Routes into Insolvency and a Single Portal – a Report for the Personal Insolvency Review

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Introductory Note

The Insolvency Service is an executive agency with responsibility for oversight and administration of the insolvency system, which is sponsored within government by the Department for Business and Trade. Part of its role involves policy development in the area of personal insolvency, a legal institution that provides support and a 'fresh start' – through debt relief – to individuals struggling under the burden of unmanageable debt. Over recent years, the Insolvency Service has been conducting a ***Personal Insolvency Review***, which has included the publication of a *Call for Evidence* in July 2022,[1] followed in August 2023 by a *Summary of Responses and Next Steps*.[2] A first aspect of these Next Steps included considering 'whether there is scope to improve the debt relief landscape through non legislative means or secondary legislation'. Accordingly, the Spring Budget 2024 saw initial reforms to expand access to the important protections offered to lower-income households by the Debt Relief Order (DRO) procedure.[3] The second strand of the Next Steps involved a government intention 'to work with stakeholders and other interested parties to develop proposals for reform for further public consultation'.

As part of this work with stakeholders, the current author was asked to chair a series of stakeholder workshops on one theme of the Personal Insolvency Review. The theme assigned by the Insolvency Service was 'Routes into Insolvency' and included consideration of key questions relating to the way in which financially troubled individuals access personal insolvency procedures, as well as the extent to which cases are directed appropriately into suitable procedures. This theme also included consideration of the prospects for reforming the law to introduce a 'Single Portal' for accessing personal insolvency. As part of this process, the author chaired two two-hour online meetings of stakeholders during May 2024, leading and structuring discussions of the above theme. Meanwhile three other workshop streams took place simultaneously, each led by an independent academic chair. The Acknowledgements section of this document, written by the Insolvency Service, provides the identities of all workshop participants and each independent chair. Participants were invited and chosen by the Insolvency Service, and included people drawn from public bodies, NGOs, practitioners, professional associations, and the credit/debt industry. This report represents the author's own assessment and summary, as chair of the workshop, of the discussions held over the course of the meetings. The author has added context and linked the discussion to contemporary relevant research.[4] The

[1] In 2021-22, as part of a panel of academic experts, the current author offered advice and contributed a research report which assisted the Insolvency Service in its preparation of the *Call for Evidence*.

[2] In March 2023, subsequent to the publication of the Call for Evidence, the author and LSE Law School hosted a Policy Impact Workshop to assist the Personal Insolvency Review process. Leading academic researchers from across the world presented research to the Insolvency Service in a review of comparative policy approaches. See LSE Law School, 'Policy Impact Workshop: Review of the Personal Insolvency Framework' (*London School of Economics and Political Science*) <https://www.lse.ac.uk/law/news/2023/spooner-cfe.aspx> accessed 20 October 2024 The author thanks for their contributions Professor Pamela Foohey, Professor Stephanie Ben-Ishai, Professor Saul Schwartz, Professor Iain Ramsay, Dr Katharina Moser, and Dr Lucinda O'Brien.

[3] In prior published research, the current author has previously argued the case for significant expansion of access to the Debt Relief Order (DRO) procedure. See e.g. Joseph Spooner, *Bankruptcy: The Case for Relief in an Economy of Debt* (Cambridge University Press 2019) 171–173; Iain Ramsay and Joseph Spooner, 'Submission to Insolvency Service Call for Evidence: "Insolvency Proceedings: Debt Relief Orders and the Bankruptcy Petition Limit"' (2014) <https://www.academia.edu/8703184/Joint_Submission_with_Prof_Iain_Ramsay_to_Insolvency_Service_Call_for_Evidence_Debt_Relief_Order_access_conditions_and_creditor_bankruptcy_petitions>.

[4] For example, the report draws on discussions of several relevant issues in the author's prior published research. See e.g. Spooner, *Bankruptcy* (n 3); Joseph Spooner, 'Bankruptcy Policy in a Dematerialised Insolvency Law: Glimpses of a Hidden System' (2019) 32 Insolvency Intelligence 30; Joseph Spooner, 'Seeking Shelter in Personal

role of the author has also involved structuring and collating the key points from meetings into a coherent thematic report.

The concept of a 'single portal', or single point of entry for accessing all personal insolvency procedures, has been proposed in academic and policy work as a potential solution to two related problems. Firstly, many legal systems offer multiple personal insolvency procedures, designed, in theory, to offer flexible options for dealing effectively with the varied circumstances of individual cases. In practice, this position has led to inconsistencies, overlaps, and gaps between procedures – particularly in relation to questions of the treatment of insolvent debtors' income, assets, and debts. Secondly, the multiplicity of personal insolvency procedures, all offering varied answers to these questions, have added considerable complexity to the process of accessing personal insolvency procedures. This complexity often leads to cases being directed into inappropriate procedures.

This report first outlines and explains these key problems, presenting stakeholder views as to how these concerns manifest in the contemporary personal insolvency system of England and Wales. The report next considers what a 'single portal' might involve, noting how stakeholders discussed three alternative conceptions of this proposal. The report presents points discussed by stakeholders regarding the advantages and disadvantages of each conception, and the potential of each model to address key concerns in the operation of the current personal insolvency system. The report also presents stakeholder views on related issues regarding the constraints placed on debtor access by factors such as stigma and the impact of insolvency on future participation in business activities and in credit, housing, and employment markets. The important role of creditor protections in personal insolvency was also discussed. While the report does not aim to present concrete policy proposals, it presents contextualised and structured stakeholder views on key questions, in a manner that will inform future Insolvency Service proposals for reform.

Insolvency Law: Recession, Eviction, and Bankruptcy's Social Safety Net' (2017) 44 Journal of Law and Society 374.

Acknowledgements (written by the Insolvency Service)

Following the four workshops on aspects of the personal insolvency regime carried out in May 2024, the Personal Insolvency Review team would like to thank all of the independent chairs and the participants for their contributions. The identities of the chairs, and of organisations taking part, are recorded below. (To maintain their privacy, while the contributions of individual participants are no less valued, their names have been omitted.)

The reports of the chairs of the workshops represent those chairs' own assessment and summary of the discussions that took place in May. The aim has been to broadly capture the discussions and the key points raised: certain points may have been omitted, or collated under wider themes. To the extent that conclusions are reached, they should not be taken as the opinion of any specific individual or organisation taking part.

In order to enable fruitful, coherent discussions, the size of each workshop was limited to a small number of participants from a range of backgrounds. As a result, it was not possible to include every contributor in every workshop, nor could we include everyone who we might have wished to take part in this exercise. The reports of the workshops have been circulated more widely, and further comments are encouraged. We would like to take this opportunity to also thank, as well as the workshop participants, all of the contributors to the personal insolvency review for their past and future assistance with this work.

Chairs of the workshops:

Dr Joseph Spooner, London School of Economics ("Routes into insolvency")

Professor Peter Walton, University of Wolverhampton ("Barriers to entry") Dr

Katharina Möser, University of Birmingham ("Assets and repayment") Dr John

Tribe, University of Liverpool ("Dealing with misconduct")

Participating organisations:

Chartered Institute of Credit Management

Christians Against Poverty

Citizens Advice

Civil Court Users Association

Community Money Advice

Consumer Duty Services

Debt Justice

Debt Managers Standards Association

Equifax TDX Group Forvis

Mazars

HM Revenue & Customs

Insolvency Lawyers' Association Insolvency

Practitioners Association

Institute of Chartered Accountants in England and Wales Institute of

Chartered Accountants of Scotland

Institute of Money Advisers

Money Advice Trust

Money and Pensions Service

PayPlan

R3

StepChange

We Are Debt Advisers

Academics (University of Kent)

Executive Summary

- Workshop participants agreed that problems of the present personal insolvency system prevent the law from achieving fully its objective of providing a fresh start to individuals struggling under the burden of unmanageable debt, while requiring reasonable repayments to creditors from debtors who have repayment capacity.

