, with the involvement of the court. We recognise that it is vital that all those

who could be affected by an application for winding up receive prompt and reliable notice of the proceedings.

There are mechanisms in place for service of the winding up petition on the company and on other interested parties, together with advertisement to the wider world, which balance the needs of companies and applicants. We want to maintain this balance whilst at the same time keeping regulatory burdens on all concerned to the minimum necessary.

The current rules require a petitioner to verify its winding up petition with a sworn statement of truth which, together with the required number of copies[43], is filed in court. The court endorses the petition and the copies with its seal and returns the documents to the petitioner, who is then required to effect service of those documents on the company and other interested parties. The petitioner must affirm its compliance with these requirements by filing a certificate to that effect with the court before the court hears the winding up petition, which forms part of the court's consideration in determining whether to grant an order.

An electronic application process will obviate the need to file copy documents at court, thus saving administrative time and expense. Instead, under the administrative process, evidence of service can be provided electronically before the application is considered. In order to ensure that the Adjudicator has the best information that would enable the right decision to be made, the applicant will be required to confirm that the contents of its application are true, to the best of its knowledge, information and belief. We discuss the possible consequences of failing to comply with the pre-action process and knowingly supplying false information in support of an application on page 31 above.

If the application is made by a creditor or creditors following service of a statutory demand, the applicant will also be required as part of the application process to confirm that the statutory demand was duly served on the company, including stating the date of service, and to produce evidence of service to the Adjudicator.

We propose that **submission to the Adjudicator of both a completed application form and payment will result in a message being generated automatically to the applicant acknowledging receipt**. This should give all applicants assurance that their application has been successfully submitted.

We also propose that the **Adjudicator will send notice of the winding up application to the company and seek the company's response.** We intend, if possible, to use email and "contact us" boxes on company websites to alert a company to the application. As with creditor applications for bankruptcy, the reason for the communication is not just to inform the company about the proceedings but also to engage with the company in order to ascertain its response to the

[43] Rule 4.74(4) Insolvency Rules 1986 (as amended)

proceedings, and specifically whether it consents or otherwise does not oppose the proceedings, or alternatively wishes to oppose them. It is for this reason that we suggest that this role should be carried out by the Adjudicator.

We propose that **the Adjudicator will send a copy of the winding up application and acknowledgement message to those who are entitled under the current law to receive notice of a winding up petition**[44] - an administrator, administrative receiver, supervisor of a voluntary arrangement or State liquidator (in each case if one has been appointed to the company), and the Financial Services Authority if the company is (a former or) an authorised deposit taker[45]. Notification would automatically be sent electronically by the Adjudicator to these parties as soon as an application is successfully submitted. In this manner, notification could be just as effective as if sent by the applicant, but achieved at minimum cost and burden to businesses.

Question 32: 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?

Question 33: Who should send notice to specified interested parties?

Question 34: When should notice be sent to these interested parties?

As with creditor applications for bankruptcy, the Adjudicator must be satisfied that notice of the winding up application has been communicated effectively. The Adjudicator will have the certainty of knowing that the address at which the company can be contacted is its registered office, as recorded at Companies House.

Advertising the winding up application

Under the current law, a winding up petition has to be advertised in the London Gazette (for companies registered in England and Wales) or the Edinburgh Gazette (for companies registered in Scotland) before the court hearing takes place. It is the petitioning creditor's responsibility to place and pay for this. This advertisement ensures that any person who has an interest in the company or its winding up should be able to find out about the proceedings. But it also has serious consequences for the company, which may find its bank account frozen and suppliers unwilling to

[44] See rule 4.10 Insolvency Rules 1986 (as amended)

[45] See rule 4.7 of the Insolvency Rules 1986 (as amended)

provide goods and services on credit. As a result, petitioning creditors generally hold off advertising the petition until they are sure that the company cannot or will not settle the petition debt, or that alternative options, such as the company filing for administration in order to achieve a rescue of the company or its business or a better realisation of assets than liquidation might provide, are not realistic and that the demise of the company really is the only option.

Under the proposed new procedure, greater emphasis will be placed on both parties engaging, communicating and exploring alternative solutions to the debt problem in the period before a winding up application is made. Once an application is submitted, and because any dialogue between applicant and company will be encouraged during the pre-action process, there could be a very short period of time before the winding up application is determined. We therefore propose that **there would no longer be a need for a winding up application to be advertised.**

Question 35: Do you think that a winding up application should be advertised under these new proposals? If yes, please provide reasons for your answer.

The Adjudicator's response

The notice of the winding up application to the company from the Adjudicator will contain details of the applicant and the circumstances in which the application has been made. We propose that **this notice will ask whether the company wishes either to consent to a winding up order being made or to oppose such action**. It will also contain information about liquidation and what might be the consequences

In respect of every application submitted, the Adjudicator will immediately proceed to check that there is evidence of the circumstances giving rise to the application, and that the company is entitled to be wound up in England and Wales (see page 43 for commentary about how the proposals could apply in Scotland). The Adjudicator will then be in a good position to make a winding up order swiftly if there is no dispute that this is the appropriate outcome for the company.

Whilst it is important that the application form is designed in a way that elicits from the applicant all the relevant facts that the Adjudicator will need in order to reach his/her decision – regarding the company's Centre of Main Interest (COMI) and circumstances for winding up - we suggest that there should be no circumstances in which it would be appropriate for the Adjudicator to request further information from the applicant. The decision to wind a company up, or not to do so, will therefore be based solely on the facts that are put before the Adjudicator in the application form.

Question 36: 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.

(a) Applications that have the company's consent

Where the company confirms its consent to a winding up order being made, the Adjudicator will proceed to make the winding up order if the company is entitled to be wound up in England and Wales (as before, see page 43 for commentary about how the proposals could apply in Scotland) and if the applicant has demonstrated in its application form that the company is unable to pay its debts.

(b) Opposed applications for winding up

A company that wishes to oppose the winding up proceedings must respond to the Adjudicator indicating exactly what the grounds are for opposition. This could be a pre-printed document that is sent to the company with the initial information pack, and which the company completes. The Adjudicator will consider all representations made by the company, whether they were made to the creditor during the pre-action process or to the Adjudicator after the application was made.

Where the Adjudicator is satisfied that the criteria for making a winding up order are nevertheless met, such an order will be made unless the company makes an application to the court. This would have the effect of referring the dispute (but not the whole winding up application) to the court. The court would then notify the Adjudicator of its receipt of the company's application and this would have the effect of halting proceedings on the winding up application.

Where the Adjudicator is not satisfied that the criteria for making a winding up order are met, the company and creditor will be notified of this fact and of the reasons why the Adjudicator has reached this conclusion. Where the creditor disputes the conclusion reached by the Adjudicator, it will have an opportunity to make an application to the court.

The court will be asked to determine the outcome of the dispute. The court may, in reaching a decision about the dispute, take into account the extent to which the applicant and company have complied with the pre-action process . Overall, the dispute would be determined by judicial ruling of the court, which could make whatever order it deems appropriate, including giving directions for the resolution of the dispute or directing the Adjudicator to continue with the winding up application.

Question 37: What period of time should be sufficient for a company to communicate to the Adjudicator its opposition? 14 days? More? Or less?

(c) Applications for winding up to which there is no response from the company

If the Adjudicator does not hear from the company, and the period of time for eliciting the company's response has expired, the Adjudicator will proceed to determine the winding up application.

Withdrawing a compulsory winding up application

Our proposals for winding up applications – like those for creditor applications for bankruptcy - are designed so that every reasonable opportunity to resolve the debt is taken before the matter is put before the Adjudicator (or, ultimately, the court) for determination. Whilst there may be some circumstances in which, despite following the pre-action process, a company attempts to resolve the debt after an application has been submitted, our intention is very clearly that taking action at such a late stage should be discouraged.

But, in order to provide effective safeguards for companies, we think that a creditor which is applying for a winding up order should be able to withdraw its application if it no longer wishes to proceed. However withdrawal will only be possible up to the point at which the application is determined. Examples of where this may occur include, if the creditor cannot provide information to the Adjudicator that is necessary to determine the application or where the company submits evidence that disputes the existence of the debt. In cases of withdrawal, the application fee would not be refunded because the application process will have commenced, and work will have been carried out, as soon as the application is submitted.

Question 38: 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?

The effect of the Adjudicator making a winding up order

The winding up of a company by order of the Adjudicator is deemed to have commenced at the time the application is made to the Adjudicator. This is similar to the current law where winding up by the

court is, generally speaking[46], deemed to have commenced at the time of the presentation of the petition to the court.

Appeal against a decision of the Adjudicator

We propose that there will be a process by which the directors of a company that has been wound up on the decision of the Adjudicator, or a creditor who has had its application for such winding up rejected, can request that this decision be reviewed. If the directors remain dissatisfied with the outcome of such a review, they can apply to the court for the winding up proceedings to be stopped.

We propose that winding up proceedings that have commenced whether by order of the Adjudicator or the court could be stopped, as they can now, in one of the following three ways:

The court rescinds (i.e. cancels) the winding up order. The company (or anyone else) can apply for the winding up order to be rescinded if (currently) the court or (under our proposals if the company is wound up following a special resolution to that effect, or the company is unable to pay its debts) the Adjudicator did not have in its possession all the relevant facts when making the winding up order. Applications must be made within 5 business days of the order being made.

Liquidation proceedings can be stayed (that is to say stopped), either permanently or temporarily. This can be done by order of the court and on the application of the liquidator, the official receiver, a creditor or a shareholder or the liquidator in proceedings opened against the company in another Member State of the European Union. If liquidation proceedings are stayed permanently, the directors usually regain control of the company. An application to stay the liquidation proceedings can be made at any time after a winding up order has been made.

If a creditor is dissatisfied with the outcome of the Adjudicator's review, it can appeal to the court. Currently, an appeal of a decision made on a winding up petition is made in the first instance to the county court or, if the winding up was determined by a Bankruptcy Registrar of the High Court of Justice[47], to a single Judge of the High Court. In order to provide a proportionate use of court resources in dealing with appeals, we propose that any appeal against the decision of the Adjudicator should always be made in the first instance to the nearest county court to the company's registered office that has winding up jurisdiction.

Question 39: 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

[46] Except where the company had earlier passed a resolution for winding up, in which case the winding up commences at the time of that resolution. See section 129 of the Insolvency Act 1986

[47] See section 117(1) and (2) Insolvency Act 1986

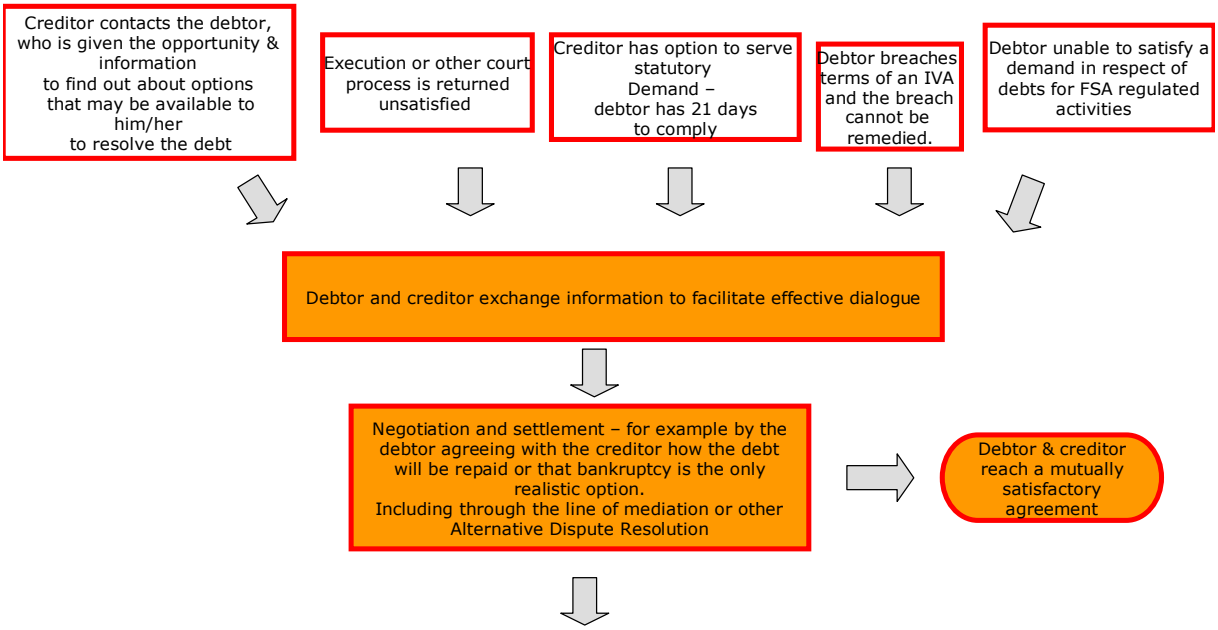
an appeal to be made in the first instance, in certain circumstances, to the High Court?

We propose that an appeal of the decision of the county court will follow the same procedure for appeals as now[48]. We propose that **the court should be able to direct the Adjudicator to make a winding up order in circumstances where the Adjudicator has not done so but where the court determines that winding up is the right outcome.** Like bankruptcy, an appeal may not be made to the court unless and until a review has been requested and carried out by the Adjudicator.

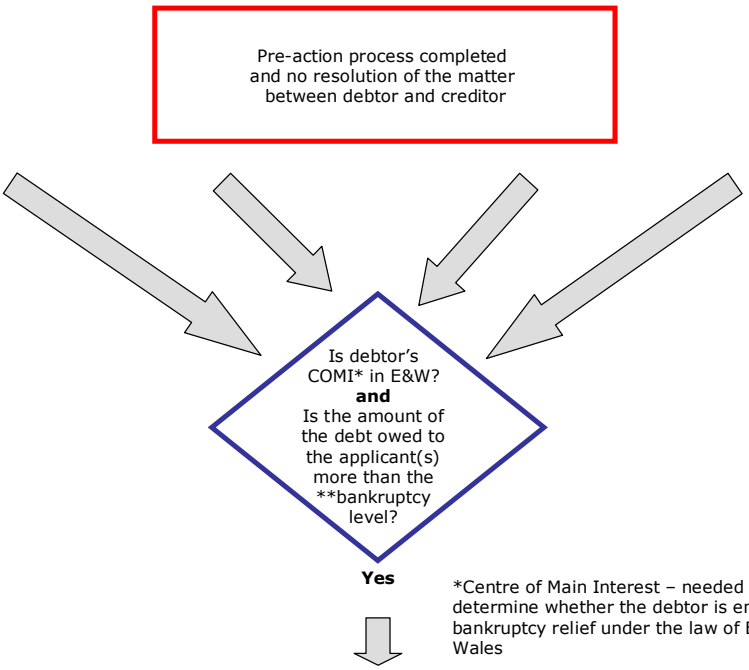
[48] Section 375 Insolvency Act 1986, CPR Part 52 (appeals) and rule 7.49A Insolvency Rules 1986 (as amended)

Annex A – Overview of the process for third party applications for bankruptcy

Part 1



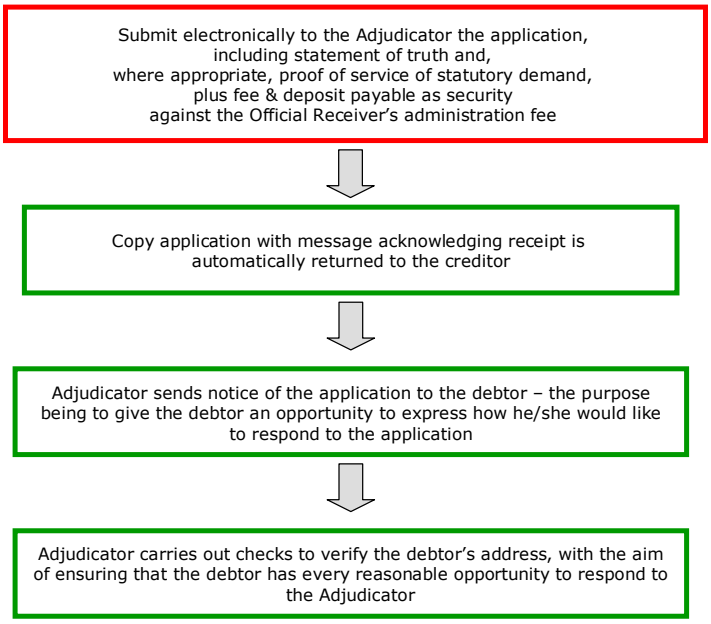
Part 2



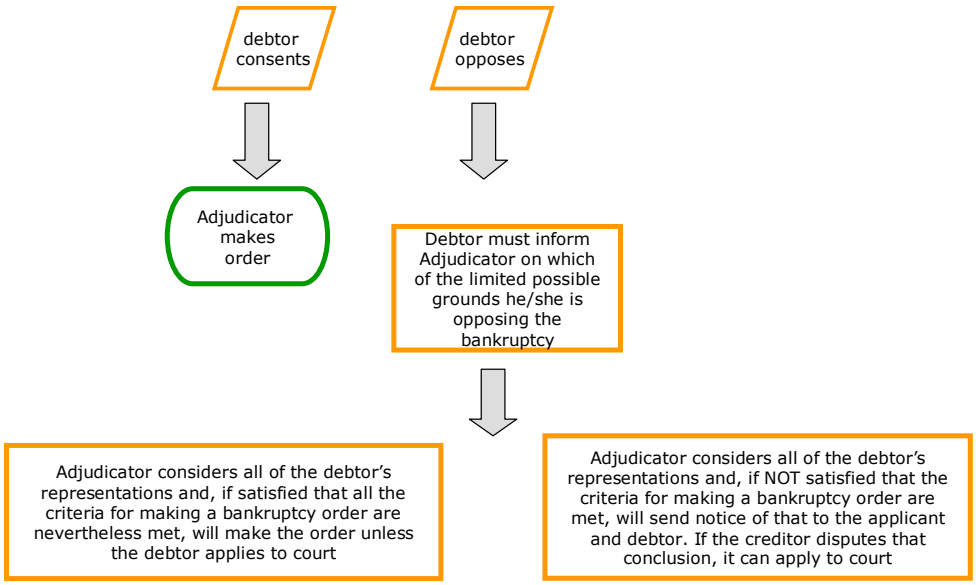
*Centre of Main Interest – needed in order to determine whether the debtor is entitled to bankruptcy relief under the law of England and Wales

