INSOLVENCY LAW REVIEW COMMITTEE

INTERIM REPORT - BRIEF NO 1

A. Some General Notes by T R Penny

1 We must first consider what we understand to be the purpose of the Interim Report.

2 It seems to me that it is being submitted at the request of the Minister in the light of proposals to reduce the extent to which the Insolvency Service is involved in bankruptcy matters.

3 This proposal is entirely contrary to our way of thinking and our purpose would appear to be to persuade the Government either to stay its hand until our full Report is out or to modify its proposals to permit the continuation of the role of the Official Receiver in individual insolvency procedures but in a substantially reduced number of cases. To effect such reduction, we put forward other alternative procedures to deal with the bulk of the cases.

4 If we are to succeed in these objectives we must:

Time Scales

(a) Prove the continuing need for investigation and administration of selected estates by a Public Official.

(b) Make proposals to ensure that administration by a Public Official is confined to such estates as justify it in the public interest. How ascertained

(c) Provide alternative procedures which are effective to deal with all cases of personal insolvency not falling within (b) above.

5 The draft Interim Report deals very adequately with (a) above.

6 With regard to (b) our proposals provide for cases in which the public interest requires a full investigation but they also include the residue of cases in which less severe forms of administration have proved ineffective because of lack of co-operation from the debtor. In other words full bankruptcy is to continue to be used as the long stop method of enforcement of judgments. If my premise on the Government's intentions is correct, it seems very unlikely that this will be acceptable, and all our proposals may fall because of it. We have to decide whether this is a matter which we must take into account at this stage.

7 In relation to (c) I submit that the details of alternative procedures are too brief to be persuasive.

(i) The proposals for the DAO make no provision for dealing with the problem of the self-employed debtor.

(ii) There are no new sanctions for the DAO save the right to invoke full bankruptcy. This I have suggested is bound to be unpopular.

(iii) The suggestions for voluntary arrangements do not specify our proposals for overcoming the problem of the dissenting creditor. We must spell out the right of the majority of the creditors to bind dissentients subject to the latter's right to apply to the court to set the arrangement aside.

(iv) I understood we were agreed that so long as a Debts Arrangement Order or a Voluntary Arrangement were being complied with, there should be a stay on all creditors listed, preventing them from taking any enforcement proceedings or filing a petition in insolvency in respect of the relevant debt.

8 Our proposals for Liquidation of Assets is still embryonic but I think we should try to put a little flesh on the skeleton by saying that there would be no public examination, no proceedings in open court and no formal procedure for discharge.

B. General remarks by Mr A I F Goldman

1 The part dealing with the compulsory insolvency process (Chapter II, paras 19-24) is a bit thin on the ground. I appreciate this is because we still have to reach decisions on subject matter, but could anything be added?

2 Perhaps something should be added to Chapter II, para 26 about penalties for creditors who abuse the system.

3 Perhaps a concluding para is required.

C. General remarks by Mr D McNab

1 I am concerned that we don't give the impression that all retailers are wanting to put people into financial difficulty by selling them goods which they cannot pay for. Naturally all firms want to increase their trade but not by way of "bad debts". There are one or two firms who sell on credit at very high rates of interest, but these are the exception.

2 I am not happy about always giving the impression that the consumer debtor is to be pitied and treated with compassion (Chapter I, para 14). The man dealing with debts in the London Co-op recently told me that in the majority of cases the debtor just couldn't care less. They buy goods on credit knowing that they will be unable to pay. They have no surplus income and if an order is made it is seldom completed as the amount has to be paid off over a lengthy period. I think it might be advisable for the Committee or the sub-committee to consider in more detail consumer credit.

D. Note by Secretary

A further brief, or briefs will follow shortly.

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INSOLVENCY LAW REVIEW COMMITTEE

INTERIM REPORT - BRIEF NO 2

General observations by Muir Hunter

Having unavoidably missed the meeting on 18th September, and having only returned to England on 3rd October, I have only just seen the Departmental letter, the minutes of that meeting, and the draft Report. I have some general views on the whole situation, some of which I should like to see incorporated in or referred to in the Interim Report.