- Workshop participants noted that English law consists of a range of alternative personal insolvency procedures, which have been added to the overall system at different points in time and in furtherance of varied objectives. Participants agreed that key problems include (a) difficulties in ensuring that cases are directed into appropriate personal insolvency procedures, and (b) complexity and complications caused by inconsistencies, gaps, and overlaps between the personal insolvency procedures (particularly in relation to key questions such as (i) the availability and scope of debt discharge, (ii) the extent of debt repayment expected of debtors, and (iii) the debtor assets to be protected or to be made available for the benefit of creditors.).

- Workshop participants proposed three distinct models of a 'single portal' for personal insolvency:
    - A single point through which existing personal insolvency procedures could be accessed, most likely involving a digital platform in which debtors enter key information and apply for an insolvency procedure.
    - A requirement that debtors seek advice before accessing any personal insolvency procedure, with the 'single entry point' here representing a single and consistent regulatory framework defining such matters as the quality of advice, and the standards of conduct of advisers.
    - A comprehensive law reform project to introduce a single personal insolvency procedure.

- There was strong support in workshop discussions for (a) a requirement that all debtors receive independent regulated debt advice before accessing any personal insolvency procedure, and (b) the development of a single consistent regulatory framework applicable to advice in respect of all personal insolvency procedures, involving comprehensive consumer protections, appropriate conduct of business standards, and robust redress mechanisms.

- Workshop participants showed strong support for a comprehensive law reform project to introduce a single personal insolvency procedure. The group acknowledged, however, that this would be a long-time policy project, and that more immediate smaller scale reforms are required more urgently. Participants therefore proposed shorter-term reforms to address shortcomings in the current law, including (a) clear and consistent eligibility criteria across all personal insolvency procedures, and (b) substantive reforms to current law to bring consistency and clarity across procedures in the treatment of important debtor assets (e.g., homes – owned and rented; essential assets

purchased on finance) and income (e.g. more transparent rules on the calculation of reasonable debtor expenses and surplus income). Contributors also discussed measures to introduce independent review of IVA proposals.

- While participants agreed on the importance of the principle of debtor choice, they also suggested that the responsibility of intermediaries/advisers for shaping debtor choice should be recognised. This would mean that liability should fall on advisers who provide inappropriate advice in breach of regulatory standards, with appropriate redress available to harmed consumers in cases of negative outcomes.

- Workshop participants also acknowledged how certain factors constrain debtor choice – including stigma associated with insolvency procedures, and the impact of insolvency on employment, professional, and business activity, as well as on credit histories. The lack of transparency in relation to these potential impacts was identified as a key problem that limits the abilities of debtors and their advisers to choose appropriate insolvency options. Potential prohibitions on discrimination on grounds of insolvency were also discussed.

- Workshop participants accepted the important role of creditor protections, particularly in cases involving debtors holding significant resources and repayment capacity. Participants agreed that an important role remains for the judicial process of involuntary bankruptcy petitions in such cases, even if the criteria for such petitions could be tweaked to better consider debtor income and asset levels. Participants emphasised the importance of the efficient administration and supervision of insolvency procedures in safeguarding creditor interests.

1. Introduction: A Single Portal for Personal Insolvency?

This report represents the outcome of a series of workshops held with key stakeholders as part of the Insolvency Service's ongoing Review of the Personal Insolvency Framework. The theme of the workshops was centred on the idea of a 'single portal' or single entry point for accessing personal insolvency. The concept of a 'single portal' has been proposed in academic and policy work as a potential solution to the two problems of (i) multiple personal insolvency procedures, featuring inconsistencies, overlaps, and gaps; and (ii) complicated means of accessing personal insolvency procedures, which often lead to cases being directed into inappropriate procedures. In the 1980s, the Cork Committee had proposed a solution along these lines, with multiple procedures available to debtors after a preliminary screening process, 'under which the courts [would] have considerable latitude to decide upon the most appropriate method for dealing with the debtor's affairs'.[5] The personal insolvency system has of course moved away from a court-based system since the time of this report in the 1980s, but the principle of systematic sorting of cases remains relevant. In the US, several authors have long argued that the distinction between 'Chapter 7' (a rapid liquidation-and-discharge procedure) and 'Chapter 13' (a long-term repayment plan procedure) could be eliminated through the consolidation of US bankruptcy law into a single personal insolvency procedure.[6] The idea of a single portal returned to policy debate in the US more recently with the introduction to Congress of a consumer bankruptcy reform bill that proposed to introduce a new 'Chapter 10' procedure for debtors owing less than $7.5m, which would remove consumer cases from 'Chapter 7' and repeal 'Chapter 13'.[7] The proposal for reform allowed repayment plans for debtors with surplus income. It also involved a rationalised approach to the treatment of important categories of debts such as home mortgages, residential leases, and car loans, under which debtors with such assets to protect would enter into particularised repayment plans.

In England and Wales, the current author has suggested that the DRO procedure could be expanded to apply to all personal insolvency cases below a 'high-value' ceiling,[8] with modification to allow debtors holding surplus income to complete repayment plans.[9] Gaps in existing insolvency legislation relating to particular categories of assets and debts could be amended as part of this process – including the treatment of rental tenancies,[10] essential assets purchased via hire-purchase or similar financing arrangements,[11] and certain debts owed to

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[5] Sir Kenneth Cork, *Insolvency Law and Practice: Report of the Review Committee* (HMSO, 1982) paras 272, 545.

[6] Jean Braucher, 'A Fresh Start for Personal Bankruptcy Reform: The Need for Simplification and a Single Portal' (2005) 55 American University Law Review 1295; William C Whitford, 'The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy' (1994) 68 American Bankruptcy Law Journal 397; Katherine Porter, 'The Pretend Solution: An Empirical Study of Bankruptcy Outcomes' (2011) 90 Texas Law Review 103, 154–6.

[7] Senator Elizabeth Warren, Consumer Bankruptcy Reform Act of 2022 2022 [S.4980-117th Congress (2021-2022):].

[8] While noting that precise amounts would have to be tailored to the personal insolvency system, the author draws on the example of the 'high net worth' borrower under FCA regulatory rules – someone earning a net income of £150,000 and holding assets of £500,000: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544), art. 60H; FCA Handbook CONC (Consumer Credit Sourcebook), App 1.4

[9] Spooner, *Bankruptcy* (n 3) 171–173; See also Ramsay and Spooner (n 3).

[10] Spooner, *Bankruptcy* (n 3) 205–207; Spooner, 'Seeking Shelter in Personal Insolvency Law' (n 4); discussing *Places for People Homes Ltd v Sharples; A2 Dominion Homes Ltd v Godfrey* [2011] HLR 45.

[11] Spooner, *Bankruptcy* (n 3) 190–191; discussing *Mikki v Duncan [2017] EWCA Civ 57.*

government.[12] This would establish a single simplified procedure offering debt relief to debtors in need, allowing repayment by those with capacity, while removing the need for a complicated range of separate Bankruptcy, DRO, and IVA procedures. The Bankruptcy and IVA procedures could be retained solely for complex high-value situations that require either the rigour of the Bankruptcy system or the flexibility of a bespoke negotiated IVA (thus effectively returning these procedures to their original purposes).[13]

The *Personal Insolvency Review Call for Evidence* noted that proposals for a 'single gateway' had consistently been proposed by academic commentary.[14] The subsequent *Summary of Responses* noted that there was considerable support among stakeholders for such a proposal, and that respondents offered a range of suggestions as to the form such a single gateway might take.[15] Our workshop discussions aimed to consider the range of possible options.