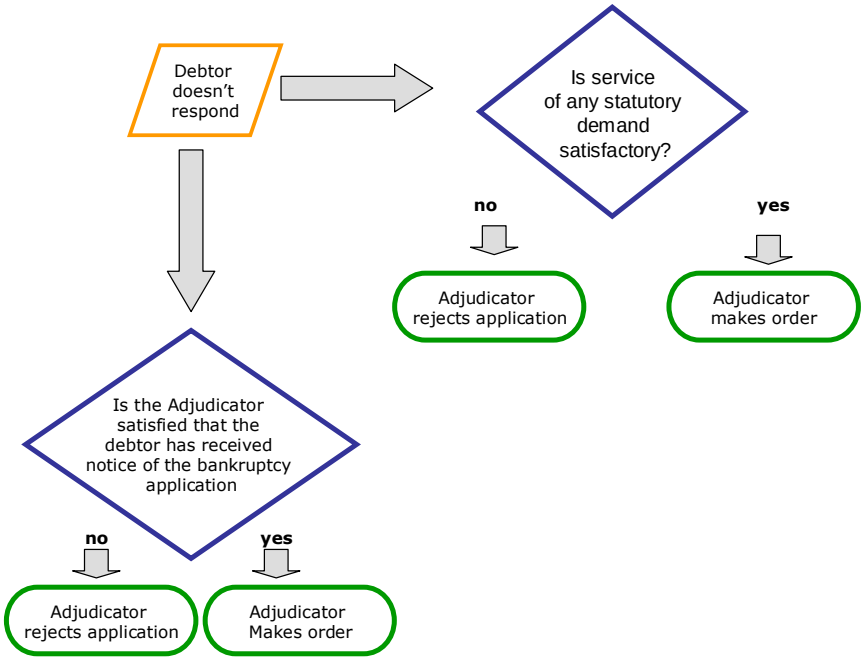
**Minimum amount of debt that can form the basis of a creditors petition (section 267 (2)(a))

Part 3


Submit electronically to the Adjudicator the application, including statement of truth and, where appropriate, proof of service of statutory demand, plus fee & deposit payable as security against the Official Receiver's administration fee
Copy application with message acknowledging receipt is automatically returned to the creditor
Adjudicator sends notice of the application to the debtor – the purpose being to give the debtor an opportunity to express how he/she would like to respond to the application
Adjudicator carries out checks to verify the debtor's address, with the aim of ensuring that the debtor has every reasonable opportunity to respond to the Adjudicator

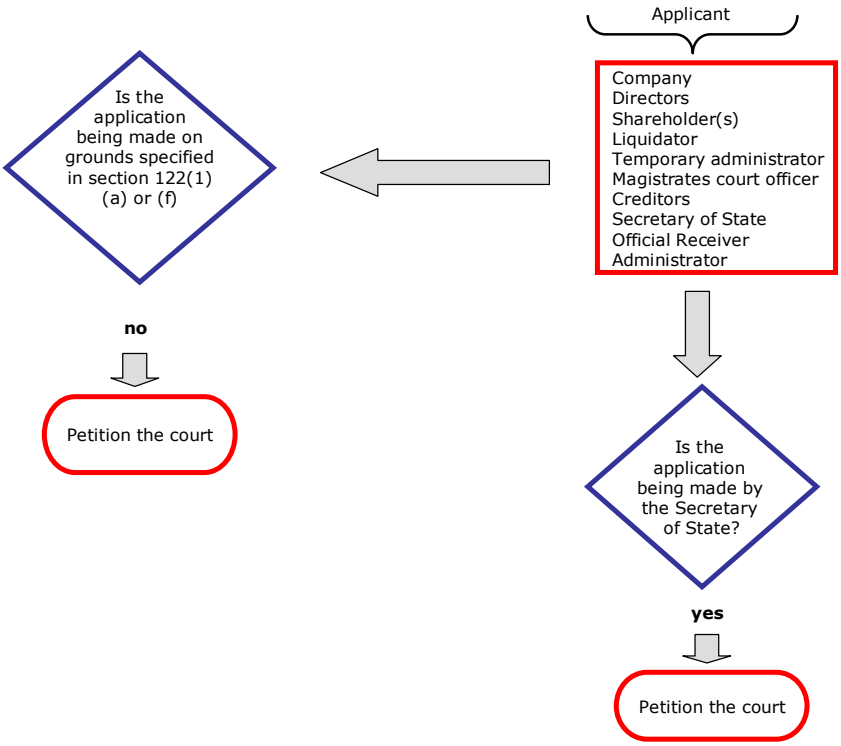
Part 4


debtor consents
debtor opposes
Adjudicator makes order
Debtor must inform Adjudicator on which of the limited possible grounds he/she is opposing the bankruptcy
Adjudicator considers all of the debtor's representations and, if satisfied that all the criteria for making a bankruptcy order are nevertheless met, will make the order unless the debtor applies to court
Adjudicator considers all of the debtor's representations and, if NOT satisfied that the criteria for making a bankruptcy order are met, will send notice of that to the applicant and debtor. If the creditor disputes that conclusion, it can apply to court

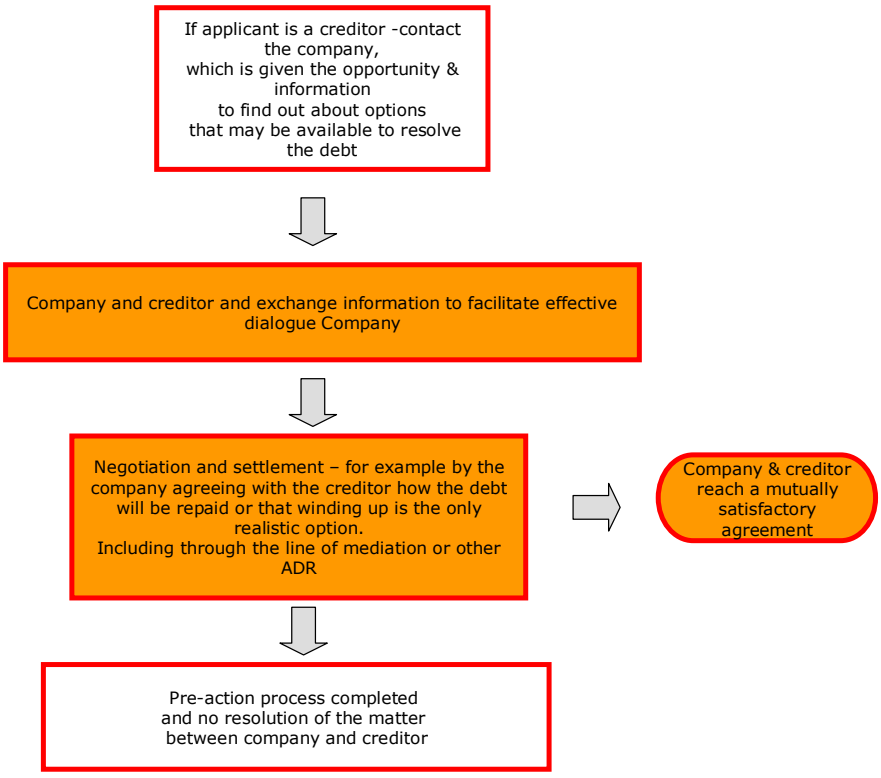

Debtor doesn't respond
Is service of any statutory demand satisfactory?
no
yes
Adjudicator rejects application
Adjudicator makes order
Is the Adjudicator satisfied that the debtor has received notice of the bankruptcy application
no
yes
Adjudicator rejects application
Adjudicator Makes order

Annex B - Overview of the proposed process for winding up applications

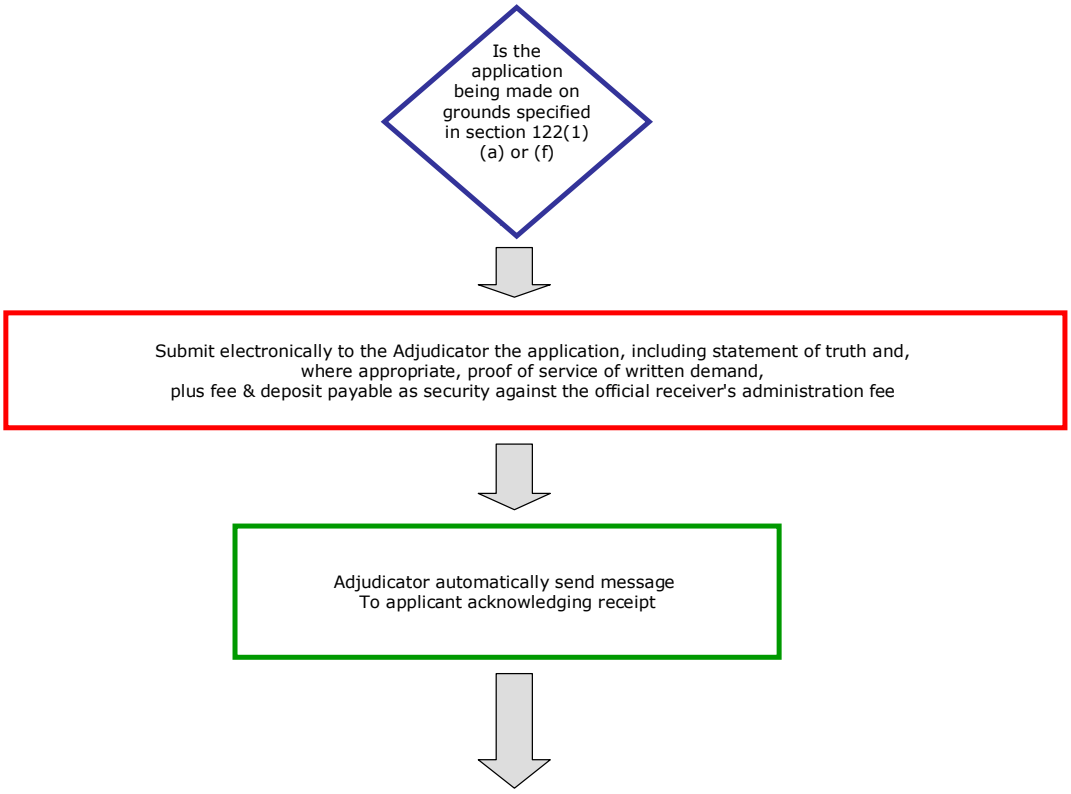
Part 1



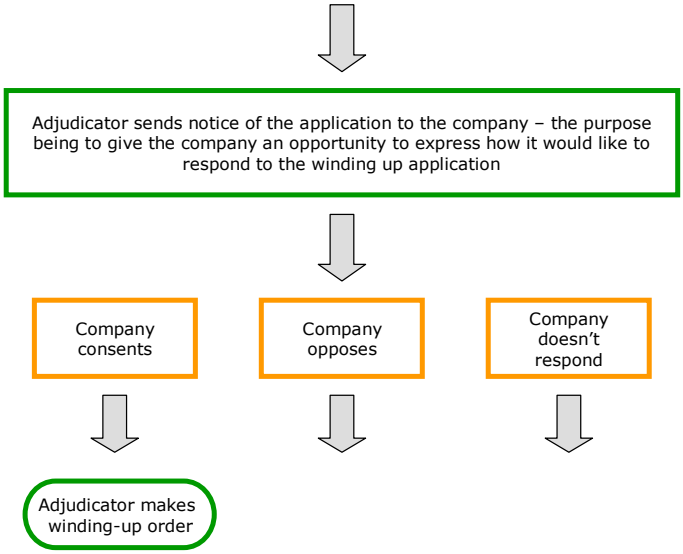
Part 2



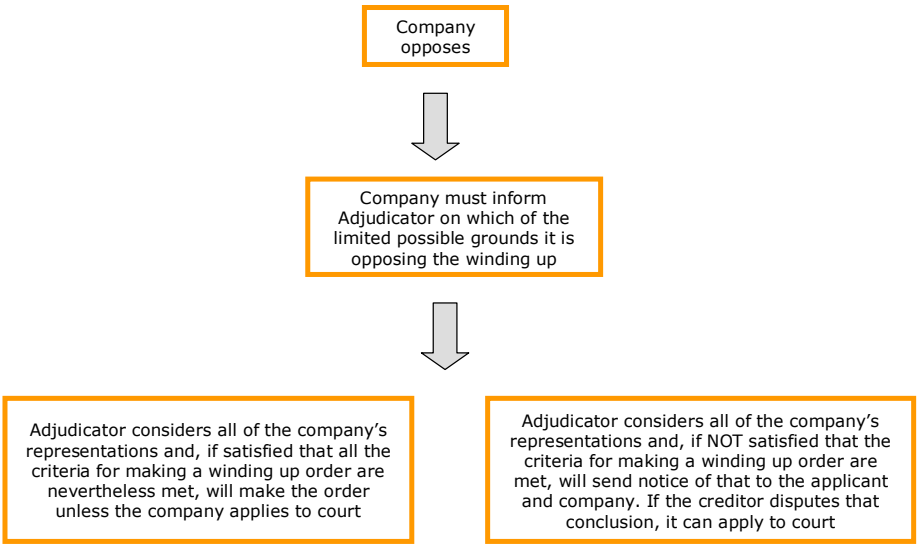
Part 3


Is the application being made on grounds specified in section 122(1) (a) or (f)
Submit electronically to the Adjudicator the application, including statement of truth and, where appropriate, proof of service of written demand, plus fee & deposit payable as security against the official receiver's administration fee
Adjudicator automatically send message To applicant acknowledging receipt

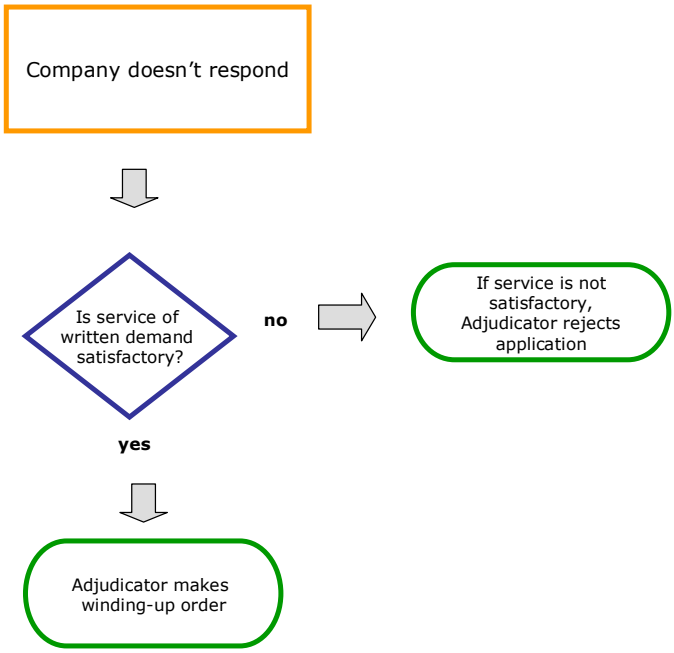
Part 4


Adjudicator sends notice of the application to the company – the purpose being to give the company an opportunity to express how it would like to respond to the winding up application
Company consents
Company opposes
Company doesn't respond
Adjudicator makes winding-up order

Part 5


Company opposes
Company must inform Adjudicator on which of the limited possible grounds it is opposing the winding up
Adjudicator considers all of the company's representations and, if satisfied that all the criteria for making a winding up order are nevertheless met, will make the order unless the company applies to court
Adjudicator considers all of the company's representations and, if NOT satisfied that the criteria for making a winding up order are met, will send notice of that to the applicant and company. If the creditor disputes that conclusion, it can apply to court

Part 6


Company doesn't respond
Is service of written demand satisfactory?
no
If service is not satisfactory, Adjudicator rejects application
yes
Adjudicator makes winding-up order

ANNEX C – Impact Assessment

Title:	Impact Assessment (IA)
Reform of the Process to Petition for Bankruptcy and Compulsory Winding Up	**IA No:** BIS0130
Lead department or agency:	**Date:** 20/04/2011
The Insolvency Service, executive agency of the Department for Business, Innovation and Skills	**Stage:** Consultation
Other departments or agencies:	**Source of intervention:** Domestic
Ministry of Justice	**Type of measure:** Primary legislation
	Contact for enquiries: suzanne.greaves@insolvency.gsi.gov.uk

Summary: Intervention and Options

What is the problem under consideration? Why is government intervention necessary?

By law, petitions for personal bankruptcy and for the compulsory winding up of companies must be made to court. Many of the petitions filed at court do not have any element of dispute and the majority, being debtor petitions, are made by the person who is seeking the relief. Government intervention is necessary to correct this regulatory failure by relieving the courts of this role, specifically where there is no dispute that would require judicial expertise, thereby removing the inefficiency that has resulted from the Insolvency Act 1986 requiring non contested petitions to be judged in court.

What are the policy objectives and the intended effects?

The policy objective is to encourage efficiency in the provision of public services and thus facilitate their delivery for the best value for money. The intended effects are to ensure that the court's focus is on dispute resolution by streamlining the current petition process (no fundamental change is proposed to the bankruptcy and liquidation process after an order is made) and to promote and protect the expertise and technical experience of the judiciary so that they are focused on matters that rightly require their skills and knowledge.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Two options have been considered:

Option 1: Reform the process for dealing with applications for bankruptcy and certain applications for the compulsory winding up of companies

Option 2: Do nothing. This option makes no changes to the current system

Option 1 is the preferred option as this saves money whilst delivering the required outcome. Due to the legislative nature of the problem (the law requires the Court to make decisions), it is not possible to consider alternatives to regulation.

A further option, to remove the requirement separately for companies and individuals was considered, but the nature of the savings means that it would be inefficent to act incrementally.

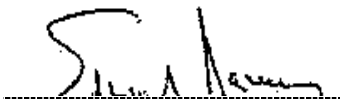
Will the policy be reviewed? It will be reviewed. **If applicable, set review date:** 1/2016

What is the basis for this review? PIR. **If applicable, set sunset clause date:** Month/Year

Are there arrangements in place that will allow a systematic collection of monitoring information for future policy review? Yes

Ministerial Sign-off For final proposal stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) the benefits justify the costs.

Signed by the responsible Minister:  Date: 06 July 2011

Summary: Analysis and Evidence Policy Option 1

Description: Reform the process for dealing with applications for bankruptcy and certain applications for the compulsory winding up of companies

*Price Base Year **2010***	*PV Base Year 2010*	*Time Period Years 10*	*Net Benefit (Present Value (PV)) (£m)*		
			*Low: **£548***	*High: **£684***	*Best Estimate: **£616***

COSTS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Cost** (Present Value)
Low	£4.5		£3.7	**£36m**
High	£4.5		£3.7	**£36m**
Best Estimate	£4.5		£3.7	**£36m**

Description and scale of key monetised costs by 'main affected groups'

The set-up costs have been estimated to be £4.5 m. This is a one-off cost, to develop IT and set up the Adjudicator's office. The average annual running cost is estimated to be £3.7 m. We anticipate that a full recovery of both the set up costs and running costs will be achieved through the fees charged for the cost of processing this work.