(1) With all respect to the Minister and Deputy Secretary Brown, it is not clear to me what immediate practical connection there can be between the Government's present and urgent desire to reduce civil service manpower and expenditure (which it is their duty and privilege to decide, and which I respectfully support in principle), and the Committee's proposed reforms. These two processes operate on two entirely different time-scales.

(2) If the Government ultimately - say in 4/5 years time - should adopt and enact our main proposals, it will then become necessary to consider what element of "public service" will be necessary to retain, or to establish de novo, in order to make them work as planned, and whether such public service element should be wholly or partially self-financing - the latter being now the case.

(3) The only apparent connection between these two processes is that if the Government were now to decide to abolish the Official Receivers in Bankruptcy, then either (1) our proposals (to the extent that they were at least

partially dependent upon a public service element) would become wholly nugatory, or (2) it would be necessary to recreate the service, or to re-expand it from its surviving remains.

(4) The abolition of the Official Receivers in Bankruptcy would, of course, entail substantial amendments to the Bankruptcy Act by reason of the statutory duties imposed on those Officers and on the Secretary of State and upon the Registrars. This would entail legislation, no doubt likely to be contentious. It would of itself require a considerable effort - for our Committee perhaps - to devise a "non-Official Receiver" structure for bankruptcy (old-style), to operate in the interim from now until our Report is brought into force.

(5) As regards the suggestion that the Official Receivers in Winding-Up could be retained, because they are a "profitable" sector, this offends against one of our central theses, both as to harmonisation of the two codes and as to the often accidental determination, whether the debtor is an individual or a company.

(6) We have not yet been supplied by the Department nor by Chris Taylor, with any detailed evidence as to the internal structure, distribution of work and expenses of the Official Receiver Service generally. Deputy Secretary Brown, however, must have some such document before him. Could we not see it?

(7) We have frequently raised and discussed this question of the public-financing, <u>as a public policy matter</u>, of the Insolvency Service as a whole, but we have not yet received any evidence or views thereon from the Department or the Treasury. Is this a closed subject?

(8) If Official Receivers in Bankruptcy are to be abolished, could some of their functions be performed without direct major Government expense, by reviving the old "non-Official" Official Receivers (Solicitors), some of whom were still operating before 1939? They were remunerated by fees. Whether suitable solicitors could be obtained at any realistic fee-income figure cannot at present be predicted.

8th, October, 1979.

INSOLVENCY LAW REVIEW COMMITTEE

INTERIM REPORT - BRIEF NO 3

Members' comments and proposed amendments

(A) General remarks

Peter Avis has asked me to record that, whilst appreciating fully the pressures now being brought upon the Committee for an interim report, he very much regrets that we are obliged to submit even these preliminary views without the benefit of a full committee discussion on the recommendations put forward by the Penny sub-committee.

(B) Introductory

Para.7. Peter suggests we add:
"However it must not be overlooked that the changes we contemplate would of necessity involve some increase in the work load of the courts."
[Note by Secretary - if we say anything at all perhaps it would be prudent simply to add to the existing paragraph, "A smaller increase may be required in the number of County Court staff."]

(C) Chapter I

Para.2. Re-draft by Peter Avis which reverses the order of the objectives:
"The policy behind existing bankruptcy legislation seeks to give expression to basic objectives which, in our opinion, are fundamental to good insolvency law. On the one hand there must be provided adequate machinery for the speedy administration of the debtor's estate by an honest and competent trustee for the benefit of the creditors generally, involving the realisation of the assets and the distribution of the proceeds in accordance with a scheme of priorities generally recognised to be fair and just. On the other hand, the aim is to protect the debtor from pursuit by his creditors individually, and, having given him relief from the burdens of his debt, to provide for his rehabilitation in due course if the circumstances of his case are appropriate."

Para.4. Duncan says that the final sentence does not make sense and requires re-writing.
[Suggest we amend the last 1½ lines to read:
"....and which is provided for, not in the Bankruptcy Act, but in the County Courts Acts."]

Para.7. Peter Millett suggests that the last sentence should be deleted.