2. The Context of the current Personal Insolvency Framework

(A) Aims of the review and problems in the English context

The personal insolvency system aims to provide a fresh start – through debt relief – to individuals struggling under the burden of unmanageable debt.[16] As the price of debt relief, the system also ensures that debtors with repayment capacity make reasonable payments to creditors. Safeguards must protect the integrity of the system and provide reassurance that it operates as intended, by detecting and addressing any relevant misconduct within insolvency procedures. The current review of the personal insolvency framework is committed to these aims, and to addressing problems in current procedures that might be preventing these aims from being achieved.[17]

Personal insolvency law has developed over centuries, to the point at which it now consists of a range of distinct procedures that have been introduced at different points in history: from age-old Bankruptcy, to the Individual Voluntary Arrangement (IVA) introduced in 1986,[18] and the Debt Relief Order (DRO) established under 2007 legislation.[19] Further, outside of insolvency law, a related Debt Respite Moratorium or 'Breathing Space' procedure was added in 2020.[20]

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[12] Spooner, *Bankruptcy* (n 3) 192–205.
[13] In other words, the 'ceiling' criteria establishing the outer bounds of an expanded DRO procedure would represent the minimum 'threshold' criteria for a Bankruptcy or IVA case.
[14] See also the proposals of Professor Walton for a review of the appropriateness of insolvency applications by an independent decision-maker: Peter Walton, 'Individual Insolvency – the Case for a Single Gateway' (27 February 2024) <https://papers.ssrn.com/abstract=4740893> accessed 17 June 2024.
[15] Insolvency Service, 'Review of the Personal Insolvency Framework: Summary of Responses and next Steps' (UK Government Insolvency Service 2023) <https://www.gov.uk/government/calls-for-evidence/call-for-evidence-review-of-the-personal-insolvency-framework/outcome/review-of-the-personal-insolvency-framework-summary-of-responses-and-next-steps> accessed 27 May 2024.
[16] For a discussion of the competing objectives of personal insolvency law, and arguments for a prioritisation of the law's debt relief objective, see Spooner, *Bankruptcy* (n 3) ch 3.
[17] Insolvency Service, 'Review of the Personal Insolvency Framework' (n 15).
[18] Insolvency Act 1986
[19] Tribunals, Courts and Enforcement Act 2007.
[20] HM Treasury, 'Breathing Space: Call for Evidence' (2017); HM Treasury, 'Breathing Space Scheme: Consultation on a Policy Proposal' (2018); Debt Respite Scheme (Breathing Space Moratorium and Mental Health

This latter procedure does not offer debt relief and the prospect of a 'fresh start'. Rather, as one stakeholder explained, it can be understood as responding to a distinct need among certain debtors for temporary protection from creditors. Meanwhile there also exists a sizeable market in debt management services.[21] In addition to the layering of new procedures upon an existing system, considerable changes have also taken place in the usage of existing procedures over time. For example, IVAs were designed by the Cork Committee as a niche procedure to be used in complicated high-value personal insolvency cases involving company directors, professionals, and other business debtors with valuable assets and sophisticated financial affairs. [22] Over time, the procedure was adapted by IVA firms to become a mass product for addressing consumer debt problems. [23]

The result is a complex personal insolvency system, which raises questions as to how the range of procedures fit together, and the extent to which gaps and overlaps exist. There are also considerable inconsistencies across the range of procedures. For example, the DRO procedure involves clear eligibility criteria that permit access only to debtors whose income, assets, and debts fall under defined limits. In contrast, no such limits apply to the IVA and Bankruptcy procedures.[24] Given that the DRO criteria make eligible those debtors whose disposable income does not exceed £75, one might consider that this reflects a principle that debtors of such income levels should not be required to make any repayments to creditors in insolvency. A debtor having a disposable income of £80, however, may well enter an IVA repayment plan requiring repayment each month of a *whole* £80. A DRO debtor having just £5 less available each month will keep the entire £75.[25]

Similarly, in comparing DROs and Bankruptcy, it seems that approximately 85% of Bankruptcy cases involve debtors making no payments to creditors (neither from income nor assets).[26] This means that many Bankruptcy cases may not differ significantly from DRO cases,

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Crisis Moratorium) (England and Wales) Regulations 2020 Policy proposals leading to the introduction of the Debt Respite Scheme had also envisaged the introduction of a new procedure of Statutory Debt Repayment Plans. Note that the Government Summary of Responses to the personal insolvency review Call for Evidence has clarified that the implementation of Statutory Debt Repayment Plans will depend on the outcome of the review.

[21] The Financial Conduct Authority has indicated that regulated providers manage approximately £6bn of debt in ongoing Debt Management Plans (DMPs): Financial Conduct Authority, 'Debt Management Sector Thematic Review' (2019) Thematic Review TR19/01 6 The Government Response to the personal insolvency review Call for Evidence confirms that a discussion of DMPs falls outside the scope of the review. .

[22] Spooner, *Bankruptcy* (n 3) 133–137 discussing; Cork (n 5) paras 363–397.

[23] Adrian Walters, 'Individual Voluntary Arrangements: A "Fresh Start" for Salaried Consumer Debtors in England and Wales' (2009) 18 International Insolvency Review 5; Iain Ramsay, *Personal Insolvency in the 21st Century: A Comparative Analysis of the US and Europe* (Hart Publishing 2017) ch 3; Spooner, *Bankruptcy* (n 3) ch 4; Katharina Möser, 'Making Sense of the Numbers: The Shift from Non-Consensual to Consensual Debt Relief and the Construction of the Consumer Debtor' (2019) 46 Journal of Law and Society 240.

[24] The creditor petition process for instigating Bankruptcy requires that a creditor is owed a debt of at least £5,000, but there are no criteria relating to the debtor's income or asset levels: s. 267 Insolvency Act 1986; Insolvency Act 1986 (Amendment) Order 2015.

[25] A debtor with debts of £30,000 and income of £75 can be discharged from debts without any fee payment through a DRO; while a debtor of identical debt levels with an income of £80 who enters an IVA will pay approximately £4,800 over a five-year period, with £3,650 going in IVA firm fees, and £1,150 going to creditors: Financial Conduct Authority, 'Debt Packagers: Proposals for New Rules' (2021) CP21/30 34; Meri Ahlberg and others, 'Set up to Fail: How the Broken IVA Market Is Failing People in Debt Distress' (Citizens Advice 2023) 9 <https://www.citizensadvice.org.uk/about-us/our-work/policy/policy-research-topics/debt-and-money-policy-research/set-up-to-fail-how-the-broken-iva-market-is-failing-people-in-debt-distress/>.

[26] In 2022, only approximately 14% of Bankruptcy debtors were required to make payments under Income Payment Orders or Agreements: Insolvency Service, 'Individual Insolvency Statistics: October to December 2023' (2024) <https://www.gov.uk/government/statistics/individual-insolvency-statistics-october-to-december-2023> accessed 12 April 2024; Insolvency Service data from a decade ago showed that over 90% of Bankruptcy

involving debt relief without creditor repayment. These cases are excluded from the DRO procedure, and forced into Bankruptcy, only by the DRO eligibility limits. Data from ten years ago showed that the DRO debt ceiling (then £20,000) excluded approximately 85% of Bankruptcy debtors from the DRO, as the vast majority would otherwise have met the DRO's "low income, low asset" criteria.[27] The increase in the DRO debt ceiling in 2021, from £20,000 to £30,000,[28] led to almost 5,000 new DROs that would previously have been ineligible cases (out of an annual case number of 24,000),[29] showing the level of demand for access to this procedure among previously excluded debtors. This raises questions regarding the need for separate DRO and Bankruptcy procedures in all but the highest value cases. It should be noted that the removal of the £90 DRO fee in April 2024 has already led to record monthly numbers of DRO cases,[30] while the recent increase of the DRO debt ceiling to £50,000 should further increase access. [31]

Similar questions might arise as to why an individual enters an IVA rather than Bankruptcy. Given that both procedures allow for long-term part repayment plans for those debtors having some capacity to pay creditors, for cases involving debtors with few assets it is not obvious as to why the IVA procedure is needed alongside Bankruptcy's Income Payment Orders/Undertakings mechanism. Meanwhile there might be some debtors who find themselves excluded from all procedures – those who fall outside of the DRO criteria, are unable to afford the up-front £680 access fee for Bankruptcy, and lack the payment capacity to fund an IVA.[32]

Furthermore, there is considerable inconsistency in relation to the roles of various intermediaries in relation to the entry routes, administration, and supervision of each personal insolvency procedure. Debtor applications for Bankruptcy are made online and determined by an Adjudicator, while Bankruptcy cases are generally supervised by the Official Receiver (or a private trustee in some high-value cases). Legislation provides that debtors can only access a DRO through an 'authorised intermediary', who is generally part of a 'competent authority'.[33] Once the case is underway, the Official Receiver oversees the case and supervises the debtor.