Other key non-monetised costs by 'main affected groups'

A result of having an administrative and possibly remote process is that there may be more debtors making contact with debt advice agencies for advice before making their application, thus increasing the workload of those agencies. This is an assumption based on anecdotal suggestions, and therefore cannot be quantified, but it is a possibility.

BENEFITS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Benefit** (Present Value)
Low	£0		£67.9m	**£585m**
High	£0		£83.8m	**£721m**
Best Estimate	£0		£75.8m	**£653m**

Description and scale of key monetised benefits by 'main affected groups'

Removing the courts from the petition process should result in savings for government (specifically HMCTS and HMRC) of £41.9 million pa, for businesses who are petitioners of between £25.2 and £41.1million pa, and for debtors of £0.8 million pa, based on our best estimate.

Other key non-monetised benefits by 'main affected groups'

Removing the requirement for routine cases to be determined by the courts should reduce waiting times for other matters that do require judicial consideration. Debtors should have speedier access to the debt relief afforded by bankruptcy; and an inappropriate barrier will be removed for those for whom bankruptcy is the best option but who are currently deterred from seeking that solution by the requirement to go to court.

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5

1. If bankruptcy numbers increase/decrease, estimated running costs (and therefore net benefit) will vary accordingly. 2. The level of fee charged to each applicant by the Adjudicator will be set to match the activity required under the administrative process. Consultation will help establish exactly what the process should require, balancing the needs of applicants and debtors, and thus more precisely gauge what should be the appropriate fee. 3. 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. 4. Calculations for savings to HMCTS are based on 2010 costings for court staff provided by HMCTS, and for HMRC are calculated using 2009-10 case numbers.

Direct impact on business (Equivalent Annual) £m):			**In scope of OIOO?**	**Measure qualifies as**
Costs: £0.9m	**Benefits:** £33.2m	**Net:** £32.3m	Yes	OUT

Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?			Other - see para 7 below		
From what date will the policy be implemented?			2014		
Which organisation(s) will enforce the policy?			N/A		
What is the annual change in enforcement cost (£m)?			N/A		
Does enforcement comply with Hampton principles?			Yes		
Does implementation go beyond minimum EU requirements?			No		
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)			**Traded:** N/A	**Non-traded:** N/A	
Does the proposal have an impact on competition?			No		
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?			**Costs:** 0	**Benefits:** 0	
Distribution of annual cost (%) by organisation size (excl. Transition) (Constant Price)	**Micro**	**< 20**	**Small**	**Medium**	**Large**
Are any of these organisations exempt?	No	No	No	No	No

Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on…?	**Impact**	**Page ref within IA**
Statutory equality duties[1] Statutory Equality Duties Impact Test guidance	Yes	95
Economic impacts		
Competition Competition Assessment Impact Test guidance	No	95
Small firms Small Firms Impact Test guidance	Yes	95
Environmental impacts		
Greenhouse gas assessment Greenhouse Gas Assessment Impact Test guidance	No	95
Wider environmental issues Wider Environmental Issues Impact Test guidance	No	95
Social impacts		
Health and well-being Health and Well-being Impact Test guidance	Yes	95
Human rights Human Rights Impact Test guidance	No	96
Justice system Justice Impact Test guidance	No	95
Rural proofing Rural Proofing Impact Test guidance	Yes	96
Sustainable development Sustainable Development Impact Test guidance	No	95

[1] Public bodies including Whitehall departments are required to consider the impact of their policies and measures on race, disability and gender. It is intended to extend this consideration requirement under the Equality Act 2010 to cover age, sexual orientation, religion or belief and gender reassignment from April 2011 (to Great Britain only). The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

Evidence Base (for summary sheets) – Notes

Use this space to set out the relevant references, evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Please fill in **References** section.

References

Include the links to relevant legislation and publications, such as public impact assessments of earlier stages (e.g. Consultation, Final, Enactment) and those of the matching IN or OUTs measures.

No.	Legislation or publication
1	**Reform of the process to apply for bankruptcy and compulsory winding up** http://www.bis.gov.uk/insolvency/Consultations/category/open
2	**Consultation on the official receiver becoming trustee of the bankrupt's estate on the making of a bankruptcy order and removal of the requirement to file a 'no meeting' notice in certain company winding up cases** http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/ORTrusteemarch10/ORtrusteeConsultationDoc.pdf
3	**Consultation Reforming Debtor Petition Bankruptcy and Early Discharge From Bankruptcy** http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/Debtor%20Petition%20Reform%20Final%20Nov%2009.pdf
4	**Enterprise Act 2002: Attitudes to Bankruptcy 2009 Update** http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/policychange/AB2009/ABrevisitedMenu.htm
5	**Bankruptcy: proposals for reform of the debtor petition process – Summary of Responses** http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/deptorpetresp.pdf
6	**Bankruptcy: proposals for reform of the debtor petition process** http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/Initialstageconsultationpaper.doc

Evidence Base

Ensure that the information in this section provides clear evidence of the information provided in the summary pages of this form (recommended maximum of 30 pages). Complete the **Annual profile of monetised costs and benefits** (transition and recurring) below over the life of the preferred policy (use the spreadsheet attached if the period is longer than 10 years).

The spreadsheet also contains an emission changes table that you will need to fill in if your measure has an impact on greenhouse gas emissions.

Annual profile of monetised costs and benefits* - (£m) constant prices

	Y_0	Y_1	Y_2	Y_3	Y_4	Y_5	Y_6	Y_7	Y_8	Y_9
Transition costs	£4.5	£0	£0	£0	£0	£0	£0	£0	£0	£0
Annual recurring cost	£3.7	£3.7m	£3.7m	£3.7m	£3.7m	£3.7m	£3.7m	£3.7m	£3.7m	£3.7m
Total annual costs	£8.2m	£3.7	£3.7m	£3.7m	£3.7m	£3.7m	£3.7m	£3.7m	£3.7m	£3.7m
Transition benefits	£0	£0	£0	£0	£0	£0	£0	£0	£0	£0
Annual recurring benefits	£75.8m	£75.8m	£75.8m	£75.8m	£75.8m	£75.8m	£75.8m	£75.8m	£75.8m	£75.8m
Total annual benefits	£75.8m	£75.8m	£75.8m	£75.8m	£75.8m	£75.8m	£75.8m	£75.8m	£75.8m	£75.8m

* For non-monetised benefits please see summary pages and main evidence base section

Microsoft Office
Excel Worksheet

Evidence Base (for summary sheets)

BACKGROUND

1. In 2007, The Insolvency Service, an executive agency of the Department for Business, Innovation and Skills, first invited views on the feasibility of removing the courts from the order making process for debtor petition bankruptcies. This first consultation, *'Bankruptcy: Proposals for Reform of the Debtor Petition Process'*[1] proposed that orders which followed debtors' own petitions for bankruptcy could be made administratively by The Insolvency Service.

2. Encouraged by the overall support for this concept, and with growing recognition that court services were reaching their capacity to deal with these types of cases, The Insolvency Service carried out a further consultation entitled *'Reforming Debtor Petition Bankruptcy and Early Discharge'* [2] which was published in November 2009. Meetings were also held with interested parties to discuss the proposals and facilitate responses. During these discussions, interested parties were encouraged to consider the detail of how such a proposal could work.

3. A fundamental part of the proposal was the introduction of a new office for a Secretary of State appointed decision maker, or Adjudicator. The office-holder would have the relevant skills, experience and expertise to enable him/her to make an administrative decision whether to grant a bankruptcy order based on the debtor's petition.

4. A total of 37 businesses, individuals, and representative bodies responded to the November 2009 consultation. The majority indicated broad support for the proposals, and in particular, for the office of the decision maker - now to be called the Adjudicator - to sit within The Insolvency Service but to be independent of the office of the official receiver.

5. Responses also offered useful feedback on detailed matters raised in the consultation paper. A summary of the responses was published in October 2010 and is available on The Insolvency Service website[3]

6. Since the close of the consultation on '*Reforming Debtor Petition Bankruptcy and Early Discharge*' in February 2010, The Insolvency Service has worked closely with the Ministry of Justice (MOJ) in respect of wider plans for transforming justice[4]. This initiative, which includes important changes to the civil justice system, has presented the government with the new

[1] http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/Initialstageconsultationpaper.doc

[2] http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/Debtor%20Petition%20Reform%20Final%20Nov%2009.pdf

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

[4] http://www.instituteforgovernment.org.uk/pdfs/transformation_in_the_ministry_of_justice.pdf

opportunity to broaden the scope of the petition reforms. The proposals therefore now extend to changes to the process by which creditors petition for the bankruptcy of individuals and for the compulsory winding up of companies which have the potential to maximise savings to business, the government and the public.

7. This impact assessment accompanies a new consultation paper entitled 'Reform of the Process to Apply for Bankruptcy and Compulsory Winding Up'. In this paper, The Insolvency Service builds on the previous consultation, and invites views on expanding the proposed reform to the debtor petition process, and reforming the entire petition process for all uncontested bankruptcy in England and Wales and the majority of company winding up cases in England, Wales and Scotland, enabling orders to be made administratively by the Adjudicator. The changes are designed to maximise potential monetary and efficiency savings.

Problem Definition

8. The court's focus should be on resolving disputes, and yet the Insolvency Act 1986 requires all petitions for bankruptcy and compulsory winding up to be presented to the court, even when there is no dispute between the two parties. This leads to inefficiencies and costs.

9. By way of illustration, not all petitions that are presented to court result in an order being made (see **figure 1** below). For example, the debtor may pay the debt that is being claimed in the petition by the petitioning creditor before the hearing takes place.

Figure 1: Table showing ratio of petitions filed against orders made, 2010

Petition Type[5]	Number of petitions filed[6]	Number of orders made[7]	Number of orders not made	Percentage of orders made (%)
Debtor bankruptcy	51,992	50,652	1340	97%
Creditor bankruptcy	17,729	8,542	9,187	48%
Company winding up	10,723	4,792	5,931	45%

Source: Ministry of Justice, and The Insolvency Service statistics published February 2010

10. In addition, the overall number of petitions made to the court, particularly by debtors seeking their own bankruptcy, has risen from 28,021 in 2003 (of which 71% were made on debtors' own petitions) to 59,194 in 2010 (of which approx 86% were made on debtors' own petitions). This represents a percentage increase of around 52% for all bankruptcies, over that seven year period. The chart at **figure 2** below illustrates how the total number of bankruptcies

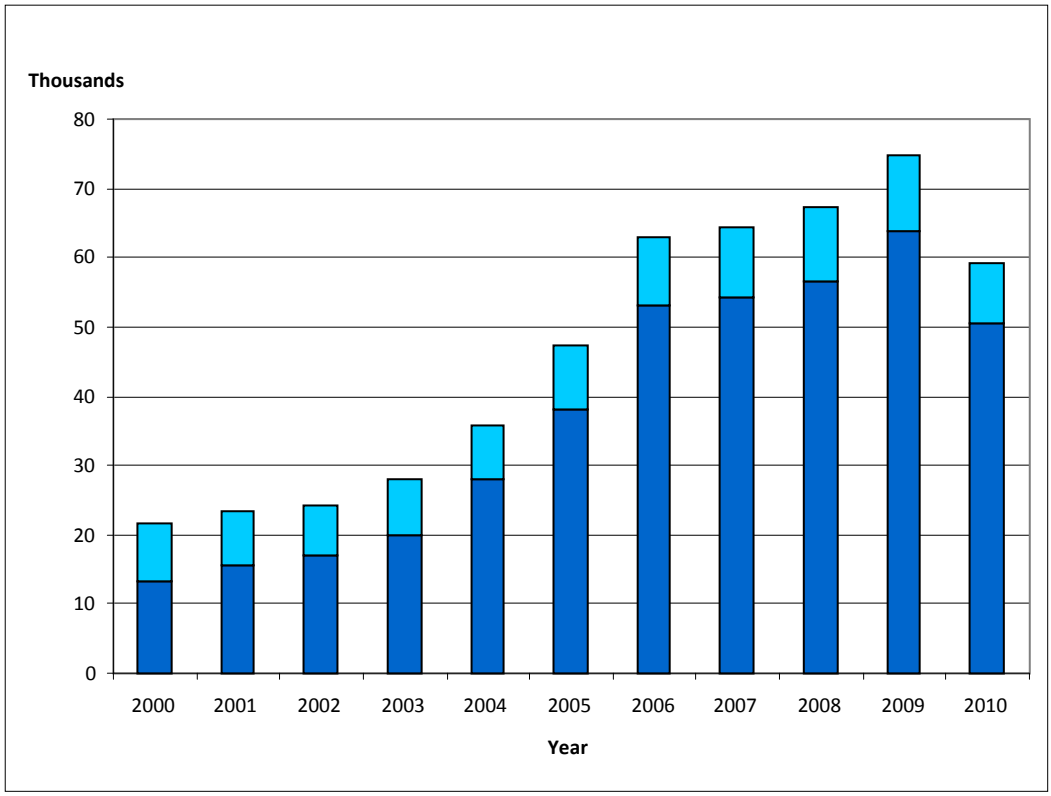
[5] These are the different types of petitions which will be analysed throughout the impact assessment, and this terminology will be used throughout this document.

[6] Ministry of Justice Statistics on company winding up and bankruptcy petitions issued in the High Court and county courts of England and Wales – fourth quarter 2010, published February 2010

[7] The Insolvency Service statistics, published February 2010

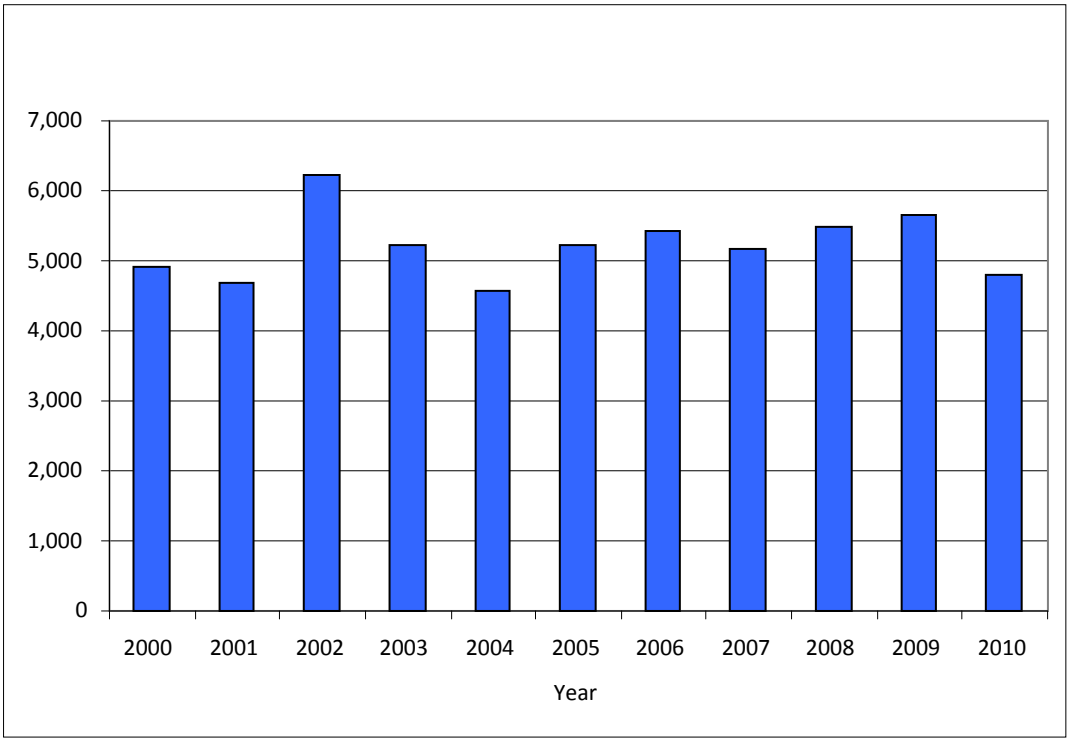
arising from debtor petitions and creditor petitions has changed over the last decade, while **figure 3** illustrates the change in the number of winding up orders made over the same period.

Figure 2: Bankruptcy orders made by petition type: 2000-2009



Source: The Insolvency Service

Figure 3: Compulsory Winding Up Orders made: 2000-2009



Source: The Insolvency Service

11. Over the last 10 years, the number of compulsory winding up orders made by courts has remained fairly steady. However, the number of uncontested petitions for bankruptcy and company winding up that are presented to the courts on an annual basis means that an inefficient service is provided, because court resources are used to make decisions even where the parties are not in dispute about what the outcome should be. In order to provide a more efficient service, a system could be introduced which ensures that judicial expertise is employed specifically where it is clear that the two parties to an application are in dispute about whether bankruptcy or compulsory winding up is the right outcome.

12. Particular problems for business, the advice sector, creditors and the government as a result of the current inefficiencies include:

- It is unnecessarily expensive to require a judicial decision (together with the corresponding court support staff time) in every case regardless of whether the parties are in dispute or not;

- Those individuals for whom bankruptcy is the best solution to their debt problems can be put off from applying for bankruptcy because of the need to attend court;

- Continued pressure on the court services. Although the rate of increase in creditor bankruptcy petitions over the last decade has not been as sharp as the rise in debtor bankruptcy petitions, the absolute number of cases remains high, so pressure on the court services also remains high. The resulting impact can also be felt by other court users facing delays for hearings, and on court resources generally.

- Ongoing delays experienced by those seeking the relief that is provided by bankruptcy. One of the principle aims of proposing changes to the debtor petition process is to remove the delays faced by debtors between the time when they decide that bankruptcy is the best option for resolving their debts, and the making of the bankruptcy order. An informal survey carried out by District Judge Jordan in 2007, supported the GfK NOP survey commissioned by The Insolvency Service in the same year, found that 'some debtors can face a wait of up to three months before their bankruptcy order is made, whilst the average waiting time is between one and two months'.[8]

- For bankruptcy cases in particular, these delays at the courts can exacerbate the psychological and physiological consequences of over indebtedness. Various research studies have highlighted the impact of debt on individuals' health and wellbeing. Research by the Legal Services Research Centre in 2007 found that 7% of their 5,000 survey group in England and Wales had suffered a stress related illness as a

[8] For more information on these surveys, see *'Reforming Debtor Petition and Early Discharge from Bankruptcy, November 2009*' pp 46.

consequence of mounting debt problems. Of this number, 22% went on to seek help from their GP, at an estimated cost of £125 per patient on the National Health Service[9].

- For creditor petition and compulsory winding up cases, the consequences of undue delay, particularly where judicial expertise is not necessary in order to reach an appropriate decision, are not only psychological, but also have a financial and economic impact. Costs associated with delayed hearings include the expense of retaining Counsel and legal representation, labour downtime as individuals, traders and company officers attend hearings, lost contracts and business opportunities as the case remains pending, and interest accruing on existing loans as debtor companies or applicant businesses wait for a hearing date.