Para.8. (line 7) Ritchie suggests amending
"which is accepted by the court" to read
"which the court is obliged to accept."

Para.11. Add to end of para:
"We consider it to be wrong in principle for legislation to encourage resort to inappropriate proceedings, and propose to recommend amending legislation accordingly."
(Peter Millett).

Para.14 Duncan objects to "compassion".

Para.15 Gerry feels that the content of this para should be played down. Peter Millett's proposed amendment may suffice, viz: line 5, after "Government departments."
"He is often an involuntary tax collector, receiving and deducting tax for which he is subsequently accountable. The credit he thus receives is not of his choosing and is sometimes beyond his ability to manage. Some of the failures of small traders arise.....etc."

Para.16 (line 8). Ritchie suggests we add, after "present Bankruptcy Act":
"There are debtors whose actions give rise to a deep sense of public outrage which can only be assuaged by a public questioning of the debtor conducted by a disinterested public servant."

Para.17 (line8). Alfred suggests:
"enhanced degree of personal and financial responsibility."

Para.17. Amend last sentence to read:
"Our recommendations will involve an enhanced degree of personal responsibility for delinquent directors and this may lead to the imposition upon them, in addition to an obligation to make financial compensation, penalties and disabilities akin to those which we envisage for bankrupts where there has been wrongful trading in relation to a company which has failed."
(Peter Avis).

Para.17. Ritchie questions whether we have agreed to do what is set out in the final sentence.

Para.19. Gerry feels the para slightly overstates the case. Some small improvements have been made to the para.

Para.23 (towards the end). Ritchie suggests the inclusion after "or even worse" of
"or the case otherwise is a matter of public concern."

Para.23 (last 2 lines). Ritchie has doubts about this.

Para.4 (lines 9 to 12)	Chris feels that this is divisive.
Para.5	Edward suggests deletion of: "and the erosion of the value of money" as not being relevant.
Para.8	Chris questions the first sentence.
Para.9 (top of p.4)	Edward suggests: "In that year there were about 7,000 compared with - in 19--. The consequence was a heavy burden on the courts and the Official Receivers and their staffs." [Accept].
Para.10 (last part)	Chris says that the object of the 1976 Act was to restore the position, not necessarily to limit creditors' petitions, and he asks if an increase can be demonstrated. [I think it can - we have figures from at least one Government department showing increases in petitions presented over the years 1976,77 and 78.]
Para.11	Gerry would like the following added after "bankruptcy proceedings":- "Those creditors whose supply to their debtor was subject to VAT are now assured of a return of 15 per cent of their debt, but only if their debtor goes through the full paraphernalia of bankruptcy, and irrespective of the quantum of the debtor's own assets."
Para.22	Add a final sentence: "Thus, in short, the working party recognised the need for some institution fulfilling the role of the Official Receivers service."

(D) Chapter II

Para.1. Peter Avis suggests adding to the end of the para "in which we use the new terms we would suggest for each procedure."

Para.2. Peter Avis suggests deleting the sub-heading and referring to the new DAO later.

Para.3(d). John Hunter suggests adding:
"unless a condition to this effect is written into the order: if so, breach is a ground for revocation. Formerly, the Administration Order Rules expressly provided that the order may be rescinded if the debtor obtained credit over £10 without disclosing the administration order."

Para 3(e). New sub-para from Ritchie:
"(e) the staff allowance for work on such orders is so low. County Court staffs discourage applications for orders and are unable to give time to ensure that they are efficiently supervised. Consequently there is no pursuit of the defaulting debtor."

Para.6. John Copp says it is not clear what a DAO actually does. Perhaps this is answered to some extent by Peter Avis's proposed 6(1) below.

6 Re-draft by Peter Avis:
"A summary of our proposals for this improved procedure is as follows:-

(1) The procedure revolves round a new court order which we would term Debts Arrangement Order (DAO) and which would replace the present administration order.

(2) To come within the new procedure the maximum total unsecured indebtedness of the debtor would not exceed £10,000 (the present limit for an Administration Order is £2,000).

(3) The new procedure would not be available where the unsecured liabilities were less than the minimum required for other insolvency proceedings (at present £500).