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debtors had less than £5,000 worth of assets available to pay creditors: Insolvency Service, 'Insolvency Proceedings: Debt Relief Orders and the Bankruptcy Petition Limit: Call for Evidence' (2014) Call for Evidence <http://news-insolvency.bis.gov.uk/Content/Detail.aspx?ReleaseID=433248&NewsAreaID=2&ClientID=95>.

[27] Insolvency Service, 'Insolvency Proceedings: Debt Relief Orders and the Bankruptcy Petition Limit: Call for Evidence' (n 26).

[28] Insolvency Service, 'Debt Relief Orders: Consultation on Changes to the Monetary Eligibility Criteria - Summary of Responses and Government Response' (2021) <https://www.gov.uk/government/consultations/debt-relief-orders/summary-of-responses-and-government-response> accessed 13 April 2024.

[29] Insolvency Service, 'Ad-Hoc Statistics on the Breakdown of Newly Eligible Debt Relief Orders by Eligibility Criteria Change, England and Wales, 1 July 2021 to 30 June 2022' <https://www.gov.uk/government/statistics/ad-hoc-statistics-on-the-breakdown-of-newly-eligible-debt-relief-orders-by-eligibility-criteria-change-england-and-wales-1-july-2021-to-30-june-2022> accessed 25 April 2024.

[30] Insolvency Service, 'Commentary - Individual Insolvency Statistics June 2024' (Insolvency Service 2024) <https://www.gov.uk/government/statistics/individual-insolvency-statistics-june-2024/commentary-individual-insolvency-statistics-june-2024> accessed 5 August 2024.

[31] The expansion of DRO eligibility criteria may move more potential Bankruptcy cases into the former procedure: Insolvency Service, 'Changes to Debt Relief Orders Will Support People in Financial Distress' (2024) <https://www.gov.uk/government/news/changes-to-debt-relief-orders-will-support-people-in-financial-distress> accessed 13 April 2024.

[32] See e.g. Matt Vaughan Wilson and others, 'Priced out of Debt Relief: How Upfront Insolvency Fees Keep People Stuck in Debt Purgatory' (Citizens Advice 2023) <http://www.citizensadvice.org.uk/about-us/our-work/policy/policy-research-topics/debt-and-money-policy-research/priced-out-of-debt-relief-how-upfront-insolvency-fees-keep-people-stuck-in-debt-purgatory/> accessed 12 October 2023.

[33] Debt Relief Orders (Designation of Competent Authorities) Regulations 2009.

The Insolvency Practitioner (IP) is given a statutory monopoly on the twin roles of 'nominee' (responsible for brokering an agreement between a debtor and creditors) and 'supervisor' (responsible for administering the payment plan and supervising the debtor) under the IVA procedure. Meanwhile 'debt advice providers' are given a new quasi-judicial role under the Breathing Space mechanism[34] - they assist debtors in applying for a moratorium, while also determining the debtor's application and supervising the debtor in the administration of a moratorium. The Official Receiver is a public office, debt advisers are regulated by the Financial Conduct Authority, while Insolvency Practitioners are subject to a system of self-regulation through Recognised Professional Bodies (RPBs) under the coordination of the Insolvency Service.[35] Individuals seeking debt relief in this way must deal with a situation in which there are multiple different sources of advice and assistance, conforming to contrasting regulatory standards, and facilitating access to different procedures. This means that the entry routes into personal insolvency are complex and difficult to navigate.

(B) Recognised problems in personal insolvency studies

These complexities have led to adverse effects for the personal insolvency system. The rapid growth in usage of the IVA procedure has been accompanied by increasingly widespread concerns that large numbers of debtors are ending up in inappropriate IVAs, in cases in which the DRO or Bankruptcy procedures would have been more suitable. For debtors who enter IVAs when other options are available, the Financial Conduct Authority (FCA) identifies consumer harm including lower wellbeing, exacerbated problems of indebtedness over prolonged periods, and higher monetary costs.[36] IVAs involve the payment of an average of £4,000 in fees, representing a considerable burden for debtors already struggling financially.[37] One study of the similar Scottish procedure of the Protected Trust Deed illustrates this point in its finding that only 34% of funds paid by debtors were passed on to creditors, with 66% of payments going towards insolvency practitioner fees.[38] IVAs also carry a considerable risk of failure, with between 40% and 25% of IVAs terminating early over the past ten years.[39] The IVA is the only insolvency procedure to produce revenues for IVA firms, creating incentives for firms to market this solution over other options. Various regulatory actions and reports from public bodies have now identified widespread poor practices in the IVA market, ranging from misleading advertising,[40] to poor quality advice,[41] to the manipulation of client financial

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[34] *Kaye v Lees [2023] EWHC 758 (KB)*.

[35] Insolvency Service, 'Call for Evidence: Regulation of Insolvency Practitioners Review of Current Regulatory Landscape' (2019) Relevant legislation excludes from FCA regulation debt counselling and debt adjustment activities where such activities are carried out by "a person acting in reasonable contemplation of that person's appointment as an insolvency practitioner": Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544), arts. 39D, 39E.

[36] Financial Conduct Authority, 'DP Proposals' (n 25) 8.

[37] Ahlberg and others (n 25).

[38] Scottish Government, 'Scottish Government Proposals for Changes to Protected Trust Deeds' (2019) 13.

[39] Insolvency Service, 'Individual Voluntary Arrangements Outcomes and Providers 2023' (2024) <https://www.gov.uk/government/statistics/individual-voluntary-arrangements-outcomes-and-providers-2023> accessed 15 April 2024.

[40] Advertising Standards Authority, 'Debt Management and Individual Voluntary Arrangements (IVAs)' (2022) <https://www.asa.org.uk/advice-online/debt-management-and-individual-voluntary-arrangements-ivas.html> accessed 30 April 2024.

[41] Insolvency Service, 'Review of the Monitoring and Regulation of Insolvency Practitioners' (Insolvency Service 2018); The Insolvency Service, 'The Future of Insolvency Regulation: Consultation Paper' (2021) Consultation Paper.

information to ‘fit’ them into profitable debt solutions.[42] The FCA has taken action to ban the payment of referral fees to debt packagers by IVA firms, as this practice was found to be exacerbating conflict of interest problems.[43]

These challenges are not unique to the personal insolvency system of England and Wales. Intermediaries play a key role in insolvency systems in many countries, whether such intermediaries take the form of lawyers, debt advisers, or insolvency practitioners. A number of empirical studies from the US have shown that the entry of debtors into long-term repayment plan procedures seems to be shaped by the interests and values of attorneys.[44] One paper shows that repayment plan rates are higher in bankruptcy courts permitting attorneys to charge higher fees, supporting ‘the notion that lawyers can and do manipulate their client’s filings to increase their revenues.’[45] Mystery shopper’ research in Canada provides evidence supporting the view that intermediaries have incentives to recommend outcomes producing greater revenues, whether or not these necessarily best fit client interests.[46] In Australia, a national survey of financial counsellors and consumer advocates revealed significant scepticism regarding business practices of firms offering debt agreements (the nearest Australian equivalent to the IVA).[47] Examples of ‘misleading’ conduct included firms’ non-disclosure of relevant information to potential clients, high and opaque fees, and brokering of unsustainable repayment plans.