Rationale for intervention

13. The processes to petition for bankruptcy and for the winding up of a company are governed by the Insolvency Act 1986. Government intervention is necessary to amend the primary legislation in order to address the regulatory failure that has been identified and thereby enable the required changes to the petition process, as it is not possible to effect these changes by non-regulatory means.

Objectives

14. The policy objectives of these new proposals are to:

- Ensure the court's focus is on dispute resolution, and thereby ensure a more efficient service for those seeking bankruptcy and compulsory winding up;
- Encourage efficiency savings in terms of the use of public money and time;
- Promote and protect the expertise and technical experience of the judiciary so that they are focused on matters that rightly require such skills and knowledge. A crucial element of this proposal is that the courts will still deal with any disputes between the parties which rightly require a full judicial determination; and
- Introduce savings to business by offering the potential to reduce reliance on legal representation at the petition stage of the bankruptcy and winding up process.

Option 1: Reform the process by which decisions are made in respect of applications for bankruptcy and certain applications for the compulsory winding up of companies

15. Under this option, all applications for bankruptcy and certain applications for the compulsory winding up of companies will be directed in the first instance to an Adjudicator, who will be a person appointed to that role by the Secretary of State. An electronic system that allows applications by individuals and businesses to be made to the Adjudicator would facilitate

[9] See Pleasence, P., Buck, A., Balmer, N.J. and Williams, K.(2007) *A Helping Hand: The Impact of Debt Advice on People's Lives*, London, Legal Services Commission, LSRC Research Paper No. 15.

efficiencies. The potential for such efficiencies could be maximised if this system is used to receive and determine all undisputed cases which do not require judicial expertise. So:

- All applications by debtors for their own bankruptcy are, by their nature, made voluntarily and with the consent of the party who will receive the relief that is provided by an order being made. It is proposed that applications for such orders will be made to the Adjudicator and that the Adjudicator will make the orders administratively.

- Applications by creditors (and certain other third parties who are currently entitled to petition for bankruptcy), in respect of debtors who have had time to take debt advice and who consent to or do not oppose a bankruptcy order being made, will be determined administratively, because they similarly do not involve a dispute.

- Applications made by companies for their own compulsory winding up or by creditors (and certain others who are currently entitled to petition for winding up) of companies in respect of unpaid debts, where the debtor company consents to or does not oppose a winding up order being made, will be determined administratively.

- Applications made by the Secretary of State for the winding up of a company on public interest grounds would be made, as now directly to the court, because it requires judicial expertise to weigh up the evidence and determine where the balance lies in the public interest. This is rightly a matter for the court.

- Applications made for the compulsory winding up of a company by third parties on grounds other than the company being unable to pay its debts would continue to be made, as now, to the courts. This is because such applications either require a greater degree of discretion to be exercised than would be appropriate under an administrative system (if the grounds for the winding up are that winding up would be just and equitable) or because few if any applications are expected and therefore there is little to be gained by way of improvements to efficiency.[10]

16. Provided that both parties involved in the application process consent, or that no objections are raised at the application stage, the orders will be granted on an administrative basis.

17. A key aspect of the proposed policy is that the parties will be encouraged and incentivised to communicate with each other during the pre-action process with a view to maximising the opportunity to reach a satisfactory resolution of the matter before the Adjudicator becomes involved. We are aware from discussion with HM Revenue and Customs (HMRC) that these discussions tend to take place currently after a petition has been presented, which can lead to court hearings being adjourned, sometimes several times, until either the petition is dismissed when the parties have reached a mutual agreement over the debt which does not involve bankruptcy or winding up; or an order made if no such agreement can be reached. The

[10] See section 122 (1) (a) to (e) of the Insolvency Act 1986.

proposed new process envisages that these same discussions would need to take place, but the appropriate time is earlier in the process - before a third party such as the Adjudicator or court becomes involved.

18. The consultation document published alongside this impact assessment explores in more detail what this proposed pre-action process should involve and asks whether the process should be discretionary or mandatory. Evaluation in 2007[11] of a pilot scheme by the Ministry of Justice involving Pre-Action Notices suggests that responsible creditors will already be engaged with debtors about alternative ways of resolving the debt dispute without recourse to the court, which indicates that a pre-action process will not result in any additional costs or burdens for business. Having said that, it would be helpful to test this with debtors and creditors.

Question 40IA: Is the proposed pre-action process likely to result in any additional costs for creditor petitioners or debtors? If so, how much and why?

19. Under option 1, the overall delays involved in having a petition heard at court could be removed, as could the associated costs of attending hearings, for both the debtors, company officers and for creditors, particularly where legal representation is required. Removing unopposed petitions from the courts would both free up court time to deal with court processes which do require judicial input and facilitate a swift start to the case administration process for the official receiver.

Option 2: Do Nothing

20. This option make no changes to the current system whereby petitions for bankruptcy and compulsory winding up orders have to be made directly to the court. As outlined in the problem definition, court resources will continue to be used in an inefficient way to determine matters that are not in dispute, which will result in courts continuing to be overstretched in dealing with the numbers of debtors applying to the courts; and individuals and creditors will continue to experience the effects of long delays for hearings.

COSTS AND BENEFITS

21. The proposed changes will impact on a various interested parties, including government, business and the advice sector.

[11] Evaluation of Pre-Action Notice (PAN) Pilot Summary report by Stephen Lea, Avril Mewse and Wendy Wrapson , 5 September 2007

22. In order to asses the costs and benefits of each option, this initial impact assessment only considers quantifiable information collated and recorded by The Insolvency Service and published data from the Ministry of Justice. We would therefore welcome quantitative data and qualitative input from all sectors wherever possible, particularly that relating to private businesses' time and expenses.

23. This impact assessment will start with the option 2 analysis of 'do nothing' as this provides much of the base information for the changes proposed under option 1.

ANALYSIS OF OPTION 2

Current Benefits

24. The full cost of administering an individual bankruptcy is £1,715 while for company liquidations, this figure is £2,160[12]. This is the case administration fee and is charged in every case where an order is made. Currently, when a petition is presented to court – whether by a creditor or an indebted individual – a deposit is payable on presentation of the petition, which partially recovers the case administration fee. The balance is recovered from realisation of any assets in such insolvent estates.

25. For debtor petition bankruptcies, the deposit that is payable as security against the case administration fee is currently £450, while for creditor petition bankruptcies, the amount is £600. This deposit is payable in addition to the court fee that petitioners making an application are asked to pay to the court.

26. The court fee for debtor petitions in 2009 and 2010 was £150, and for creditor bankruptcy and company winding up petitions, the court fee at that time was £190. These fees were increased to £175 and £220 respectively from 4 April 2011. The calculations within this impact assessment use the previous fee levels, as they relate to data at that time prior to implementation of the fee increases. In addition, some individual debtors do qualify for a means-assessed exemption from paying the full court fee.

27. In 2007, The Insolvency Service commissioned a GfK NOP survey, which asked debtors who had petitioned for their own bankruptcy whether they had paid the full court fee of £150. Approximately 50% of debtors confirmed that they had received the benefit of fee remission, which meant that they did not have to pay either all or some of the court fee, a benefit to this group of individuals that would continue if the current process were to remain the same. The Insolvency Service and HM Courts and Tribunals Services have not been able to provide a figure for the number of creditor bankruptcy petitioners and company winding up petitioners who qualify for full remission, but it is expected that this would be an extremely small number.

28. By not changing the current procedure, there would be no familiarisation or capital costs in setting up a new administrative system. However, the monetary and non-monetary costs to creditors and debtors of petitioning for compulsory winding up orders and for bankruptcy,

[12] The Insolvency (Fees) (Amendment) Order 2010 No 732

would remain the same. These include the unnecessary expense of involving the court in matters which are not in dispute, the psychological effects on indebted individuals, the economic consequences on companies where debtors continue to incur credit as well as the financial implications for businesses awaiting a hearing. Costs of the current system are discussed further below.

Current Costs to Government

HM Courts & Tribunals Service

29. The insolvency service has worked with HM Courts & Tribunals Service (HMCTS) with a view to calculating the average cost of dealing with each bankruptcy and compulsory liquidation application.

30. For an individual to present his/her own petition at court, the court fee payable is £150. The service that the court provides in return includes administering the documents relating to the petition and subsequent order, administering any application for fee remission, and judicial time making the order. For creditor bankruptcy petitions and compulsory winding up petitions, the court fee is £190.

31. The unit cost for each court clerk in dealing with a bankruptcy and winding up petition has been calculated as £2.08 per minute (based on HMCTS business management system administration times) and judicial billing time is £1.82 per minute (based on judicial salary and a percentage of all other HMCTS civil costs - accommodation, it and shared services.

32. In calculating the judicial cost of dealing with a petition by HMCTS, it has been assumed that each district judge or registrar takes 20 minutes to hear and decide each application. The total cost of judicial time in dealing with any bankruptcy or winding up petitioner is therefore £1.82 x 20 minutes = £36.40[13]

[13] These are the current costs and, when compared to suggested new costs, indicate the potential for savings.

Figure 4: Table showing the cost to HMCTS of dealing with a bankruptcy and company winding up petition, 2010

Petition type	Average court clerk time to deal with petition and work associated with petitions excl orders (minutes)	Clerk time associated with making the order only (minutes)	Unit staff cost[14] to deal with a petition and order	Unit staff cost[15] to deal with a petition (where no order is made) incl. Judicial cost @ £36.40	Total cost to court of making an order (incl. Judiciary time @ £36.40)
Debtor bankruptcy	**174**	**45**	**£455.52**	£398.32	£491.92
Creditor bankruptcy	**114**	**27**	**£293.28**	£273.52	£329.68
Company winding up	**65**	**37**	**£212.16**	£171.60	£248.56

33. Using the calculations of court costs from **figure 4** above, the tables at **figures 5, 6 and 7** below show the overall estimated cost to HMCTS in 2010 of processing bankruptcy and company winding up petitions, based on numbers of petitions filed in the calendar year 2010.

Figure 5: Table showing the estimated cost to HMCTS of making bankruptcy orders based on debtor petitions, 2010

	Current System		
	Orders Made 2010	Petitions Filed and order not made	Total cost to HMCTS dealing with petitions and making orders £
Number of petitions	50,652	1340	Not applicable
Cost	£24,916,732[16]	£533,749[17]	**£25,450,481**

[14] Includes overheads, salaries, IT and accommodation

[15] Includes overheads, salaries, IT and accommodation

[16] Total cost to the court of making a bankruptcy order including judiciary time = £491.92 x 50,652 (number of orders made)

[17] Total cost to the court of dealing with a bankruptcy petition but where no order is made, including judiciary time = £398.32 x 1340 (number of petitions filed where the order was not made)

34. The overwhelming majority of debtor bankruptcy petitions do result in an order being made, as shown by comparing data from the MOJ and The Insolvency Service (see **figure 1**).

Figure 6: Table showing the estimated cost to HMCTS of handling creditor petitions for bankruptcy, 2010

	Current System		
	Orders Made 2010	Petitions Filed and order not made	Total cost to HMCTS dealing with petitions and making orders £
Number of petitions	8,542	9,187	Not applicable
Cost	£2,816,127[18]	£2,512,828[19]	**£5,328,955**

Figure 7: Table showing the estimated cost to HMCTS of handling compulsory winding up petitions, 2010

	Current System		
	Orders Made 2010	Petitions Filed and order not made	Total cost to HMCTS dealing with a petition and making an order 2010 £
Number of petitions	4,792	5,931	Not applicable
Cost	£1,191,100[20]	£1,017,760[21]	**£2,208,859**

35. **Figures 5, 6 and 7** take into account that different administrative tasks are undertaken by court staff, resulting in different costs when an order is made compared to when an order is not made. The total current annual cost to HMCTS in administering debtor and creditor petitions for bankruptcy and petitions for the compulsory winding up of companies is about **£33 million.**

HM Revenue and Customs (HMRC)

[18] Total cost to the court of making a creditor bankruptcy order including judiciary time = £329.68 x 8,542 (number of orders made)

[19] Total cost to the court of dealing with a creditor bankruptcy petition but where no order is made, including judiciary time = £273.52 x 9,187 (number of petitions filed where the order was not made)

[20] Total cost to the court of making a winding up order including judiciary time = £248.56 x 4,792 (number of orders made)

[21] Total cost to the court of dealing with a winding up petition but where no order is made, including judiciary time = £171.60 x 5,931 (number of petitions filed where the order was not made)

36. There are a number of statutory obligations that a third party petitioner must fulfil before issuing a petition. This includes ensuring that specific documents are served correctly upon the respondent and that evidence of such service is correctly documented.

37. Often creditors employ the services of legal representatives to assist in completing petitions for bankruptcy and company winding up. The costs involved in employing a solicitor and Counsel vary, as does the length of any court hearing from between one to 30 minutes (hearings in chambers could also take longer than this), depending on the complexity of the case.

38. The cost to HMRC of complying with the current procedure as compared to the proposed new procedure is analysed separately from other petitioners in order to assess the overall potential costs and benefits for government.

39. Between July and August 2010, The Insolvency Service's National Dividend Unit, which distributes money to creditors following the realisation of assets in insolvent estates, obtained a sample of bills of costs for legal services from HMRC and non-government petitioners. The sample, which comprised 27 HMRC legal bills, showed the median legal cost to HMRC in respect of administering a bankruptcy petition was £1,100 and, for dealing with a winding up petitions, was £2,000 per case (see **figure 8** below). This is in tune with general Insolvency Service guidance[22] that provides that a bill for petition costs of up to £2,000 in companies and £1,500 in bankruptcies can be approved by the official receiver (or his/her deputy) for immediate payment. Bills in excess of these amounts may require the official receiver to ask the court to decide upon the amount in question and, in these circumstances, will require the petitioner to submit their bill of costs for detailed assessment.

40. Figures from a sample population of 25 legal bills from non-government petitioners, obtained from The Insolvency Service National Dividends Unit, show that the median[23] cost to these petitioners of employing the services of a solicitor for creditor bankruptcy petitions is £1,700, and approximately £3,100 for company compulsory liquidation petitions. Although The Insolvency Service provides general guidance on petition costs (see paragraph 39 above), bills in excess of the guideline amounts are permissible depending on the circumstances of the case, for example where service of the petition has been resisted.

41. In addition to the legal costs, there are also the costs associated with filing a petition. In bankruptcy cases, these costs include the court fee (£190) and the official receiver's deposit as security for the costs of administering the insolvent estate (£600). Therefore, the total cost to HMRC in respect of bankruptcy petitioning costs are approximately £1,890 per case. For company winding up petitions, the total petition amount per case could be at least £3,190 which includes the court fee (£190) and the official receiver's deposit (£1,000) as well as the cost of legal representation (£2,000).

42. Because of the approximate nature of the legal costs, for the purposes of this impact assessment, the total cost per case has been rounded to the nearest £1,000. So the cost to

[22] The Insolvency Service Technical Manual, Chapter 36 Part 4 paragraph 36.75

[23] The median figures were taken from a sample of bill of costs received by The Insolvency Service National Dividends Unit between July and August 2010.

HMRC petitioning for bankruptcy is approximately £2,000 and the cost of HMRC petitioning for company winding up is approximately £3,000.

Figure 8: Table showing the estimated cost to HMRC of filing bankruptcy and winding up petitions, based on 2009-10 case numbers and costings

Petition Type	Number of HMRC petitions filed	HMRC approximate costs per case (£)	Estimated total cost to petition (£)
Creditor bankruptcy petitions	5,315	£2,000	£10,630,000
Company compulsory liquidation	3,821	£3,000	£11,463,000
Total		**£22,093,000**	

43. Overall, the estimated legal costs to HMRC each year of filling bankruptcy and winding up petitions, and employing legal representation, based on 2009-10 data, is over **£22 million**.

Debtors

44. Debtors who petition for their own bankruptcy incur a court fee (£150) and must pay the Official Receiver's deposit (£450). Around half of all debtor petitioners qualify for remission of the court fee, which is payable whether or not an order is made. No remission is allowed for the deposit but this is returned to the applicant if an order is not made. The cost to debtor petitioners under the current system is around **£26.7 million** p.a. (based on number of debtor petitions in 2010 – see **figure 1**) as shown the in the table at **figure 9** below.

Figure 9 : Table showing estimated costs to debtors petitioning for their own bankruptcy

Number debtor petitions	**Amount of court fee paid per petition** (50% x £150) (£)	**Total court fees paid** (£)
51,992	75	3,899,400
Number debtor petitions that result in an order	**Amount of OR deposit per petition** £	**Total OR deposits paid** **£**
50,652	450	22,793,400
Total cost to debtor petitioners		**£26,692,800**

Cost to Non–Government Petitioners

45. Figures obtained from The Insolvency Service National Dividends Unit show that the median[24] cost to non-government petitioners of employing the services of a solicitor for creditor bankruptcy petitions is £1,700, and approximately £3,100 for company compulsory liquidation petitions. This is based on a sample of legal bills submitted by non-government petitioners in 18 bankruptcies and 7 company windings up.

46. The table **at figure 10** below shows the total annual cost to business of filing bankruptcy and winding up petitions against debtor individuals and companies.

Figure 10: Table showing the estimated cost to non-government petitioners for filing bankruptcy and winding up petitions, based on 2010 case numbers and 2009-10 costings

Petition Type	No. non-government petitions[25] filed	Solicitor costs per case (approx £)	Estimated legal cost of filing petitions pa (£)	Court fee and Official Receiver's deposit combined - per case (£)	Total court fees and deposit paid pa (£)	Total estimated petition cost (£)
Creditor bankruptcy petitions	10,737	1,700	18,252,900	790	8,482,230	26,735,130
Company compulsory liquidation	6,921	3,100	21,455,100	1,190	8,235,990	29,691,090
Total						**£56,426,220**

47. The overall legal costs associated with a petition hearing could also be greatly increased where a hearing is adjourned. This increase has not been calculated in the above figures as the nature of adjournments and the length of hearings vary considerably from case to case and are not easily quantifiable for the purpose of this impact assessment.

ANALYSIS OF OPTION 1:

48. Option 1 builds upon previous proposals to remove the courts from the order making process in debtor petition bankruptcies by extending the reforms to encompass creditor petition bankruptcies and most petitions for compulsory winding up.

49. Under option 1, we propose that applications by debtors for their own bankruptcy could be made either electronically on-line, or by post using paper application forms. The consultation document also discusses how the Post Office could assist by providing a "check and send"

[24] The median figures were taken from a sample of bill of costs received by The Insolvency Service National Dividends Unit between July and August 2010.