Discussions in this workshop identified and recognised these problems. It was widely accepted among participants in the workshop that the current system is overly complicated, particularly with regard to the relationship between the various procedures. It could be considered that the key features of a personal insolvency system can be broken down into certain key questions - relating to such fundamental points as (i) the availability and scope of debt discharge, (ii) the extent of debt repayment expected of debtors, and (iii) the debtor assets to be protected or to be made available for the benefit of creditors. Workshop participants generally agreed that a streamlined consumer insolvency system should provide a clear and consistent set of answers to these questions. Ambiguity and inconsistency in relation to these points currently makes it very difficult for debtors, particularly vulnerable debtors, to make informed choices in relation to their options.

The group recognised that debtors are currently ending up in inappropriate procedures, with the key problem being the direction of debtors into unsuitable IVAs, when alternatives of Bankruptcy or DROs would be more suitable. At least one participant pointed out that recent FCA action in relation to debt packagers has not cured problems in the IVA market, with certain

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[42] Insolvency Service, ‘IP Review’ (n 41) 12; Financial Conduct Authority, ‘DP Proposals’ (n 25) 4.
[43] Financial Conduct Authority, ‘DP Proposals’ (n 25); Financial Conduct Authority, ‘Debt Packagers: Feedback to CP23/5 and Final Rules’ (2023) Policy Statement PS23/5.
[44] Pamela Foohey and others, ‘No Money down Bankruptcy’ (2016) 90 Southern California Law Review [i]; Jean Braucher, Dov Cohen and Robert M Lawless, ‘Race, Attorney Influence, and Bankruptcy Chapter Choice’ (2012) 9 Journal of Empirical Legal Studies 393.
[45] Frank McIntyre, Daniel M Sullivan and Laura Summers, ‘Lawyers Steer Clients Toward Lucrative Filings: Evidence from Consumer Bankruptcies’ (2015) 17 American Law and Economics Review 245.
[46] Stephanie Ben-Ishai and Saul Schwartz, ‘Credit Counselling in Canada: An Empirical Examination’ (2014) 29 Canadian Journal of Law and Society / La Revue Canadienne Droit et Société 1.
[47] Paul Ali, Lucinda O’Brien and Ian Ramsay, ‘Perspectives of Financial Counsellors and Consumer Solicitors on Personal Insolvency’ (Social Science Research Network 2015) SSRN Scholarly Paper ID 2660712 <https://papers.ssrn.com/abstract=2660712> accessed 8 January 2018.

market actors responding creatively by developing new means of customer acquisition.[48] In other words, participants agreed that a central problem facing the personal insolvency system is the difficulty in getting debtors into the right personal insolvency solutions.

3. Three Models of a Single Portal

After discussing the potential key features of a single portal system, workshop participants effectively proposed three alternative visions:

1. A single point through which existing personal insolvency procedures could be accessed, most likely involving a digital platform in which debtors enter key information and apply for an insolvency procedure.
2. A requirement that debtors seek advice before accessing any personal insolvency procedure, with the 'single entry point' here representing a single and consistent regulatory framework defining such matters as the quality of advice, and the standards of conduct of advisers.
3. A comprehensive law reform project to introduce a single personal insolvency procedure.

(A) Single (Digital) Personal Insolvency Application Platform

During workshop discussions, one idea of a single personal insolvency application platform came to resemble an online process through which debtors would enter key financial details, before receiving (i) information regarding insolvency options, or (ii) a recommendation or direction towards a particular option. Different views were advanced as to the outcome that would be produced by the platform – largely this turned on whether the platform could be more or less prescriptive in directing a debtor towards an appropriate solution. Certain workshop participants favoured a degree of automation in the single portal, under which a debtor applicant would enter their data into the portal and then be directed towards a particular procedure. Some participants thought that after this 'sorting' stage, a subsequent stage should follow in which the debtor receives advice. Discussions noted that the idea of a digital application platform would not differ greatly from the online tools used by certain free-to-client advice organisations in assessing or triaging clients' cases and providing initial steers as to options that clients should consider. Discussions also noted that the idea is not dissimilar from methods used by commercial 'lead generators' in collecting client details and referring clients to intermediaries such as IVA and DMP providers.

There was broad consensus that the introduction of a single platform for debtor personal insolvency applications (i) would not alone solve problems in the current personal insolvency system, and (ii) could indeed prove problematic itself in certain ways. Firstly, problems would remain regarding the overly complex array of personal insolvency options, and the inconsistencies, overlaps, and gaps arising among them. If the single platform was merely a form of sorting process for directing debtors down various routes, questions arise as to whether and how debtors who have gone through this sorting process would then receive advice before

[48] The FCA had predicted that IVA and DMP providers would adjust customer acquisition practices in response to its proposed action, while the measures might also see changes to debt packager and lead generator practices: Financial Conduct Authority, 'DP Proposals' (n 25) 30–31.

finalising their insolvency options. In such a situation, the sorting process may simply be moving existing problems regarding access to advice, and the quality and consistency of such advice, further down the insolvency entry process. One participant also noted that many debtors will not be active seekers of insolvency solutions, but rather will end up being referred towards advice and solutions through processes such as creditor debt collection efforts. In these latter cases, it would be unclear how the application platform would work.

Secondly, concerns were raised about difficulties in establishing a 'single' digital application platform. The widespread online marketing of services relating to consumer debt was noted, as well as the recognised problems of misleading advertising of such services.[49] Discussants noted that any new digital platform would have to compete with such online marketing, and that it might be necessary to introduce strict regulatory control of online marketing in order for the new digital platform not to be crowded out by existing extensive advertising practices. A further question then arose as to what would happen at the end of a portal's 'sorting' function, including whether the portal would refer debtor applicants to advice or solutions providers. If the portal were to involve a referral function, questions would inevitably arise as to the reform of the advice regulatory regime, to address the challenge of determining which intermediaries should be authorised to receive referrals.

(B) Advice Regulatory Regime as an Entry Portal

A second vision of the single-entry point model was based around a mandatory requirement that all debtors receive advice before entering an insolvency procedure, in which circumstance the single entry point would effectively involve a single set of regulatory standards applicable to this advice. It was noted that legislation currently requires debtors to access DROs, IVAs, and Debt Respite Moratoria through intermediaries (and so receive advice), and the consensus position was that there are no reasons why an advice requirement should not be extended to Bankruptcy.[50] Consensus among the group was that the larger problem lay in the current regulation of advice, involving inconsistencies between the FCA regulation of debt advice and the self-regulation (RPB) system for regulating Insolvency Practitioners providing IVAs. Various members of the group emphasised that regulatory shortcomings contribute to the direction of consumer debtors into inappropriate IVAs.

The group agreed that there are significant problems regarding the regulation of advice leading to debtors entering into IVAs. The original legal nature of the role of the Insolvency Practitioner was discussed, and the case law under which the IP is described as neither an agent for the creditor nor debtor.[51] It was noted that the role of the IP was not originally conceived under the Insolvency Act 1986 as that of an adviser, but rather as more of a neutral broker between independently advised creditors and debtors. The market practice of providing IVAs to consumers on a mass retail basis has changed this position – IPs now effectively operate as debtor advisers alongside their other roles as neutral 'nominees' and 'supervisors' of IVAs. The regulatory guidance in Statement of Insolvency Practice 3.1 identifies four different roles of the IP – 'the provision of initial advice, assisting in the preparation of the proposal, acting as the nominee, and acting as the supervisor'.[52] It has become very difficult from a legal

[49] Advertising Standards Authority (n 40).
[50] The group did not consider that a requirement to obtain advice prior to entering Bankruptcy would unduly restrict access or cause excessive delays for those seeking to enter Bankruptcy.
[51] See e.g. *Re a Debtor (No. 222 of 1990), ex parte Bank of Ireland and others (No. 2)* [1993] BCLC 233
[52] Statement of Insolvency Practice 3.1, para. 2.

perspective to identify when an IP is acting as an adviser and when the same IP is acting in the official role of IVA nominee or supervisor.[53] Challenges arise from the fact that only IPs (who have various professional duties, including advice provision), and not IVA firms (which may be focused on marketing their products), are subject to regulation.[54] One participant also noted the further complication that in some situations an IP may be operating as an agent or appointed representative of a firm regulated by the FCA. In terms of service providers referring clients to IVA and DMP firms, there are discrepancies between regulated debt packagers and unregulated lead generators.[55] The workshop group recognised the complexity, inconsistency, and ultimate inadequacy of this fractured regulatory landscape. It was emphasised that people should be able to trust the regulatory framework, and concerns were raised that this might not be the case at present.

In summary, the consensus among workshop participants was that it would be beneficial for the personal insolvency system to introduce a requirement that debtors receive independent advice (which could be documented by a certificate etc.) before applying for any and all personal insolvency procedures. It was also agreed that a single consistent set of consumer protections should apply to such advice. The point was made that a revamped single advice regulatory regime should involve mechanisms for awarding redress to consumers where substandard advice has been provided, and much stronger sanctions than currently exist. A concern was raised that there will always be limits on the availability of advice, but this was not seen as sufficient reason to oppose the idea of the introduction of an advice requirement under a unified regulatory framework.

(C) Single (Consumer) Insolvency Law as a Single Portal

(1) Comprehensive Reform of Personal Insolvency Law

There was broad consensus support among the workshop group for a comprehensive reform of personal insolvency law, to create a single personal insolvency procedure. Certain members of the group admired the ambition and coherence of this idea. Participants agreed that the current system contained important gaps, overlaps, inconsistencies and complexities, all of which created a case for a single streamlined system. Several parties noted that it was impossible to consider important issues relating to the routes into insolvency without considering reform of the substantive provisions of personal insolvency law itself. For example, one participant noted that one reason why it is challenging to provide appropriate advice on insolvency solutions is the complexity of the current system, with each procedure involving different eligibility criteria and varying rules on the treatment of income, assets, and debts. Another noted that where one procedure fails and terminates, there is often not a clear route for a debtor into an alternative procedure – a single coherent system, with less rigid rules on termination, would avoid cases falling between gaps in this manner.

[53] See, for example, the High Court's discussion of this point in *Irvine v Duff & Phelps Ltd [2019] EWHC 2780 (Ch)*.
[54] This issue is discussed extensively in The Insolvency Service (n 41).
[55] Financial Conduct Authority, 'DP Proposals' (n 25).

(2) Shorter-Term Reforms to address Shortcomings and Inconsistencies

The group recognised, however, a major drawback of a comprehensive reform project to create a single personal insolvency procedure – it was accepted that such a project could only be completed over a long-term period. The group was keen to agree that more immediate reforms are required to the current system, and that any long-term redesign should take place only alongside shorter-term, smaller-scale reforms. A suggestion was made that potential policy reforms should be organised in categories based on (a) timelines involved in implementation; and (b) whether legislation (primary or secondary), regulatory rules, or other less formal instruments are required to implement such proposals. Several participants supported a more immediate approach involving two main elements: (i) establishing clear and consistent eligibility criteria across all current procedures; **and** (ii) identifying key shortcomings or gaps in the current personal insolvency system and addressing these issues through smaller scale reform. These reforms could potentially design out some of the complexity of the current system.

(i) Clear and Consistent Eligibility Criteria

In relation to the first of these points, the approach could, for example, involve introducing eligibility criteria for Bankruptcy and IVAs that mirror the current eligibility criteria for DROs. This would mean that a debtor eligible for a DRO would not, under reformed insolvency legislation, be eligible for Bankruptcy or an IVA. One participant noted that under such an approach, the rigidity in terms of eligibility criteria should be accompanied by flexibility within procedures as to the treatment of changes in debtor circumstances. Currently, for example, the DRO procedure provides for termination, rather than variation or conversion of the DRO into an alternative procedure, when a debtor's income or assets increase beyond the original eligibility criteria.[56] A more sophisticated approach to changes in circumstances would be required if the eligibility criteria for each personal insolvency procedure were aligned with one another. This might involve, for example, allowing debtors whose incomes increase to remain on track for a discharge, but conditional on the making of some repayments to creditors.[57]

(ii) Reforming Key Shortcomings in Current Personal Insolvency Legislation

One participant suggested that part of the growth in usage of the IVA procedure can be attributed to the failure of insolvency legislation to address certain key policy issues. A classic example is the treatment of a debtor-owned home in Bankruptcy – current legislation only exempts debtor home equity to a value of £1,000,[58] meaning that any debtors in Bankruptcy who hold a greater level of home equity are potentially liable to lose their homes. It was noted that this position is accepted by debtors and by creditors as excessively harsh and the flexibility of the IVA has been used to reach a compromise position allowing homeowning debtors to avoid losing their homes.

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[56] A harsh example of the operation of this feature of DROs was evident in a High Court case in which the Official Receiver revoked a DRO from a debtor suffering from disabilities when the debtor received a delayed payment of working tax credits: *Howard, R (on the application of) v The Official Receiver* [2014] QB 930; discussed in Spooner, *Bankruptcy* (n 3) 72–73.

[57] Se e.g. s. 36 of the Irish *Personal Insolvency Law 2012*.

[58] Insolvency Act 1986 1986 s 313A See also art. 5(5) Insolvency Proceedings (Monetary Limits) Order 1986/1996.

Another example of addressing shortcomings in the current law would be to introduce relatively minor reforms to each procedure to clarify the treatment of debtor income (e.g. the calculation of debtor surplus income) and the level of repayments to creditors. The group discussed how this issue is currently addressed under various procedures, including using the Standard Financial Statement. The group supported the idea of introducing greater consistency and clarity across procedures, so that a debtor could readily ascertain what level of repayment is expected in personal insolvency.[59] Participants supported the possibilities of making the Standard Financial Statement more publicly accessible, and of exploring how it can become a more universally used tool (including through integrating it more formally into insolvency procedures).

Certain additional ideas were presented as potential substantive reforms of current personal insolvency law, and particularly of the IVA procedure. One suggestion was that the IVA procedure could be amended so that the approval of an arrangement was no longer subject to a creditor qualified majority vote, but rather that a debtor's proposal could come into effect on passing a 'fair and reasonable' test. Such test could in principle be administered by a public official within the Insolvency Service, making the Service an adjudicator of whether a proposal was feasible and viable. Another suggestion was that after a qualified majority of creditors had voted in favour of a debtor's IVA proposal, the proposal would have to be reviewed by a public official before it could come into effect. This official would then determine whether or not the IVA was appropriate in the given case. These suggestions brought to mind reforms introduced in recent years in relation to the equivalent Australian Debt Agreement procedure.[60] These included the introduction of a cap of the duration of repayment plans under the procedure (with a maximum duration of 3 years in most cases, and 5 years for homeowners).[61] They also introduced the concept of a maximum payment-to-income ratio, under which an arrangement could not be put in place that would cause the debtor to make excessively high payments to creditors, in proportion to the debtor's income.[62] The details of this income ratio are to be specified in secondary legislation. Further, the reforms gave a power to the Australian Official Receiver to refuse to accept a debt agreement proposal where the Official Receiver considers that complying with the terms of the proposal would cause the debtor undue hardship.[63] One stakeholder noted that under the Scottish Debt Arrangement Scheme (DAS), the "DAS Administrator" (the Scottish Accountant in Bankruptcy) has legislative power to impose a debt payment programme where creditors have refused to accept a debtor's proposed repayment plan, provided that the programme is "fair and reasonable".[64] The context of the DAS is quite different from insolvency procedures, however, and limited lessons can be drawn from comparisons with this mechanism. The DAS does not reflect principles of modern insolvency policy and offers no debt relief, instead requiring that debtors make full repayment of debts

[59] For discussion of the question of transparency in the calculation of debtors' surplus income, and comparative approaches to this issue in other countries, see Joseph Spooner, 'Holding Money & Debt up to the Light: The Case for Transparency in the Standard Financial Statement · Debt Camel' (*Debt Camel*, 17 September 2019) <https://debtcamel.co.uk/transparency-standard-financial-statement/> accessed 5 March 2020.