[25] Excludes petitions filed by local authorities, HM Revenue and Customs, Secretary of State, the Financial Services and Authority and the Serious Organised Crime Agency.

service and/or electronically communicating to the Adjudicator the data that is contained in a debtor's paper application. In developing this policy proposal to extend to creditor petitions for bankruptcy and winding up, it has been assumed that third party petitioners, particularly business and government who make up the majority of petitioners, should have greater access to electronic facilities and thus should be encouraged to submit their applications electronically. This should help to ensure that the most efficient service possible is provided. This assumption is tested by the consultation document.

COSTS

The Insolvency Service

Set up costs

50. It is proposed that The Insolvency Service will carry out the role of Adjudicator. The majority of those who replied to the most recent consultation, which closed February 2010, suggested The Insolvency Service for this role. The Insolvency Service has staff with appropriate training and expertise to carry out this function, and these staff can do so independently of official receivers. In addition, The Insolvency Service already has some experience of making orders administratively, as it has been making debt relief orders since their introduction in April 2009. The IT that is used in this order making process will need to be adapted to deliver these proposals.

51. There will be therefore some set up costs in developing a system to deliver the application process. The Impact Assessment published with the consultation document `*Reforming Debtor Petition Bankruptcy and Early Discharge*' estimated set up costs for the debtor petition bankruptcy process to be £900,000, which included the cost of developing and testing the IT software as well as licensing applications.

52. The process to administer applications for bankruptcy and company liquidation from third parties will involve different interactions and decisions than the process to administer applications from debtor applicants. Therefore the overall cost of developing a system that deals with both creditor and debtor applications will be higher. The Insolvency Service has estimated overall set up costs at **£4.5 million**.

Familiarisation costs

53. People will need to know about and be aware of the key changes proposed by the new system. For example, debtors, creditors and others will need to know that they do not have to approach the court but can make an application on line.

54. The Insolvency Service intends to be proactive in communicating with stakeholders and disseminating key information. Electronic communication, such as web-based newsletters and targeted emails, could be used for the launch. An early engagement strategy for involving key stakeholders in the development of the proposals will identify the main representative bodies who have an interest. Those bodies will be encouraged to participate in the consultation and

development of the policy, and will thus be best placed to communicate key details to their members in the run up to the launch. Publicity for the launch of the new system is therefore expected to be **cost neutral**.

Operating/ongoing costs

55. Whilst the costings in this impact assessment are based on the detail of the proposals that are subject to consultation, the policy intention is for the new system to recover costs in full. That is to say that those who use the system are to bear the cost of the service provided. As it is intended that the adjudicator will provide a demand-led service, the operating costs are largely determined by the number of applications because the cost of processing an application includes both fixed costs and variable costs. This means that if case numbers increase, the cost of administering each application is likely to decrease. Conversely, should case numbers decrease below the level expected, the operating cost per case is likely to go up.

56. This impact assessment therefore considers the possible cost of (and therefore fee chargeable for) each application type (creditor petitions for bankruptcy and compulsory winding up and debtor petitions for bankruptcy) within a range of possible case number scenarios, as **figure 11** below shows. These costs are 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.

57. The scenarios are based on historical levels of annual case numbers. The effect on costs of lower levels are analysed rather than the higher levels experience in recent years. This is because the nature of the costs, which include an element of fixed costs, means that lower case levels equates to higher costs per case. Analysing lower annual case levels is therefore the most prudent approach.

Figure 11: Tables showing a sensitivity analysis of possible application fees based on a range of number of orders

a	b	c	d	e
Total number of Orders that the Adjudicator makes pa (estimated)		**Number of applications made that would result[26] in the estimated number of orders in column (a)**	**Fee per application £**	**Total cost £**
52,500	Debtor application for bankruptcy	40,950	69	2,825,550

[26] Taking into account the proportion of applications that do not result in an order being made

	Creditor application for bankruptcy	9,188	90	826,920
	Application for company winding up	5,250	113	593,250
		55,388		**£4.2 m**

		Applications	**Fee £**	**Total cost £**
	Debtor application for bankruptcy	39,170	69	2,702,730
50,000	Creditor application for bankruptcy	8,788	99	870,012
	Application for company winding up	4,750	122	579,500
		52,708		**£4.2 m**

		Applications	**Fee £**	**Total cost £**
	Debtor application for bankruptcy	30,861	77	2,376,297
	Creditor application for bankruptcy	6,924	106	733,944
40,000	Application for company winding up	4,500	125	562,500
		42,285		**£3.7m**

		Applications	**Fee £**	**Total cost £**
31,000				
	Debtor application for bankruptcy	23,146	90	

				2,083,140
	Creditor application for bankruptcy	5,193	120	623,160
	Application for company winding up	3,375	136	459,000
		31,714		**£3.2m**

		Applications	**Fee £**	**Total cost £**
20,000	Debtor application for bankruptcy	15,430	121	1,867,030
	Creditor application for bankruptcy	3,462	156	540,072
	Application for company winding up	2,250	171	384,750
		21,142		**£2.8m**

58. These figures also include the cost of introducing a telephone enquiry line. It is proposed to staff this by a team of experienced insolvency service personnel. Their role would be to offer guidance (not advice) to people completing bankruptcy and company winding up application forms. The number, level of staff and cost of operating the new enquiry line team has also been assessed based on the cost and number of telephone assistance offered in the debt relief order application process. The estimated cost for this team is £92,300, which has been included in the overall annual running costs of approximately **£3.7 million** (based on the mid range of 40,000 orders per year).

BENEFITS

Government

HM Courts & Tribunals Service (HMCTS)

59. The proposed new system will have the greatest impact on HMCTS by removing all unopposed bankruptcy and certain winding up petition work from the courts. This will enable the courts to focus their time and resources on their primary function of dispute resolution and other civil procedure matters that do require judicial expertise. This is the primary drive of the new policy. The tables at **figures 12, 13 and 14** below show the cost of administering

applications under the proposed administrative model and compares this to the current cost of administering petitions in order to indicate potential benefits.

60. The table at **figure 12** below shows the costs in relation to debtor petitions for bankruptcy. This is based on a fee payable to the Adjudicator under the proposed new system of around £60 per application - the figures in the table at **figure 11** suggest a fee of £69 for 40,950 debtor bankruptcy applications, indicating that £60 is not an unreasonable estimate of the proposed new fee for the higher number of debtor petitions filed in 2010. The table at **figure 11** does not include costings for total orders pa above 52,500 because annual numbers of bankruptcy petitions are falling (see **figure 2**). This point also applies to the calculations at **figures 13 and 14** below.

Figure 12: Table showing the cost of administering debtor bankruptcy applications under the proposed administrative model compared with the current cost of administering debtor bankruptcy petitions by the courts, based on case numbers in 2010.

	Current system	**Proposed system**
Number of petitions	51,992	
Cost	£25,450,481 (see figure 5)	£3,119,520
Benefit under the proposed administrative system	Not applicable	**£22,330,961**

61. Anecdotal evidence provided to the MOJ by the Association of HM District Judges suggests that only around 5% of all creditor bankruptcy and company liquidation petitions, that progress to a hearing, are opposed. We have also been informed that there have been no contested cases dealt with by Colchester County Court over the past few years; Manchester Civil Justice Centre and Southampton County Court have dealt with a very small percentage of these cases; Wigan County Court deal with 1 or 2 cases a year; and Newcastle County Court deal with less than 6 cases a year.

62. This percentage suggests that 887 of the total number of 17,729 bankruptcy petitions received in 2010 would need judicial consideration of a dispute. For company winding up petitions, 537 of the total number of 10,723 would need judicial consideration of a dispute.

63. Furthermore, petitions that are based on 'just and equitable' grounds or that are presented by the Secretary of State, for example on grounds of public interest, will continue to be made directly to and determined by the courts, as they are now.

64. Based on case numbers in 2010, around 2.4% of company winding up petitions were presented either by the Secretary of State, the Official Receiver, HM Court Services (as they

were) or the Serious Organised Crime Agency (SOCA). Only 0.05% of third party bankruptcy petitions presented in 2010 were by any of the above organisations or agencies.

65. In total therefore, 7.4% of company winding up petitions and 5% of all creditor bankruptcy petitions are likely to require some input from the courts (based on 2010 case numbers). It is proposed in the consultation document that, if there is a dispute between the two parties, it is that dispute and not the whole application that is referred to the court for determination. The outcome of the court's consideration of the dispute may be a direction to the Adjudicator about how to proceed. This should ensure that the court's attention is focused on the dispute, and that it does not need to consider other matters that are relevant in determining an application for bankruptcy, as those can be dealt with administratively by the Adjudicator.

66. Only the court fee has been considered in examining the financial impact of these proposals on HMCTS. If all undisputed bankruptcy and certain undisputed winding up applications are made to the Adjudicator instead of the court as now, HMCTS will immediately lose its fee income from these cases, but is unlikely to be able to reduce its costs as quickly, resulting in a shortfall for which there is no provision within its current budget. Also, there is no intention within these proposals to amend or change the deposit that is payable to the official receiver (currently via the courts) for work carried out in administrating the insolvent estate after an order is made. If there is a dispute that needs to be resolved by the court, it is proposed in the consultation document that this will require a separate application and fee. The fee is likely to be the same as for any application to the court for a judicial determination, so around £80.

67. The table at **figure 13** below takes into account the likely proportion of creditor bankruptcy applications that will still require judicial input at a cost of £80 per court application; and a fee payable to the Adjudicator of around £50 per application. On this latter point, the figures in the table at **figure 11** suggest a fee of £90 for 9,188 creditor applications for bankruptcy. It is also clear from the figures that, as the number of cases per annum rises, the cost per case falls. This suggests that £50 is not an unreasonable estimate of the proposed new fee for the higher number of creditor applications made in 2010. The calculations in the table at **figure 13** below also assume that an £80 court fee recovers the full cost of the court determining a dispute. Further analysis will be carried out during the consultation period in order to explore the current cost of a judicial determination of a dispute.

Figure 13: Table showing the cost of administering creditor applications for bankruptcy under the proposed administrative model, compared with the current cost of administering creditor petitions for bankruptcy by the courts, based on case numbers in 2010

	Current system	**Proposed system**	
	HMCTS	INSS dealing with a petition and making an order	5% contested cases requiring judicial input
Number of cases[27]	17,729	17,729	887

[27] Based on the number of petitions filed in 2010 (see figure 1)

Cost	£5,328,955 (see figure 6)	£886,450[28]	70,960[29]
Total cost	£5,328,955	£957,410	
Benefit under the proposed administrative system	**£4,371,545**		

68. The table at **figure 14** below takes into account the likely proportion (see paragraphs 63 and 64 above) of applications for compulsory winding up that will still require judicial input at a cost of £80 per court application. This assumes that a fee of £80 for an application to the court to determine a dispute recovers the cost of the judicial determination in full. The figures in the table also take into account the proportion of applications that will be made directly to the court with no involvement by the Adjudicator. It is also assumed that the best estimate for an application fee for number of the cases in 2010 would be £90. This is not unreasonable because the figures in the table at **figure 11** suggest a fee of £113 for 5,250 applications for compulsory winding up, indicating that £90 would be reasonable estimate to apply to the higher number of compulsory winding up petitions presented made in 2010.

Figure 14: Table showing the cost of administering applications for compulsory winding up under the proposed administrative model, compared with the current cost of administering compulsory winding up petitions by the courts, based on case numbers in 2010

	Current system	**Proposed system**		
	HMCTS	INSS dealing with a petition and making an order	5% contested cases requiring judicial input	2.4% petitions made directly to the courts
Number of petitions	10,723	10,466	536	257
Cost	£2,208,859 (see figure 7)	£941,940[30]	£42,880[31]	48,830[32]

[28] 17,729 x £50

[29] 887 x £80

[30] 10,466 x £90

[31] 536 X £80

Total cost	£2,208,859	£1,033,650
Benefit under proposed system	**£1,175,209**	

Non-monetised Benefits to HMCTS

69. HM Courts & Tribunals Services will benefit from no longer being required to set up a court file in every bankruptcy and compulsory winding case, which could leave court staff with more time to deal with other administrative matters leading up to or following judicial decisions.

70. In addition, judicial time could be focused on the more complex matters arising from creditor petitions, where there is a dispute or where the debtor does not consent to an order being made. Both the petitioning and petitioned parities can therefore benefit from the experience and technical expertise of the District Judge or Registrar, who will have the time to devote to these matters that rightly require their intervention.

HM Revenue and Customs

71. In 2009-10, HMRC spent an estimated £22m on presenting bankruptcy and winding up petitions (see **figure 8**). This figure includes the cost of legal representation, the official receiver's deposit and the court fee.

72. Although the official receiver's deposit would still be payable as it is now, the fee to make an application under the proposed new system is expected to be less than the current £190 court fee. This is because the application will be submitted electronically, thus facilitating greater efficiencies within the Adjudicator's office. This impact assessment has provided a range of possible application fee scenarios based on a corresponding range of orders made annually, from 20,000 to 52,500 (see **figure 11**). Possible application fees for creditors range from £113 - 171 for winding up applications and £90 -156 for creditor bankruptcy applications. Furthermore, the cost of legal representation should be considerably reduced as the way the forms will be designed; the way the questions in the forms will be phrased; and removal of the requirement to present the forms to court, will all mean that petitioners should not automatically require the services of a solicitor or counsel to complete and submit applications.

Figure 15: Table showing the application costs for HMRC under the current system compared with the application costs under the proposed administrative system, based on numbers of petitions in 2009-10 and the possible future fee most closely related to this annual number of petitions (see **figure 11**)

	Current system		**Proposed system**	
Petition Type	**Creditor bankruptcy petitions**	**Company compulsory liquidation**	**Creditor bankruptcy petitions** @ £690 per case incl deposit	**Company compulsory liquidation** @ £1,136 per case incl deposit

[32] 257 x £190

Number petitions	5,315	3,821	5,315	3,821
Cost	£10,630,000 (see figure 8)	£11, 463,000 (see figure 8)	£3,667,350	£4,340,656
Total cost	£22,093,000		£8,008,006	
Benefit			**£14,084,994**	

The Insolvency Service

73. Because information will be collected electronically at the application stage, the Adjudicator should be in a position to provide good quality information to the official receiver once the order is made. Electronic submissions should result in better quality information being provided at the outset, which should enable a swift start to the case administration process being carried out by the official receiver, which in turn should result in a better service to creditors in terms of more prompt information and dividend payment (the latter where there are sufficient assets).

74. Because it is proposed that The Insolvency Service will carry out the role of the Adjudicator, orders made by the Adjudicator will be capable of being communicated very efficiently to official receivers. Although the roles of these two persons are completely separate, the IT that each uses should be compatible, enabling swift transfer of information to the appropriate official receiver.

Debtors

75. It is proposed that there be no remission of application fees under the new process, and therefore the full amount of the cost will be recovered from the applicant whether this is the individual debtor or third party petitioner. A system of fee remissions currently exist in the high court and county courts to ensure access to the courts for those who have difficulty or are unable to pay a court fee. A strict test is applied before fee remissions are allowed. Under the new process, there will no longer be a court fee, but an application fee which we expect will be lower than the current court fees for bankruptcy petitions (£150) and creditor petitions (£190). This means that those applicants, specifically debtors applying for their own bankruptcy, who would previously have been relieved of the obligation to pay some or all of the court fee of £150, will have to pay the full application fee under the new system in order to secure the benefit of this debt relief. The intention is that the person who benefits from the debt relief that is provided by the bankruptcy process should pay for that benefit. Insolvency service records show that the average amount of debt relief obtained by a bankrupt is over £30,000 and, in that context, the requirement to pay in full the cost of dealing with the application for bankruptcy, which could be as low as £69 (see **figure 11**), is thought to be reasonable.

76. Debt relief orders are available as an alternative to bankruptcy for the most vulnerable people in debt, at a one off cost of just £90. Analysis of debt relief orders made between their

introduction in April 2009 and august 2010 shows that around two thirds of successful applicants are unemployed[33].

77. This indicates that the most vulnerable members of society, who are overwhelmed by relatively low levels of unmanageable debt, are in receipt of benefits as a result of unemployment. This initially suggests that this group will lose out as a result of there no longer being fee remissions. However, the availability of debt relief orders does offer this group of individuals access to debt relief at a much lower cost (providing they meet the eligibility criteria).

78. The consultation document that accompanies this impact assessment also discusses whether there is merit in allowing the debtor's bankruptcy application fee and deposit to be payable in instalments, an option that is not currently available. This could facilitate access for those for whom bankruptcy is the right option but who are unable to find immediately all of the money to fund the entry cost.

79. The changes to the debtor petition bankruptcy process could benefit debtors by removing an inappropriate barrier for those for whom bankruptcy is the right solution to their debts but who are put off applying because of the current requirement to attend court. The changes could also benefit debtors by reducing the potential for delays which exist in the current system, allowing them to gain quicker access to debt relief. Waiting time for debtors has been as high as three months[34]. It is estimated that, under the proposed system, the waiting time could be reduced to a matter of days. Although this benefit is not quantified, it is expected to have potential social and health benefits, as discussed below.

80. In October 2009, the Money Advice Trust published a report on debt and mental health[35] which concluded there was "*plausible evidence from longitudinal research that indebtedness is often subsequently followed by mental health problems*". By obtaining faster access to debt relief, the debtor should be relieved of the financial, psychological and physiological consequences of over-indebtedness in a shorter period of time. This should have consequential benefits for the debtor's family and reduce pressure on the NHS. Debtors who petition for their own bankruptcy would no longer be required to attend court in order to file their petitions and obtain their bankruptcy order. Electronic or paper submissions could reduce the stigma associated with attending court and save time, as well as reducing the burden faced by some debtors associated with travelling to court. It will mean that some debtors will gain debt relief at an earlier stage, thus saving them the time and expense involved in dealing with their creditors whilst they are waiting for a bankruptcy order to be made.

[33] The Insolvency Service, 2009-10

[34] Research has been carried out by The Insolvency Service, a GfK NOP survey commissioned by The Service and an informal survey carried out by District Judge Jordan, detailed in the impact assessment to the consultation 'Bankruptcy: proposals for reform of the debtor petition process':
http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/Initialstageconsultationpaper.doc

[35] http://www.infohub.moneyadvicetrust.org/resource.asp?r_id=468

81. In creditor petition bankruptcy cases, specifically in circumstances where debtors acknowledge their insolvent status and do not object, (or possibly even welcome the relief of another person taking this step for them towards bankruptcy), there may be the benefit to the debtor of saving costs associated with filing the petition and attending court. Instead, debtors can complete a form to confirm to the Adjudicator that they consent to an order being made. And the indications are that, where bankruptcy orders are made, most debtors do not object in court to this being the outcome.

82. The table below compares the cost to debtors of the current system with the cost of the proposed system, based on case numbers for 2010. The range of possible fees at **figure 11** does not extend as high as the number of debtor petitions filed in 2010, because case numbers are falling. But the fee for 40,950 applications p.a. is £69, suggesting that a fee of £60 for the 2010 level of petitions is reasonable. This would be payable in addition to the deposit of £450 in those cases where an order is made.