[60] 'Comprehensive Reform of the Debt Agreement System' <https://www.attorneygeneral.gov.au/Media/Pages/Comprehensive-reform-of-the-debt-agreement-system-12-February-2018.aspx> accessed 21 November 2018.

[61] Bankruptcy Act 1966, s. 185C(2AA).

[62] Bankruptcy Act 1966, s. 185C(4)(e). The payment-to-income formula operates so as to prevent a proposal coming into effect that would involve total payments under the proposal exceeding the debtor's total after-tax annual income by a certain percentage. The relevant percentage is to be determined by secondary legislation.

[63] Bankruptcy Act 1966, s. 185E(2AB).

[64] Debt Arrangement Scheme (Scotland) Regulations 2011, reg. 25(1).

owed to creditors over very long periods of time (apparently on average seven years, but often much longer).[65]

4. Choice and Responsibility in Navigating Insolvency Options

The workshop group largely supported the idea that, in principle, debtors should have a choice of personal insolvency procedure, and that the autonomy of debtors should be respected. Nonetheless, participants expressed some concerns as to the reality of an idea of debtor choice, given such factors as

- The complexity of the insolvency system, which means that it is generally impossible for debtors to be fully informed of all relevant factors (as discussed in the previous section).
- The tendency for intermediaries to shape debtor choices.
- Constraints placed on debtor choice by factors such as stigma, absences of transparency (e.g. in relation to credit reporting) and shortcomings in existing procedures (e.g. insufficient protections for certain assets etc.).

(A) Responsibility and Liability for Choice of Personal Insolvency Procedure

Workshop discussion noted that the issue of the 'choice' or 'decision' regarding the suitable insolvency procedure in each case raises the related question of the allocation of *responsibility* for this choice or decision in the event of inappropriate outcomes. If the system is to be based on a principle that a debtor exercises a choice in selecting a personal insolvency procedure, this should not absolve a debtor's adviser from responsibility for recommending such procedure. Scepticism was raised as to the reality of a model under which a debtor becomes fully informed through an advice process, such that the debtor can then make a choice independent of the views of the adviser. For example, it was considered impossible for debtors to weigh up coherently such factors as the different legal rules, relative stigma, and risk of failure under each procedure. In effect, advisers tend to lead debtors towards the choice of an insolvency option. This means that advisers should be responsible and liable where an inappropriate solution has been recommended and should be liable to pay redress when negative outcomes result for the debtor. It was noted that redress is available to harmed consumers in relation to products and services falling within the FCA regulatory regimes and the jurisdiction of the Financial Ombudsman Service (FOS). In contrast, at present there is no provision of redress for consumers harmed by conduct of IPs and IVA firms under the Recognised Professional Bodies self-regulation system.[66] This shortcoming was noted in the previous government's commitment to conduct work on the establishment of a system of

[65] The third largest provider of services under the DAS (and largest not-for-profit provider) indicates that it applies for debt payment programmes where they would extend up to a period of *twenty* years: https://www.stepchange.org/debt-info/debt-arrangement-scheme-or-dmp.aspx

[66] IPs are also immune from general civil liability in respect of the performance of certain of their statutory functions: *Irvine v Duff & Phelps Ltd [2019] EWHC 2780 (Ch)* (n 53).

redress as part of the ongoing review of the regulation of the insolvency profession.[67] Workshop members were in favour of a consistent and comprehensive approach to the responsibility of intermediaries, such that compensation is available where advice causes consumer harm. Participants encouraged the government to accelerate relevant work on the establishment of a redress system.

(B) Constraints on Debtor Choice: Alleviating Stigma and Addressing Uncertainties

Participants discussed factors that influence debtors' choices of personal insolvency procedures and noted that such factors are often not related to the benefits or advantages involved in the procedure ultimately chosen. Firstly, participants noted that stigma continues to play an important role in shaping decisions. For example, debtors for whom the DRO would seem an excellent solution will sometimes refuse to enter that procedure due to a sense of shame and stigma. These individuals may then try to make payments under a Debt Management Plan (DMP) or IVA, even if such option is not appropriate. While acknowledging that alleviating stigma is a particularly difficult challenge due to the historical and cultural nature of this problem, contributors noted that efforts should be made to use less stigmatising language in the insolvency system – the perceived lesser stigma associated with the DRO procedure compared to Bankruptcy was noted as evidence of the success that alternative language can have in reducing stigma. It was suggested that it would be important to test different forms of language, and to obtain the views of users of the personal insolvency system regarding stigmatising effects of current language and procedures. The availability of high-quality empathetic advice was also suggested as a means of alleviating stigma. In contrast, it was suggested that intermediaries who have incentives to recommend IVAs might present perspectives of Bankruptcy and DROs that exacerbate stigma and anxieties surrounding these latter procedures. Another area of the law identified as contributing to stigma was the range of sanctions and disqualifications applicable to debtors in insolvency. One participant noted the often-condemnatory tone of Bankruptcy Restriction Order/Undertaking announcements, particularly in relation to issues such as gambling, which are now recognised as warranting sensitive and nuanced treatment.

Relatedly, the potential impact of insolvency procedures on debtors' employment was also raised. Participants discussed how a range of disqualifications on holding certain employments, offices, or professional qualifications can apply to debtors in insolvency procedures.[68] One participant noted that many disqualifications are contained not in legislation, but rather in the rules of professional associations and licensing bodies. Other disqualifications are contained in various sectoral legislation falling within the remit of a range of different government departments. Often these disqualifications and restrictions are accepted as being outdated and potentially founded upon historical prejudices regarding insolvency, rather than coherent contemporary justifications. Several participants nonetheless acknowledged the logistical difficulties of removing all disqualifications, given the range of legislative and other provisions involved. Suggestions were proposed as to potential specific legislative measures prohibiting

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[67] The Insolvency Service, 'The Future of Insolvency Regulation: Government Response' (2023) Consultation Outcome.

[68] See the discussions in Spooner, *Bankruptcy* (n 3) 227–256; Katharina Moser, 'Restrictions after Personal Insolvency' 2013 Journal of Business Law 679; John Tribe, 'Parliamentarians and Bankruptcy: The Disqualification of MPs and Peers from Sitting in the Palace of Westminster' (2014) 25 King's Law Journal 79.

discrimination on the grounds of insolvency in employment, in the awarding of professional qualifications, and/or in appointments to public office.[69] A related issue was identified regarding potential discrimination in housing rental markets against individuals who have been through Bankruptcy, and whether legislative measures could be adopted to prevent this discrimination.

It was also noted that the unrealistic approach to assets in the Bankruptcy procedure has diverted certain debtors from this procedure when it would otherwise be appropriate. One participant noted that the IVA procedure has allowed a more realistic approach to be taken to the debtor's home, and that this may have led to increased usage of IVAs among homeowners (though noting also that a large number of debtors using the IVA procedure do not own their homes). Reference was also made to the uncertainty regarding the treatment of pension savings in Bankruptcy in recent years,[70] and how this may have deterred some debtors from entering the otherwise suitable solution of Bankruptcy. Clashes have arisen between public policy interests in relation to insolvency and other areas such as housing and retirement. Often these policy clashes have been left unresolved, and law reform would be beneficial in finding appropriate solutions to these problems, involving more appropriate and realistic protections of important debtor assets in Bankruptcy.