Figure 16: Table showing the application costs for debtors under the current system compared with the application costs under the proposed administrative system, based on numbers of petitions in 2010

	Current system	**Proposed system**	
Number petitions	51,992		
		Cost where order made	**Cost where no order made**
Cost	£26,692,800 (see figure 9)	£25,832,520	£80,400
Total cost	£26,692,800	£25,912,920	
Benefit under the proposed administrative system	**£779,880**		

Creditors and other petitioners - Legal Representatives

83. Often creditors employ the services of legal representatives to assist in completing petitions for bankruptcy and company winding up. The new application form for creditors will be designed in such a way as to minimise the likelihood that creditors will require legal assistance to complete it, although the option to do so remains. However, it would be helpful to assess potential benefits if we were able to gain a better understanding of how frequently legal assistance is currently required by a creditor petitioner to complete and present the current court petition.

Question 41IA: 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?

84. The estimated costs of filing a petition at court should be reduced considerably if the need to instruct solicitors at the initial stages of the application process, or even at all in an undisputed case, is removed or reduced. The result would be that businesses would save an estimated £56.4 million (see **figure 10**) in not having to instruct solicitors. Under the proposals, there would be no regulatory or legislative requirement to engage the services of a solicitor. Legal advisors would only receive instruction where the petitioner chose to engage the services of a legal representative.

85. Creditors should benefit from the proposed system because the delays associated with waiting for a hearing date will be reduced, or removed altogether. For bankruptcy cases, debtors will therefore not be forced to incur further credit to cover living costs whilst waiting to enter the bankruptcy process, and thus will not increase their debts to creditors significantly during this time.

86. However, the savings which creditors could make and the reduction in the need to incur further credit to cover living costs that results from reduced waiting times cannot be quantified due to the significant variation in delays and variations as determined by the circumstances of each case.

87. The table at **figure 17** below shows the estimated potential savings to non-government creditor bankruptcy and winding up petitioners if there is no longer a need to employ legal representation at the application stage. These savings are estimated to be over £41m, assuming 100% of all creditor and bankruptcy and winding up applications are in the first instance made to the Adjudicator using 2010 petition numbers.

88. Although engaging solicitors would not be mandatory under the proposals, the tables at **figures 17 and 18** below consider how the total benefits may be affected should 20% and 40% of petitioners still choose to use solicitors to complete application forms on their behalf. For example, even if 40% of petitioners chose to begin the application process using solicitors, (assuming the legal charges remain the same), there could still be an estimated saving of over £25 million.

Figure 17: Overall estimated net benefits to non-government creditor petitioners for bankruptcy under the proposed administrative system if solicitors were employed to submit petitions in 20% and 40% of application cases, using 2010 case number figures

	Current system	**Proposed system** (£90 fee + £600 deposit)
Number petitions	10,737	

		Cost where 100% of non-government petitioners submit application form without solicitor £	**Cost** where 80% of non-government petitioners submit application form without solicitor £	**Cost** where 60% of non-government petitioners submit application form without solicitor £
Cost	£26,735,130 (see figure 10)	7,408,530	11,059,110	14,709,690
Total cost	£26,735,130	Between 7,408,530 and 14,709,690		
Benefit under proposed administrative system	**£12 – 19.3 million**			

Figure 18: Overall estimated net benefits to non-government creditor petitioners for company winding up under the proposed administrative system if solicitors were employed to submit petitions in 20% and 40% of application cases, using 2010 case number figures

	Current system	**Proposed system** (£136 fee + £1,000 deposit)		
Number petitions	6,921			
		Cost where 100% of non-government petitioners submit application form without solicitor £	**Cost** where 80% of non-government petitioners submit application form without solicitor £	**Cost** where 60% of non-government petitioners submit application form without solicitor £
Cost	£29,691,090 (see figure 10)	7,862,256	12,153,276	16,444,295
Total cost	£29,691,090	Between £7,862,256 and £16,444,295		
Benefit under proposed administrative system	**£13.2 - £21.8 million**			

Summary of Net Savings

89. Estimated monetary savings to HMCTS, HMRC, business and debtors could be up to some £83 million p.a., as summarised in **figure 19**. Non-monetised savings include less time spent travelling to court to, the psychological, physiological and economic relief of swift debt resolution.

Figure 19: Table summarising total estimated benefits of the proposed administrative model

		(£) million
HMCTS	Company Winding Up (**fig 14**)	1.2
	Creditor Bankruptcy Petition (**fig13**)	4.4
	Debtors' Bankruptcy Petition (**fig 12)**	22.3
	Total	**27.9**
HMRC		
	Company Winding Up (**fig 15**)	7
	Creditor Bankruptcy Petition (**fig 15)**	7
	Total	**14**
Business		
	Company Winding Up (**fig 18**)	13.2 – 21.8
	Creditor Bankruptcy Petition (**fig 17)**	12 – 19.3
	Total	**25.2 – 41.1**
Debtors	Debtors' Bankruptcy Petition **(fig 16**)	**0.8**
TOTAL		**£67.9 – 83.8 million**

90. Taking into consideration both the monetised and non monetised costs and benefits of each choice, option 1 is the preferred option as it is most likely to achieve the policy objectives while minimising the burdens on business and the courts and maximising the savings derived from an electronic application process.

91. Many of the figures contained in this initial Impact Assessment are dependent upon what will be the final process, which is the subject of consultation. And as the new administrative system will be a demand-led process, the final fees set will depend on the forecasted volume of cases received by the Adjudicator (see **figure 11**). In order to reflect this, we have calculated potential benefits based on a range of possible fee scenarios according to different levels of applications.

92. 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.

93. The level of uptake for an online system, particularly for individual debtors petitioning for their own bankruptcy, is also unknown but an internal study carried out in 2007 suggested 80% of debtors who had petitioned for their own bankruptcy in the past would be prepared to apply using e-forms. For the purposes of this assessment a more conservative estimate of 50% electronic applications has been used. However, if the e-application uptake is significantly less than this, the cost of paper applications - which are higher than electronic applications, but currently absorbed in the overall fee calculations, may increase the overall proposed fee level.

94. In calculating the potential savings to business from no longer having to employ legal representation, there is the assumption that between 60% and 100% of petitioners will no longer employ solicitors to assist in completing the application form. If more petitioners choose still to use legal assistance, the potential for savings would be reduced. Even so, there would be no mandatory requirement to employ lawyers routinely, instead this would be a petitioner's own choice.

95. As the new system would be an administrative process, there may be a perception that respondents would be more inclined to challenge an application made against them. This would raise the current 5% estimated level of contested cases which has been used as a basis for calculations in this impact assessment. The consultation document proposes that there be a mandatory pre-action process, which would encourage and incentivise the parties to explore the scope to resolve any dispute in the early stages and without recourse to the court. The Insolvency Service therefore does not envisage companies or individuals would, consequently, contest applications in more instances than they do currently.

96. The proposals contained in this consultation document are also part of wider reforms to the civil courts in England and Wales led by the Ministry of Justice. The realisation of any benefits outlined in this consultation document, particularly those to HMCTS, are dependent on overall changes to the court services and resource allocation within the MOJ and HMCTS.

<u>One in One Out (OIOO)</u>

97. Under the 'One In, One Out' rule, whereby a measure that has a net cost to business must have a measure or measures of equivalent cost removed in order to be implemented, this measure counts as a ONE OUT. The equivalent annual net saving to business is £32.3m, calculated as follows.

98. The costs identified of £3.7m (based on the mid point of the range i.e. 40,000 orders, as set out in table 11 above) are for all users, comprising businesses, government departments and consumers. Debtor petitions are predominantly filed by consumers, so the cost of

administering debtor petitions under the proposed new administrative system has not been included within the calculation of OIOO. That leaves £733,944, being the cost of administering creditor applications for bankruptcy, and £562,500, being the cost of administering applications for company winding up (see table at figure 11). It can be seen from tables 8 and 10 above that businesses filed approx 67% of creditor bankruptcy petitions (10,737 ÷ 16,052) and approx 64% of company winding up petitions (6,921 ÷ 10,742). The cost to business is therefore based on approx two thirds of the cost of administering creditor bankruptcy petitions and company winding up petitions. That is to say, 66% x (733,944 + 562,500) = £855,653 or £0.9 m.

99. In order to ensure full cost recovery, the fees chargeable to applicants must recover total costs. This includes the transition costs estimated at £4.5m. The fees chargeable to business are therefore suggested at a level that would recover not just the operating costs but also, over a period of 5 years, the transition costs.

100. The benefit to business is taken as the mid point of the range £25.2m and £41.1m (see table at figure 19 above), that is to say £33.2m.

101. The monetary benefit of ONE OUT is therefore measured as £33.2 - £0.9m = **£32.3m**.

SPECIFIC IMPACT TESTS

1. Competition Assessment
   The proposed policy will have no impact on competition as the work involved in dealing with petitions is merely being moved from one government department (HM Courts and Tribunals Services) to a person or person under the control of the Secretary of State.

2. Small Firms Impact Test
   The proposed policy may have an impact on small legal firms who currently handle petition case work.

3. Justice
   The proposed policy will have no impact on Legal Aid, as it is not available to fund bankruptcies. It is proposed that there be new criminal offences, for knowingly or recklessly making a false representation or omission in providing information in connection with a bankruptcy or winding up application.

4. Sustainable Development
   The proposed policy will have no direct impact on sustainable development.

5. Greenhouse Gas Assessment
   The proposed policy will have no direct impact on greenhouse gas assessments.

6. Other Environment
   While the implications of this proposed system may not be so significant as to warrant a detailed impact assessment for “Sustainable Development” or “Carbon Assessment”, the following benefits would flow from the system:

   - Reduction in the use of paper, in particular due to the use of an electronic method of filing for a bankruptcy petition
   - Reduction in levels of unwanted paper
   - Reduction in the need for travel

7. Health
   It is anticipated that the proposed system will have beneficial effects on the health of debtors. The adverse psychological and physiological effects of stress relating to financial circumstances are well documented, but by removing the inordinate delays in the petition process, debtors will be able to access debt relief procedures more quickly. In this way, debtors will be relieved of some of the stress of their financial situation more quickly than under the current debtor petition system.

8. Equality Impact Assessments
   The proposed system will not have an adverse or disproportionate effect on any person as a consequence of race, ethnic origin, religion, gender or sexual orientation. The proposal provides for electronic submission of debtor bankruptcy petitions, but any person who, for whatever reason, is unable to participate in this form of submission of petitions will still be able to submit their petition on paper via the post. The forms will be available to download from The Insolvency Service website. There will be a telephone helpline, funded from the

application fee, to help any applicants to complete their forms and we are asking whether the Post Office can also help with an assisted application service.

9. In addition, the removal of the requirement to attend at courts with insolvency jurisdiction in order to file a bankruptcy petition should benefit people who are unable to travel to court due to disability, cost of travelling, inability to take time off work or any other commitments which may prevent attendance at court.

10. Human Rights
The proposed system does not impact upon any human rights issues.

11. Rural Proofing
Under the current system, debtors and creditors or their representatives must attend at the appropriate court with insolvency jurisdiction in order to present a petition. The forms required to petition can be obtained from the court, printed from The Insolvency Service website or completed electronically on The Insolvency Service website and then printed. However, in all cases, the debtor must attend court in order to file the papers. The requirement to attend court personally means that, in some areas of the country, debtors must travel considerable distances in order to file their petition at a court with insolvency jurisdiction.

The map below indicates the current location of the courts with insolvency jurisdiction and serves to highlight the distances that petitioners may have to travel in order to reach the appropriate court. In some rural areas, there may be a lack of direct public transport and therefore debtors without a car may experience difficulty in attending court. Similarly, even if public transport is available, the cost in attending court may prove onerous for some petitioners and respondents, particularly individual debtors.

12. The proposed system would alleviate the problems of access to court with insolvency jurisdiction by removing the courts from the debtor petition process. Debtors will be able to choose either to electronically submit their petitions via an online service or to submit their petitions via post, therefore removing the requirement of attendance at court and the access and costs issues associated with travel to court.


Carlisle
Sunderland
Whitehaven
Middlesborough
Darlington
Kendal
Scarborough
Barrow in Furness
Harrogate
Preston
Bradford
Kingston upon Hull
Bolton
Barnsley
Grimsby
Birkenhead
Sheffield
Rhyl
Chesterfield
Caernarfon
Chester
Boston
Nottingham
Burton upon Trent
Kings Lynn
Shrewsbury
Leicester
Peterborough
Aberystwyth
Birmingham
Warwick
Bury St Edmunds
Bedford
Ipswich
Hereford
Banbury
Colchester
Carmarthen
Cheltenham
Aylesbury
Chelmsford
Aberdare
Romford
Swindon
Bridgend
Bristol
Newbury
Croydon
Canterbury
Tunbridge Wells
Barnstaple
Salisbury
Taunton
Southampton
Hastings
Brighton
Bournemouth
Exeter
Plymouth
Truro

Annexes

Annex 1 should be used to set out the Post Implementation Review Plan as detailed below. Further annexes may be added where the Specific Impact Tests yield information relevant to an overall understanding of policy options.

Annex 1: Post Implementation Review (PIR) Plan

A PIR should be undertaken, usually three to five years after implementation of the policy, but exceptionally a longer period may be more appropriate. If the policy is subject to a sunset clause, the review should be carried out sufficiently early that any renewal or amendment to legislation can be enacted before the expiry date. A PIR should examine the extent to which the implemented regulations have achieved their objectives, assess their costs and benefits and identify whether they are having any unintended consequences. Please set out the PIR Plan as detailed below. If there is no plan to do a PIR please provide reasons below.

Basis of the review: [The basis of the review could be statutory (forming part of the legislation), i.e. a sunset clause or a duty to review , or there could be a political commitment to review (PIR)]; The review would form part of an overall evaluation of the new legislative proposals put forward by The Insolvency Service.
Review objective: [Is it intended as a proportionate check that regulation is operating as expected to tackle the problem of concern?; or as a wider exploration of the policy approach taken?; or as a link from policy objective to outcome?] A proportionate check that regulation is operating as expected to tackle the problem.
Review approach and rationale: [e.g. describe here the review approach (in-depth evaluation, scope review of monitoring data, scan of stakeholder views, etc.) and the rationale that made choosing such an approach] The evaluation would focus on the debtor's and creditor's experience, the cost to The Insolvency Service and business and the views of stakeholder groups, including creditors, other government departments and money advisors. Evaluation would be of a qualitative and quantitative nature.
Baseline: [The current (baseline) position against which the change introduced by the legislation can be measured] The current views and experiences of debtors and stakeholders will be tested and collected during the current consaultion, and some can be found in this Impact Assessment; in the consultation document entitled: *'Reforming Debtor Petition Bankruptcy and Early Discharge'* ; and summarised in the response document published in October 2010.
Success criteria: [Criteria showing achievement of the policy objectives as set out in the final impact assessment; criteria for modifying or replacing the policy if it does not achieve its objectives] Evidence that the proposals have been effective in reducing the delays experiences in the courts and the experience of petitioners and other court users of a more efficient, streamlined and modern administrative procedure.
Monitoring information arrangements: [Provide further details of the planned/existing arrangements in place that will allow a systematic collection systematic collection of monitoring information for future policy review] The Insolvency Service collates and publishes statistucs on petition can case numbers every quarter. In addition, The Service maintains regular contact with stakeholders in a variety of forms that will support the ongoing collection of feedback on the impact of the proposals. An evaluation plan will be drawn up to collate qualitative and quantitative information from all stakeholder groups.

Reasons for not planning a review: [If there is no plan to do a PIR please provide reasons here]
N/A

Annex D - Equality Impact Assessment Framework

STEP 1: IDENTIFY THE AIMS OF THIS CHANGE (POLICY, PROCEDURE, INSTRUCTION, ETC.)

1.1	Title of subject	Reform of process to apply for bankruptcy (creditor and debtor petitions)
1.2	Who is the main policy owner for this area?	Suzanne Greaves
1.3	What is the aim of the proposed change? *Keep this brief – the core aim is all that is required here, including the new/revised elements where appropriate.*	Replacement of the current court route into bankruptcy with a more efficient electronic administrative system operated by The Insolvency Service.
1.4	Who is likely to be affected by this, both internal to The Insolvency Service and outside it? **Think about both the delivery mechanism and users**	☒ Staff, specifically The Insolvency Service operational side (Official Receivers) ☒ Customers Please specify - ☒ Creditors ☒ IPs ☒ Debtors ☐ Redundancy Claimants ☒ Other (please specify) - Debt advisors ☒ Other Stakeholders (please specify) - HM Courts Service, HM Revenue and Customs, insolvency lawyers
1.5	Who is intended to benefit from the proposed change and how?	Debtors – Improve efficiency of the bankruptcy application process by providing better access for those in need of debt relief; remove or reduce the delay for those who wish to apply for bankruptcy; remove the need to attend at court, which is one of the

		major causes of the stigma associated with bankruptcy; facilitate engagement between debtors and creditors in respect of applications brought by creditors, and debtors will be encouraged to seek advice. Creditors – Reduce the application fee and remove the requirement for legal representation in most cases. Improve efficiency of the application process by removing delays caused by waiting for hearing dates The Insolvency Service – Receive information in a format that will allow for efficient case administration, thus improving timeliness of communication with creditors, including payment of any dividends. HM Courts and Tribunals Service – Remove the administrative burden, and therefore cost, of courts having to deal with matters where there is no dispute between the parties. HM Revenue and Customs – Reduce the application fee and remove the requirement for legal representation in most cases. Improve efficiency of the application process by removing delays caused by waiting for hearing dates.
1.6	How will the proposed change be delivered and who will be responsible for it?	The Insolvency Service, as a public authority, has in place guidance to ensure we comply with our duty to have due regard to the needs of our service users. Delivery of the legislation is the responsibility of The Insolvency Service Policy Unit. The effectiveness of the policy and its delivery will be evaluated following implementation, and action taken if the policy fails to achieve desired outcomes. Responsibility for the effective operation of the policy lies with The Insolvency Service Operations.

STEP 2: INITIAL PRIORITY ASSESSMENT

An assessment of this will allow for effective work prioritisation in the face of competing deadlines.

To 'check' a box, double-click on it and select "Checked" in the "Default value" field.

2.1	Does the proposed change have any direct or indirect impact on people? If no, an EQIA is not required. Please sign it off at this point and submit it to the DECG, via the D&E Team.*	Yes ☒ No ☐
2.2	Is the proposed change to address an existing known inequality? If yes, an EQIA is not required. Please sign it off at this point and submit it to the DECG, via the D&E Team.*	Yes ☐ No ☒
2.3	Please assess the priority of the proposed change - ☒ **High Impact – Criteria** • The outcome of the proposed change is necessary for The Service to achieve its wider business aims and objectives; • The proposed change has a major financial or resource implication for The Service; • The proposed change may affect The Service's ability to progress its Statutory Equality Duties; and/or • There are concerns that the proposed change may cause disproportionate and unjustifiable adverse impact of equality for staff and/or service users. ☐ **Medium Impact - Criteria** • The policy falls between the prioritisation criteria for high and low impact policies. ☐ **Low Impact – Criteria** • The proposed change may result in differential outcomes for different people - however, it is believed these are not disproportionate or inequitable and can be reasonably justified with evidence; and/or • The proposed change is not relevant to an immediate priority for The Service.	

Supporting evidence for EQIAs should reflect the level of impact that the proposed change will have. Comprehensive evidence is required for all EQIAs, but the higher the impact, the more research should be conducted.

* Please complete if the EQIA is being signed off at this point.

Name of Assessor, Job Title and Section	
Date screening completed	
Authorised by (Director)	
Date of Authorisation	

STEP 3: EXAMINE THE DATA AND RESEARCH AVAILABLE

3.1 You will need to examine and analyse evidence in order to inform your assessment. Evidence is any data, research or other information relevant to the policy you are analysing. Please list the evidence you have gathered, in this table. The EQIA guidance will assist in where this evidence might be found, and information is also available from the D&E Team.

3.2	**Diversity Strand**	**National/External Data/Information**	**Internal Data/Information**
	Gender	The Office for National Statistics – Internet Access 2010 http://www.statistics.gov.uk/CCI/nugget.asp?ID=8&Pos=&ColRank=1&Rank=374 The Insolvency Service's 'Profiles of Bankrupts: 2005/6 to 2007/8' available to view on The Insolvency Service website – www.bis.gov.uk/insolvency The Insolvency Service's 'Enterprise Act 2002: Attitudes to Bankruptcy 2009 Update', http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/policychange/AB2009/ABrevisitedMenu.htm Consumer Credit Counselling Service Statistical Year Book 2006, http://www.cccs.co.uk/Portals/0/Documents/media/reports/statisticsyearbooks/stats-yearbook-2006.pdf	Customer Equality Data up to 31 March 2010 Insolvency Service Statistics (published)
	Trans-gender	None identified	None identified

	Ethnicity/ Race	The Office for National Statistics – Report on Ethnicity and Identity 2005 http://www.statistics.gov.uk/focuson/ethnicity/ Office for National Statistics Census 2001 – England and Wales, http://www.ons.gov.uk/census/index.html 'A Life in Debt', (1999), Citizens Advice, http://www.citizensadvice.org.uk/index/campaigns/social_policy/evidence_reports/er_consumerandebt/a_life_in_debt Research Paper: 'Ethnic Minorities and the Bankruptcy Process - Results of Survey of Bankrupts in London February 2007', Centre for Enterprise and Economic Development Research Middlesex University Business School, available to view on The Insolvency Service website Poverty Site, 2010 http://www.poverty.org.uk/	Customer Equality Data up to 31 March 2010 Insolvency Service Statistics (published)
	Disability	The Leonard Cheshire report 'In the Balance' (2008) http://www.lcdisability.org/?lid=3043 The Office for National Statistics Survey on Health, 2010 www.ons.gov.uk	Customer Equality Data up to 31 March 2010
	Sexual orientation	None identified	None identified

	Religion/ belief	None identified	None identified
	Age	The Office for National Statistics http://www.statistics.gov.uk/CCI/nugget.asp?ID=6 Office for National Statistics, Internet Access 2006 and Internet Access 2010 reports, www.ons.gov.uk http://www.statistics.gov.uk/ageinginthe uk/agemap.html The Insolvency Service's 'Enterprise Act 2002: Attitudes to Bankruptcy 2009 Update', http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/policychange/AB2009/ABrevisitedMenu.htm 'Older People's Access to Financial Services' by Barry Fitzpatrick and Irene Kingston for the Equality Commission for Northern Ireland, June 2008 Office for National Statistics, Internet Access 2006 and Internet Access 2010 reports, www.ons.gov.uk	Customer Equality Data Up To 31 March 2010 Profiles of Bankrupts 2005/6 – 2007/8
	Pregnancy/ Maternity	None identified	None identified

	Socio-economic status	The Insolvency Service's 'Enterprise Act 2002: Attitudes to Bankruptcy 2009 Update', available to view on The Insolvency Service website - www.bis.gov.uk/insolvency Consumer Credit Counselling Service, Statistical Yearbook 2006, published March 2007, www.cccs.co.uk Information published by the Office for National Statistics – Internet Access 2010 http://www.statistics.gov.uk/CCI/nugget.asp?ID=8&Pos=&ColRank=1&Rank=374	Specifically, a negative correlation between qualifications and belief that there is stigma associated with bankruptcy (see page 119).

	Cross-strand	Office for National Statistics, Carers in Britain 2002, www.ons.gov.uk CarersUK: 'Caring and Pensioner Poverty: A report on older carers, employment and benefits' (2009) http://www.carersuk.org 'Poverty among ethnic groups how and why does it differ?', (2007) New Policy Institute, Peter Kenway and Guy Palmer 'The Use of and Attitudes Towards Information and Communication Technologies (ICT) by People from Black and Ethnic Minority Ethnic Groups Living in Deprived Areas', (2003) Centre for Research in ethnic Relations and Institute for Employment research, University of Warwick School of Continuing education and Department of sociology and Social Policy, University of Leeds, Owem, D; Green A.E.; McLeod, M; Law, I; Challis, T; Wilkinson, D Neither HMRC nor MOJ were able to share any diversity data on creditors.	

3.3. Please provide details of any internal consultation undertaken as regards the possible equality impacts of the proposed change (add rows as necessary)

Diversity Strand	**Consultee**
All	Insolvency Service's Diversity and Equality Team

3.4 Please provide details of the external consultation undertaken as regards the possible equality impacts of the proposed change (add rows as necessary). For legislative changes, external consultation must be undertaken.

Consultation is proposed with the following:

Diversity Strand	**Consultee**
All	Public consultation; bankruptcy associations
Trans-gender	A:gender
Disability	Leonard Cheshire; Employers' Forum on Disability
Sexual orientation	Stonewall
Religion/belief	Employers' Forum on Belief
Age	Employers' Forum on Age
Ethnicity/Race	Race for Opportunity
Gender	Opportunity Now

3.5	Do you need further information to inform the assessment of the likely relevance or impact of the proposed change on any of the diversity strands? If so, please give details and refer to the D&E Team. Please include details of where you believe the evidence could be sourced from (e.g. external groups or companies).		
	List of evidence required	Action by D&E Team	Results

STEP 4: WHAT DOES THIS INFORMATION SHOW?

Having gathered and considered this evidence, please list your conclusions here.

4.1	**Diversity Strand**	**Conclusion**
	Gender	Based on The Insolvency Service statistics, over half of those who became bankrupt in 2009-10 were male. This is despite an increase in the proportion of female bankrupts over the last four years, particularly women aged between 35-54[85]. Evidence gathered by the Consumer Credit Counselling Service (CCCS) in 2006 and again in 2009 showed that women are more likely to seek debt advice and, although many are recommended bankruptcy as the best option, fewer are willing or able to seek bankruptcy compared with men. The main reason given by CCCS clients overall for not seeking bankruptcy was the stigma associated with it (36%)[86]. The Insolvency Service's 2009 update report on attitudes to bankruptcy[87] found that women are more likely to agree that there is a stigma associated with bankruptcy than men. The survey also found that attendance at court is a strong factor that contributes towards this stigma. The proposed policy of removing the court from the process by which a bankruptcy order is made should have a positive impact on gender equality by removing a stigma associated with bankruptcy, which the above evidence suggests is of greater concern to women than men. The proposed policy also encourages the use of electronic applications and e-communication in the bankruptcy application process. The Office for National Statistics (ONS) data shows that men are more likely to use the internet, with only 16% of men never having used the internet in 2010, compared with 21% of women in the same year. Although the numbers of women using the internet

[85] The Insolvency Service, 2010 statistics

[86] Consumer Credit Counselling Service Statistical Year Book 2006, http://www.cccs.co.uk/Portals/0/Documents/media/reports/statisticsyearbooks/stats-yearbook-2006.pdf

[87] Enterprise Act 2002: Attitudes to Bankruptcy 2009 Update, The Insolvency Service, http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/policychange/AB2009/ABrevisitedMenu.htm

		are slightly smaller than that of men, data collected over four years shows the overall number of females using the internet is growing[88]. In order to ensure that the policy does not have an adverse effect according to an individual's ability or degree of comfort in using computers, it is proposed that there will be a facility for debtors applying for their own bankruptcy to submit a bankruptcy application on paper by post.
	Trans-gender	The Insolvency Service does not hold data on the number of individuals who are transgender and who enter into bankruptcy. There is also no identified research on how insolvency, and bankruptcy in particular, impacts on people who are transgender. But it is acknowledged that privacy and a recognition of the individual's new identity is an important consideration amongst transgender people. This is of particular significance in a process, such as bankruptcy, which looks at the historical financial activity of an insolvent individual. In order to ensure that all debts incurred by the individual are identified, the application process requires individuals to provide details of all names in which they have incurred credit and debt[89]. These details may be advertised, with the exception being where inclusion of such information in an advertisement places the individual at risk of violence[90]. This requirement, and therefore its effect on those who are transgender, will be unchanged by the proposed reforms. This is to ensure the right balance is struck between the protection afforded to the individual in bankruptcy, and the needs of creditors to identify when a person who owes them money is subject to bankruptcy. However, the new process may introduce a degree of discretion, as the requirement to attend a court hearing in person, as a prerequisite to becoming bankrupt, would be removed. In summary, there is no evidence to suggest that the policy proposal would have a negative impact on the promotion of equality amongst

[88] Internet Access Report, Office for National Statistics, 2010

[89] Rule 6.38 Insolvency Rules 1986

[90] Rule 6.235B Insolvency Rules 1986

		transgender individuals.
	Ethnicity/ Race	Research from Citizens Advice shows that in 2008, 17% of their debt clients were from ethnic minority backgrounds[91], compared to 8% of the UK population[92]. In 2009-10, less than 8% of those entering into bankruptcy were from an ethnic minority background[93]. This figure has stayed roughly the same over the last four years. The evidence suggests that, although those in minority ethnic groups do seek advice, they are less likely to petition for their own bankruptcy, possibly instead being declared bankrupt on third party petitions. Research commissioned by The Insolvency Service[94] suggests that in some ethnic minority communities there are strong cultural and religious motives to settle debts and this can lead to a strong desire not to seek or fully engage in the bankruptcy process[95]. A number of communities do share strong communal bonds which promote and maintain privacy and which provide support during financial difficulties[96]. Consequently, this creates a stronger desire to honour payments, particularly to family members. The same research discussed shame as a key barrier to entering into bankruptcy, in particular, the requirement to advertise a bankruptcy order. Since April 2009, the requirement to advertise in a local newspaper is discretionary. However, any change in attitude is likely to be limited as, the requirement to place a notice in the London Gazette remains mandatory[97]. It is therefore not expected that there would be a significant effect on these attitudes as a result of moving applications for bankruptcy to an administrative application process,

[91] 'A Life in Debt', Citizens Advice, http://www.citizensadvice.org.uk/index/campaigns/social_policy/evidence_reports/er_consumerandebt/a_life_in_debt.

[92] England and Wales Census (2001), www.ons.gov.uk

[93] Customer Equality Data Up to 31 March 2010

[94] The Insolvency Service: 'Survey of Debtor Petition for Bankruptcy', 2007, http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/policychange/surveyofdebtors.htm

[95] Research Paper: Ethnic Minorities and the Bankruptcy Process - Results of Survey of Bankrupts in London February 2007, Centre for Enterprise and Economic Development Research Middlesex University Business School, available to view on The Insolvency Service website

[96] Ibid.

[97] Part 12A Insolvency Rules 1986

		although removing the court from the adjudication process may help to reduce feelings of shame. The same study of Ethnic Minorities and the Bankruptcy Process also found that, in some instances, language barriers made it difficult for some ethnic minority service users to access advice and obtain information (e.g. asylum seekers and refugees). The proposed new application process will encourage debtors to seek advice and help before either making their own application for bankruptcy or responding to a creditor's application. It is recognised that those for whom English is not their first language may have difficulty understanding how to respond. The policy intention is therefore to provide information about the process in other languages in addition to English.
	Disability	Research over recent years has shown a strong link between disability and debt, with disability being identified as both a cause and consequence of financial difficulty. Citizens Advice reported in 2008 that more than one in four of their debt clients had a person with a disability or long term illness in their household, compared with 18% of the UK population[98]. Higher rates of unemployment and lower levels of income, even when employed (compared with non-disabled counterparts) has resulted in a greater proportion of people with a disability living on low income or reliant on welfare benefits as a main source of income[99]. Although The Insolvency Service does not collect data on the numbers of bankruptcy orders made against individuals with a disability, data on the more recently available electronic debt relief order (DRO) shows that in 2009, 28.4% of debtors who successfully applied for a DRO declared a disability, compared to the 2001 Census which shows that 18% of the national population have a long-term health problem or disability. This suggests a greater proportion of the population who have a disability seek and are able to access DROs as a debt relief tool. A breakdown of the disability

[98] 'A Life in Debt', http://www.citizensadvice.org.uk/index/campaigns/social_policy/evidence_reports/er_consumerandebt/a_life_in_debt

[99] Poverty Site, 2010

		types declared by debtors who successfully applied for a DRO in 2009-10 showed that half of the respondents who declared a disability disclosed a physical impairment (50%) while just under a third (30%) classed their disability as a mental health condition[100]. An inference could be made, based on DRO data, that similar types of disabilities and health issues are likely to be found amongst individuals who enter into the bankruptcy process. There is a risk that debtors with mental health problem may disengage with the process if contacted repeatedly, particularly where a petition is filed against them[101]. However, throughout the proposals debtors would be encouraged to seek advice and signposted to where help can be accessed. The removal of the requirement to attend court may have a positive impact on those with mobility problems, as well as their carers. A precedent for an electronic debt relief tool has already been set with the availability of DROs, although the application for a DRO is completed with the assistance of an intermediary. The policy intention for petition reform is to design a user-friendly system that will take into consideration the needs of users, including those who may have a disability, in order to ensure access for all potential applicants. For example, the intention is that the proposed new system would accommodate the various needs of users who are visually impaired, whether they be applicants or respondents. This may mean providing information in alternative formats, such as audio or large typeface. A telephone enquiry line would also be available where customers may contact a trained individual with queries regarding the application process. The ONS Health Survey 2010 survey found that, of those individuals who indicated they had an illness or disability which limited their

[100] Customer Equality Data Up to 31 March 2010 (internal publication)

[101] Fitch, C; Davey, R (2010), The Royal College of Psychiatry and the Money Advice Trust Debt Collection and Mental Health: Ten Steps to Improve Recovery

[102] Office for National Statistics Survey on Health, 2010

		activities, 39% had never used the internet. This compared with 14% of adults who either had no illness or disability, or were not limited by any illness or disability[102]. The policy intention is that individuals would be able to access bankruptcy for themselves by submitting paper applications as an alternative to the on-line application, in order that the same service is available to everyone.
	Sexual orientation	Data on the sexual orientation of bankrupts is not collected by The Insolvency Service, and there is no evidence to suggest the proposal for an administrative application process will have any impact as a result of an individual's sexual orientation.
	Religion/ belief	Data on religion/belief of bankrupts is not collected by The Insolvency Service, and there is no evidence to suggest that the proposal for an administrative application process will have an adverse impact as a consequence of religious or other beliefs. Indeed, electronic applications may offer a positive impact in enabling greater access to the service as applicants can complete and submit application forms at their own convenience and outside of religious celebrations or holy days. However, there is no evidence currently available to support this assumption. Although there has been no specific impact identified as regards the religion/belief of customers, there is a potential general positive impact relating to "green" issues. By moving to an online petition process, there should be a reduction in paper with a consequent potential positive impact on the environment.
	Age	The introduction of an online petition process may have an adverse impact on those who do not have access to the internet, and research indicates that this may have a disproportionate effect on older people. A 2006 survey by a consumer panel at telecoms regulator Ofcom looking at the online access of marginalised groups showed that older people are less likely to have internet access - just 28% of people over the age of 65 have home internet access, compared to

a UK average of 57% of households.

Research carried out in Northern Ireland found that older people (people aged over 55) had a general dislike and distrust of online services or found them particularly complex[103]. This report supports the ONS Internet Access survey which found that in 2010, 60% of 65 year olds and over in the UK had never accessed the internet compared with just 1% of those aged 16-24[104].

Similarly, a survey of debtor petition bankrupts in 2007 carried out by The Insolvency Service found that in broad terms, a bankrupt was more likely to have completed the bankruptcy forms online the younger they were.

The age breakdown of bankrupts has remained broadly the same over the last four years, which shows that around 9% of bankrupts are aged 60 and over, compared to 27% in the general public (see below).