Multiple participants also identified as a very significant factor the potential or perceived impact of insolvency on debtors' credit histories and credit scores.[71] In particular, participants emphasised the significant lack of transparency (for debtors and even their advisers) regarding the effects of an individual's insolvency on such person's credit history or credit score. It was accepted that far greater clarity is required in relation this question. One contributor noted that their debt advice agency had found that worries regarding potential impacts on credit histories were a primary factor in clients delaying seeking advice and engaging with creditors. Even after receiving advice, clients frequently delayed in acting on such advice and entering a solution, due to concerns regarding potential impact on their credit histories. It was suggested that debtors may carry assumptions that one procedure (e.g. an IVA) is more beneficial from a credit history perspective, when it is currently extremely difficult to verify whether this is indeed the case. It is impossible for debtors to weigh up the costs and benefits of personal insolvency procedures when key information regarding a factor like the impact on credit scores is not clearly available. The importance of credit histories to debtors' decision-making was noted, as well as the broad range of market applications of credit scores in the UK – stretching to housing markets, employment applications, access to basic communication services etc. Contrasting methods for addressing this question were noted, such as the Australian approach under which the duration for which insolvencies may stay on an individual's credit file is not merely decided by market practice (as in the UK) but rather is regulated by statute.[72] The recent FCA study of the credit information market was noted.[73]

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[69] Note that a major World Bank report on personal insolvency identifies a principle of non-discrimination as an important element of debtor rehabilitation through insolvency: World Bank, *Report on the Treatment of the Insolvency of Natural Persons* (2013) 118–119, 142.

[70] See *Raithatha (as Trustee in Bankruptcy of Michael Roy Williamson) v Williamson* [2012] High Court of Justice, England and Wales [2012] EWHC 909 (Ch), [2012] 1 WLR 3559; effectively overturned by *Horton v Henry* [2016] EWCA Civ 989 (Court of Appeal (Civil Division)).

[71] Spooner, *Bankruptcy* (n 3) 261–267.

[72] *Privacy Act 1988* (Cth) s. 20X(1).

[73] Financial Conduct Authority, 'MS19/1.3: Credit Information Market Study Final Report' (Financial Conduct Authority 2023) <https://www.fca.org.uk/publications/market-studies/ms19-1-credit-information-market-study> accessed 31 July 2023.

5. Creditor Protections

All stakeholders recognised that streamlining the routes into insolvency is necessary and appropriate in most cases, which generally involve honest debtors who have fallen into financial difficulty. A theme raised by stakeholders concerned with creditor protections was that robust safeguards must be in place to deal with other types of cases – including those of well-resourced debtors who seek to conceal their true financial situation when entering insolvency, or debtors engaged in outright misconduct and fraud. The working group discussed means of ensuring that creditor interests are appropriately protected, through the residual role of involuntary Bankruptcy, and the appropriate administration and supervision of all procedures.

(A) The Residual Role of Involuntary Insolvency

The workshop group expressed general acceptance of the need for a residual role for involuntary insolvency (i.e. Bankruptcy commenced via creditor petition), with equal acceptance that this procedure is only to be used in rare cases. It was universally agreed that the creditor petition procedure in Bankruptcy should remain as a court-based procedure.

One participant representing creditors expressed the position that clients are generally advised that Bankruptcy, and personal insolvency, are not methods of debt collection.[74] It was noted that Bankruptcy is a collective remedy for creditors as a whole, rather than a debt collection tool for an individual creditor. It was also noted that Bankruptcy of course involves the discharge of the debtor's obligations, which can reduce, rather than enhance, returns to an individual creditor. Generally, creditors will consider petitioning for a debtor's Bankruptcy only when it is clear that the debtor has significant assets but is making no reasonable attempt to offer debt repayment. Bankruptcy may be used as a last resort when a well-resourced debtor is deliberately refusing to cooperate and make repayments. This may be particularly important in cases such as those involving deliberate non-compliance with tax law. It was also explained that Bankruptcy offers specialised tools and processes for the recovery of hidden or inappropriately transferred assets, in cases of inappropriate debtor conduct where efforts have been made to put assets out of the reach of creditors. In other cases, alternative approaches are adopted - including methods of working with debtors to encourage repayment or deploying different legal tools such as obtaining County Court Judgments (CCJs) and charging orders against debtors.

Stakeholders commented that concerns regarding the potentially disproportionate or abusive use of statutory demands and creditor bankruptcy petitions were more widespread in the past, and there is a sense that such practices are less common at present. The increase of the monetary threshold for creditor petitions to £5,000 in 2022 was cited as a positive development in this regard, as were efforts by regulatory bodies to ensure that creditors use bankruptcy in a proportionate manner.[75] It was noted that the debt threshold for creditor petitions does not consider a debtor's income and/or asset levels, even though these factors may be relevant to

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[74] One creditor organisation provided detailed information regarding their various debt management practices, and we are very grateful for this input. Detail has not been reproduced in this report, in the interests of ensuring that comments remain unattributed to particular contributors.
[75] See e.g. Local Government Ombudsman, 'Can't Pay? Won't Pay? Using Bankruptcy for Council Tax Debts' (Local Government Ombudsman 2011).

the question of whether Bankruptcy proceeding are appropriate and proportionate. This contrasts with the DRO eligibility criteria, for example, which are based on the income, assets, and total included debt levels of the debtor.

(B) Administration and Supervision of Personal Insolvency Procedures

It was noted that all insolvency applications rely on debtors providing full and frank statements of their financial affairs, and that appropriate mechanisms should be in place to verify this information. Creditor representatives highlighted the important role of the respective supervisors and administrators of personal insolvency procedures. This led to discussion of the complicated and somewhat inconsistent approach to oversight and supervision under current personal insolvency procedures. One contributor noted that the intermediaries under current procedures perform multiple functions. For example, under the DRO procedure, an authorised intermediary advises the debtor and assists the debtor in preparing an application, but also acts as a gatekeeper in determining whether or not a debtor meets the eligibility criteria for a DRO.[76] This latter function relates more to the protection of creditors than consumer protection – the role of the authorised intermediary in verifying DRO applications adds to the integrity and trust of the procedure. It was noted that the process of verifying DRO proposals by authorised intermediaries is generally accepted as operating well, and that there are few DRO applications rejected by the Official Receiver as inappropriate. The dual roles of debt advisers in performing their "quasi-judicial role" under the Debt Respite/'Breathing Space' scheme was also discussed in this context. Participants noted the need for the development of training and processes when new duties are being assigned to actors previously performing different roles and functions. This highlighted the challenges involved in establishing appropriate vetting and oversight of personal insolvency applications under any proposed new routes into insolvency.

As noted above, the IVA procedure involves an IP who both advises the debtor, but also protects creditors by ensuring that a proposal represents a reasonable contribution to creditors based on the debtor's resources. A suggestion was raised as to whether the law should return to the original position under the Insolvency Act 1986 where an IP was not an adviser, but a neutral broker between independently advised debtors and creditors. This might involve a more distinctive definition of the current twin roles of 'nominee' and 'supervisor', such as making an IP responsible for verifying proposals and administering arrangements but removing the IP's capacity to offer advice. Duties falling into the 'supervisor' role might remain within the current insolvency regulatory framework, with pre-arrangement duties falling into an advice regulatory regime. The suggestion presented in Part 3(C) above, under which IVA proposals would be verified and approved by the Insolvency Service under a 'fair and reasonable' test, was offered as another solution to this perceived problem.

Outside of the question of verification of personal insolvency applications, participants representing creditor interests also emphasised that similarly robust safeguards should be in place in relation to the supervision and administration of cases once a debtor has entered an insolvency procedure. There was universal agreement across the workshop group that such safeguards are appropriate for addressing the small minority of cases in which debtors conceal resources or otherwise engage in misconduct.

[76] This contrasts with entry to Bankruptcy, where a public official (the Adjudicator) determines whether a debtor's application satisfies the requirements for entering the procedure.