Age breakdown of bankrupts

Age bands	2001 Census data	2006/7	2007/8	2008/9	2009/10
18 to 29	19.4%	18.5%	16.9%	16.3%	14.9%
30 to 39	20.1%	30.5%	29.6%	29.7%	29.5%
40 to 49	17.3%	27.0%	28.5%	29.3%	30.5%
50 to 59	16.3%	15.7%	16.0%	15.9%	16.5%
60 to 69	12.0%	6.6%	7.1%	7.0%	6.9%
70 and over	15.0%	1.8%	1.9%	1.7%	1.7%

The adjustments put in place to mitigate the impact on people with disabilities should also address the potential adverse impact on older individuals. Further, the potential adverse impact is balanced

[103] 'Older People's Access to Financial services' by Barry Fitzpatrick and Irene Kingston for the Equality commission for Northern Ireland, June 2008

[104] http://www.statistics.gov.uk/cci/nugget.asp?id=8

		by a possible positive impact that an electronic process may afford. This would include better access as those who are unable to attend court due to ill health or caring responsibilities would still be able to take part in the application process and access the service. For debtors wishing to petition for their own bankruptcy, paper applications would still be available. It should be noted that there has been a definite growth over the last four years in the number of older people accessing the internet, with the greatest increase in the over 65s which has seen a 22% growth, closely followed by the 55-64 year old age category which has also seen an increase by 21% in the same time period[105]. With changing behavioural attitudes to computer and internet use, and with the government drive to deliver more services through digital channels, over time, there may no longer be a need for the paper application form as it will be the norm to obtain and deliver services online[106]. The policy intention is for information contained in guidance to be clear and comprehensive for all to understand, regardless of age. For those who are younger, and more familiar and comfortable with the use of the internet, there should be less of a barrier to accessing bankruptcy via an online application form, without having to attend a court. Although research carried out by The Insolvency Service found there was no significant difference of opinion about bankruptcy, based on age[107], 70% of those across all age groups who indicated that there is a stigma associated with bankruptcy said the requirement to attend court contributed to the stigma. By removing a significant contributory factor to sustaining the stigma of bankruptcy (the requirement to attend court), the effect is likely to have a positive impact across all age groups.
	Pregnancy/ Maternity	The Insolvency Service does not collect data on the number of pregnant women against whom bankruptcy orders are made, and there is no evidence to suggest that the proposal for an

[105] Office for National Statistics, Internet Access 2006 and Internet Access 2010 reports, www.ons.gov.uk

[106] http://www.cabinetoffice.gov.uk/newsroom/news_releases/2010/101122-defaultdigital.aspx

[107] Enterprise Act 2002: Attitudes to bankruptcy 2009 Update, October 2009, The Insolvency Service

		administrative application process will have an adverse impact on pregnant women or those on maternity leave. Indeed, an administrative process does mean that, in the vast majority of cases, an individual will not need to attend court. This is more likely to have a positive impact on pregnant women, particularly in the later stages of pregnancy and the period after having given birth, when a journey to court might be more difficult to undertake.
	Socio-economic status	Financial difficulties can affect all socio-economic groups whether as a consequence of over-commitment on credit or unexpected change in personal circumstances. However, research has shown that attitudes to bankruptcy do differ based on the socio-economic background of the individual. A survey carried out by the Consumer Credit Counselling Service (CCCS) in 2006 found that 58% of all those clients who were recommended bankruptcy decided not to pursue this option, citing the stigma associated with the process as the main reason[108]. The "Attitudes to Bankruptcy: 2009 Update" found that, of the total bankruptcy respondents who agreed that there was a stigma attached to bankruptcy, 64% believed that this was because of the requirement to attend court. In the survey, those with no qualifications and those out of work were less likely to believe that there is stigma associated with bankruptcy. Those that perform a managerial, administrative or professional role were more likely to consider there is a stigma still associated with bankruptcy[109]. Therefore removing the requirement to attend court may contribute to reducing the stigma associated with bankruptcy, particularly for those in certain professions for whom bankruptcy is otherwise the best option, but who avoid bankruptcy due to the associated stigma. Data published by the Office for National Statistics shows that the rate of internet use decreased in line with income and qualifications[110]. Almost 100% of people with an income of £41,600

[108] Consumer Credit Counselling Service, Statistical Yearbook 2006, published March 2007, www.cccs.co.uk

[109] Enterprise Act 2002: Attitudes to bankruptcy 2009 Update, October 2009, The Insolvency Service

[110] Office for National Statistics News Release – Internet Access Households and Individuals 2010, www.ons.gov.uk, August 2010

		had used the internet in the three months prior to being interviewed, while just over two-thirds of adults with an income of less than £10,399 had used the internet within the same timeframe. There was also a correlation with education, as 45% of adults without formal qualifications had used the internet compared with 97% of those with a degree. The same figures also reveal that internet use amongst those adults whose socio-economic indicators show lower incomes and education levels is growing. Under our proposals, those who are unable or unwilling to access the internet would have the option of submitting an application on paper by post. The proposals therefore are likely to have a positive effect on the promotion of access to bankruptcy for those from across socio-economic groups by removing one of the contributory factors attached to stigmatising bankruptcy, and by offering the facility to submit bankruptcy applications in both paper and electronic form.
	Cross-strand	<u>Socio-economic status, age and ethnicity</u> Attitudes to bankruptcy are governed by a number of issues, including socio-economic status, age and ethnicity. The Insolvency Service's 'Profiles of Bankrupts 2005/6 and 2007/8' shows that, generally, the majority of bankrupts tend to be white, middle-aged men. This reflects evidence discussed above which highlights that men are less likely to consider there is a stigma associated with bankruptcy, and those who describe themselves as 'white' are less likely to associate shame with bankruptcy. The Insolvency Service survey on attitudes to bankruptcy also showed that the perceived stigma associated with bankruptcy declined as income levels and qualifications declined[111]. Internet use is also affected by a number of factors. As well as a strong age dimension which shows internet use declines with age[112], there is also a strong racial and socio-economic dimension which is just as influential[113]. The policy intention for an administrative application process, carried out predominantly online, would have an impact on those who are less able to use or have less access to the

[111] Enterprise Act 2002: Attitudes to Bankruptcy 2009 Update, October 2009

[112] Help The aged: http://policy.helptheaged.org.uk/NR/rdonlyres/1D80E84D-8605-40FD-B9BC-A2A856C6FA97/0/pstatedigdivide240707.pdf

[113] Ibid.

		internet. Evidence from Poverty Site shows that as a proportion, fewer white people live in low-income households compared with people from ethnic minorities[114]. Research carried out by the Joseph Rowntree Foundation in 2007 concluded the differences are the result of family composition, work status but most significantly, the prevalence of low pay amongst those from ethnic minority groups[115]. Data collected in 2010 from the Office for National Statistics shows that the rate of internet use decreases in line with income, which supports research carried out by the University of Warwick showing computer use and access to the internet and other information communication technology (ICT) was particularly low amongst black and ethnic minority groups living in deprived areas[116]. The same research raised the link between language and computer literacy, commenting that those for whom English is not their first language, and living in deprived areas, their levels of computer literacy are lower that those not living in deprived areas and for whom English is their first language. The policy objective to encourage online applications would therefore impact on those from aged, non-white and lower socio-economic backgrounds. But this effect would be fully countered by allowing applications to be submitted on paper by post and signposting debtors to sources of information and advice. <u>Age, Disability and Gender</u>

[114] http://www.poverty.org.uk/06/index.shtml

[115] Kenway, Peter and Palmer, Guy (2007), 'Poverty among ethnic groups how and why does it differ?', New Policy Institute

[116] Owem, D; Green A.E.; McLeod, M; Law, I; Challis, T; Wilkinson, D (200X), 'The Use of and Attitudes Towards Information and Communication Technologies (ICT)by People from Black and Ethnic Minority Ethnic Groups Living in Deprived Areas', Centre for Research in ethnic Relations and Institute for Employment research, University of Warwick School of Continuing education and Department of sociology and Social Policy, University of Leeds

[117] ONS, Carers in Britain 2002, www.ons.gov.uk

[118] CarersUK: The voice of carers, 'Caring and Pensioner Poverty: A report on older carers, employment and benefits' http://www.carersuk.org

		According to data from the Office for National Statistics relating to 2002, women were more likely than men to take on an informal caring role. In the same year, 14% of women were the main carer for a sick, disabled or elderly person compared with 7% of men. Although there were no gender differences in the proportion caring for someone in the same household, women were more likely than men to look after someone outside the household, (12% compared with 9% per cent[117]). The result is a negative impact on women's time and social and economic activity, including access to services[118]. An online application process would lift the barrier imposed by having to attend court, and enable those with caring responsibilities to access bankruptcy where it is appropriate to do so. The policy therefore is likely to have a positive impact on disabled groups and their carers, who are disproportionally female.

STEP 5: ASSESSMENT OF IMPACT ON EQUALITY

5.1 Assessment of proposed change with regard to gender equality

	Positive impact – it could benefit	***Negative impact*** – it could disadvantage	**No specific impact**
Women	☒	☐	☐
Men	☐	☐	☒
Reasons for these conclusions: Attending court is one of the barriers mentioned by debtors, particularly female debtors, when choosing a debt relief option. Removal of the requirement to attend court would remove a barrier to both accessing a service and taking part where a third party application has been made. Evidence collected also shows that a higher proportion of full time carers are women, who would be impacted positively by the flexibility that an administrative process offers.			

5.2 Assessment of proposed change with regard to trans-gender equality

	Positive impact – it could benefit	***Negative impact*** – it could disadvantage	**No specific impact**
Trans-gender	☐	☐	☒

Reasons for these conclusions (please remember to include the different impacts on transsexual, intersex, androgyne and polysex, and cross-dressing and transvestite people): There is no evidence to suggest the proposals will have a specific impact on transgender equality.

5.3 Assessment of proposed change with regards to ethnicity/race equality

	Positive impact – it could benefit	***Negative impact*** – it could disadvantage	**No specific impact**
Asian or Asian British people	☐	☐	☒
Black or Black British people	☐	☐	☒
People of mixed race	☐	☐	☒
White people	☐	☐	☒
Other groups (please specify)	☐	☐	☐
Reasons for these conclusions: The proposal is to ensure information is made available for all in a choice of languages so those for whom English is not their first language will still be able to access information and guidance on the application process. The proposals may not necessarily affect the willingness or attitude of individuals from ethnic minority groups from accessing bankruptcy. The application process will also include a paper process alongside an online application process for those less willing or able to use an electronic form.			

5.4 Assessment of proposed change with regards to disability equality

	Positive impact – it could benefit	***Negative impact*** – it could disadvantage	**No specific impact**
Physical	☒	☐	☐
Sensory	☒	☐	☐
Cognitive/ Learning	☒	☐	☐
Mental health	☒	☐	☐

Reasons for these conclusions:

Removal of the courts from the application process in most cases would also remove associated delays in accessing bankruptcy (see Impact Assessment) so those who need bankruptcy would have appropriate access to debt relief. Those against whom a petition has been filed would still have an opportunity to engage in the process, albeit that more emphasis would be placed on sorting out any issues at an earlier stage – which should be beneficial to all parties. The process is designed to encourage and provide time for individuals to seek advice, which would assist those with cognitive and learning difficulties in particular. The intention is for information to be made available in different formats such as audio services and large typeface for those who are sensory impaired. The removal of the requirement to attend court for a hearing would also be a positive impact for people with physical disabilities.

5.5 Assessment of proposed change with regards to age equality

	Positive impact – it could benefit	***Negative impact*** – it could disadvantage	**No specific impact**

Older people (50 +)	☒	☐	☐
Younger people (16-25)	☒	☐	☐
Any other age group	☐	☐	☒

Reasons for these conclusions:

The move towards an administrative and electronic application process is likely to have an impact on older people who are less familiar with electronic service delivery than younger generations. However, evidence has shown that attitudes and use of the internet are changing amongst aging generations and, over time, accessing services online should be the norm. In the meantime, paper applications would be made available as an alternative to electronic applications. The impact of the proposal on age equality is likely to be positive as older populations are also likely to take on caring responsibilities, and themselves suffer from poor health. Being able to access bankruptcy without having to attend a hearing would offer flexibility.

5.6 Assessment of proposed change with regards to Belief and Religious equality

	Positive impact – it could benefit	***Negative impact*** – it could disadvantage	**No specific impact**
Those with religious beliefs	☐	☐	☒
Those without religious beliefs	☐	☐	☒

Reasons for these conclusions (please remember to include the different impacts that might affect some religion/belief groups to the exclusion of others):

There is no evidence to suggest the proposals would have a specific impact on belief and religious equality

5.7 Assessment of proposed change with regards to sexual orientation equality

	Positive impact – it could benefit	***Negative impact*** – it could disadvantage	**No specific impact**
Heterosexual people	☐	☐	☒
Gay and/or Lesbian people	☐	☐	☒
Bi-sexual people	☐	☐	☒

Reasons for these conclusions:

There is no evidence to suggest the proposals would have a specific impact on sexual orientation equality

5.8 Assessment of proposed change with regards to Pregnancy and Maternity equality

	Positive impact – it could benefit	***Negative impact*** – it could disadvantage	**No specific impact**
Pregnancy	☒	☐	☐
Maternity	☒	☐	☐

Reasons for these conclusions:

There is no evidence to suggest the proposals would have a negative impact on gender equality. An administrative process rather than a court based process does provide for greater flexibility in choosing when and how to submit an application, which would have a positive impact for pregnant individuals or those on maternity leave.

5.9 Assessment of proposed change with regards to Socio-economic status equality

You may include additional rows for specific socio-economic factors, as necessary, by clicking on 'Table'>'Insert'> 'Rows below', while your cursor is in last of the "Area" rows.

Area (please list)	**Positive impact** – it could benefit	***Negative impact*** – it could disadvantage	**No specific impact**
Socio-economic	☒	☐	☐
	☐	☐	☐
	☐	☐	☐

Reasons for these conclusions:

The proposals are likely to have a positive impact on those people from a higher socio-economic background as not attending court may remove a barrier to accessing bankruptcy. Paper applications would still be made available, alongside the electronic application process for those on lower incomes who may not be able to access the internet.

STEP 6: CONSIDER YOUR OPTIONS FOR ACTION

6.1	Does the evidence from steps 1 to 5 indicate that the proposed change is having, or is likely to have, an adverse impact or be discriminatory. If yes, work onwards from section 6.2. You will need to consider which course of action is the most appropriate. If no, sign the form off and submit it to the DECG, via the D&E Team.*	Yes ☐ No ☒

6.2	**Measures to mitigate** What measures could you put in place to remove the adverse impact?	N/A
6.3	**Change what is planned** What changes could you make to remove the adverse impact?	N/A
6.4	**Alternative policies** What other changes could still achieve the original aim?	N/A
6.5	**Abandon the proposed change(s)** Is it an option to abandon the proposed changes altogether? If not, why not?	N/A

6.6	**Rely on the 'justification' defence** If this EQIA shows that the proposed change is discriminatory, you should reject it, unless you are satisfied that you can justify it. You will need to show reasonable and practicable evidence for that justification and may need to seek legal advice before selecting this option. Please consult with The Diversity & Equality Team if you ever reach this stage.

* Please complete if the EQIA is being signed off at this point.

Name of Assessor, Job Title and Section	Maria Isanzu, Senior Policy Advisor, Policy Unit.
Date assessment completed	17th January 2011
Authorised by (Director)	Suzanne Greaves, Assistant Director - Policy
Date of Authorisation	20th January 2011

If this EQIA cannot be submitted to the DECG at this time, and further work is identified as requiring completion, please start a new EQIA framework for the subsequent actions that you undertake.

STEP 7: DECG REVIEW AND COMMENTS

Date	Summary (for completion by D&E Team)	EQIA approved by DECG?
26/01/11	The DECG thought the EQIA was very well drafted. A few minor amendments were suggested namely: • Q. 1.3 – Add 'electronic' to highlight that it included electronic applications. • 2.3 – The impact should be revised from 'Medium' to 'High' • 3.4 - 'bankruptcy associations' should be added. • Step 3 – Should highlight the lack information on the diversity of creditors.. The DECG suggested that Policy Section could ask ORs to collate the data on Annulments, Dismissed petitions to help establish the number of contested cases. The DECG found it very valuable to be involved. The DECG would like to be up-dated on the EQIA once the consultation process was completed.	Yes ☒ No ☐

If no, identify what further work, or evidence, is required? N/A

Name of DECG member	Jane Young (Chair)
Date	25 February 2011

If this EQIA is not ratified by the DECG, and further work is identified as requiring completion, please start a new EQIA framework for the subsequent actions that you undertake.

STEP 8: MAKE ARRANGEMENTS TO MONITOR AND REVIEW THE IMPACT OF THE CHANGE.

An EQIA is not a one-off exercise. You will only know the actual impact of your proposed change once you have put it into practice. Once any changes are fully in effect, you should include equality impacts as part of your regular arrangements for monitoring, consulting upon and reviewing your procedures and policies (even those that have been previously assessed as having no relevance to equality).

8.1	Date of next review of the impact	May 2012
8.2	Data required for monitoring, consultation and review purposes	Update to include details on creditors, and Data on Annulments, Dismissed petitions obtained from OR Service, to help establish the number of contested cases.
8.3	Monitoring systems to be used/established and what data are to be collected, when and by whom	A survey to be designed by Policy Unit and distributed to OR Services. This data would then be collated by Policy Unit.
8.4	Individual responsible (name, job title and section)	Maria Isanzu, Senior Policy Advisor, Policy Unit.

STEP 9. PUBLISH THE RESULTS OF THE EQIA

Copies of all completed EQIAs will be placed on the intranet by the D&E Team.

You also need to consider whether the EQIA will need to be published externally. If so, please prepare a full and technically detailed report, and consider whether the report needs to be prepared in alternative formats.

9.1 External publication details

	Date of decision/action	**Reasons for not publishing, if appropriate**
National media publication Yes ☒ No ☐	08 March 2011	N/A
Insolvency Service website Yes ☒ No ☐	08 March 2011	N/A
Other publications (specify)	08 March 2011	N/A
Languages other than English Yes ☐ No ☒	08 March 2011	N/A
Alternative formats e.g. MP3, large print Yes ☐ No ☒ Please specify	08 March 2011	N/A

Impact assessment completed by:

Name of Assessor, Job Title and Section	Maria Isanzu, Senior Policy Advisor, Policy Unit.
Date completed	08 March 2011
Authorised by (Director)	Suzanne Greaves, Assistant Director - Policy
Date of Authorisation	5th April 2011

Annex E: List of Consultation Questions

Question 1: 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.

Question 2: 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?

Question 3: 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?

Question 4: Should instalment payments be non refundable?

Question 5: If not, how should the administrative costs of handling the refund be recouped?

Question 6: Should there be any additional requirements for registration in order to deter abuse? If yes, please outline what you think those requirements should be.

Question 7: 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?

Question 8: 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?

Question 9: 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.

Question 10: 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?

Question 11: 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?

Question 12: 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.

Question 13: 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.

Question 14: Do you think that the pre-action process should be mandatory or discretionary?

Question 15: 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?

Question 16: 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?

Question 17: Can you suggest any other matters that the guidance could usefully cover to further help applicants?

Question 18: 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?

Question 19: 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?

Question 20: Who do you think should be responsible for sending a copy of the bankruptcy application to the debtor and eliciting his/her response?

Question 21: 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.

Question 22: 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?

Question 23: 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?

Questions 24: 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?

Question 25: 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?

Question 26: 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?

Question 27: 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?

Question 28: How important is it for the reforms proposed in this document that there is a Liquidator of Last Resort for Scotland?

Question 29: 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?

Question 30: 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.

Question 31: 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?

Question 32: 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?

Question 33: Who should send notice to specified interested parties?

Question 34: When should notice be sent to these interested parties?

Question 35: Do you think that a winding up application should be advertised under these new proposals? If yes, please provide reasons for your answer.

Question 36: 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.

Question 37: What period of time should be sufficient for a company to communicate to the Adjudicator its opposition? 14 days? More? Or less?

Question 38: 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?

Question 39: 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?

Impact Assessment:

Question 40IA: Is the proposed pre-action process likely to result in any additional costs for creditor petitioners or debtors? If so, how much and why?

Question 41IA: 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?

Annex F – The Consultation Code of Practice Criteria

1. Formal consultation should take place at a stage when there is scope to influence policy outcome.
2. Consultation should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. Consultation exercise should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. Officials running consultations should seek guidance in how to run an effective consultation