(4) Any debtor whose total liabilities fell within the limits laid down should be entitled to apply to the court for a DAO."

(Then continue as at top of page 3).

Para.6(1) (or new 6(2)) John Copp dislikes arbitrary limits and says that size (of liabilities) should be a factor in considering whether to make a DAO, but not a reason for necessarily refusing one.
[Note by Secretary - The Penny sub-committee wish to retain a top limit of £10,000 in respect of applications for a DAO; but they have agreed that where the court is hearing a petition for insolvency proceedings and the court is of the view that a DAO would be appropriate, the £10,000 limit need not apply. I suggest an additional sub-para under 6:
"Where a petition for compulsory insolvency proceedings has been presented (see para below) the court should have discretion to make a DAO notwithstanding that the liabilities exceed £10,000 if, in the opinion of the court, such an order would be appropriate. This proviso should enable DAO's to be made in many cases where there are few, if any, tangible realisable assets, and which at present fall to be dealt with in bankruptcy by the Official Receiver."]

Para.6(6) John Hunter suggests expanding the note in brackets:
"(There is no limit under the present system; until 197 the County Court Rules limited the duration of an Administration Order to 10 years)."

Para 6(9) Duncan thinks "post-order creditors" could be misconstrued.
[Perhaps we could amend it to read:
"Unlike the present system, there should be no provision for adding any person who after the date of the order became a creditor of the debtor."]

Para.6(11) New sub-para by Ritchie:
"(11) In making the order the court will have power to provide for instalments at such level as will result in payment of less than 100p in the £ over the period of the order. If the debtor complies with the terms of the order it would result in his being completely discharged from the debts listed."

Para.6(12) New sub-para by Ritchie:
"(12) So long as a DAO is in existence no petition for insolvency may be presented."
[I don't think this is quite correct.]

Para.6(13) New sub-para by Ritchie:
"(13) The DAO is not intended for the debtor with realisable assets, unless they are such that the court is happy to allow the debtor to effect realisation thereof on terms that the net proceeds are paid over to the court officer administering the order in reduction of the amount due to the creditors. Such orders are particularly intended for the debtor who has surplus income which enables

Cf which will result in distribution?

him to pay periodic instalments for the benefit of his creditors."

Para.6(14) /Note by Secretary: The Penny sub-committee have now agreed the following which I suggest be added to para.6:
"In the event of the debtor failing (or "if the debtor fails") to comply with the terms of the DAO, the administrator should refer the matter to the court for a decision as to whether or not the debtor's conduct amounted to a contempt of court."/

Para.7 (on Page 5)

(a) Alfred points out that the sentence referring to 2,500 receiving orders, etc, is inaccurate.

(b) Duncan dislikes the final sentence regarding consumer debtors getting into financial difficulty through being unable to cope with the lure of credit offers.

(c) John Copp asks (with regard to paras 7 and 8) how many AO's are made at present.

/Note by Secretary - suggested re-draft of para.7:
"The procedure which is outlined above should appeal to most ~~if not all~~ debtors who at present file their own petitions in bankruptcy or who are the subject of small bankruptcies generally. It should provide relief at an early stage for the increasingly large number of consumer debtors who become seriously over-burdened by debts they cannot immediately repay, particularly where the debtor is affected by some unforeseen catastrophe. We think that the revised procedure will appeal also to many creditors who hitherto have not been attracted by existing insolvency proceedings. We estimate that there could be as many as 10,000 DAO's a year, as against the present average of about 2,000 administration orders."/

Para.7A Ritchie says that there is no indication of improved enforcement in the Interim Report.

Para.8 Re-draft by Peter Avis:
"The expected number of DAO's as compared with the number of AO's presently being made would be substantially greater and would involve an increase in the work of County Court clerical staff, but we believe that there should be a substantial reduction in the work of the Official Receiver's service and of other County Court staff such as bailiffs."

Para.9 John Copp queries whether we can correctly call the new system "voluntary" if the debtor is subject to compulsory powers.

Para.15 Proposals by Peter Millett:
"We envisage that there will no longer be a need for the absolute right of a creditor to insist on full bankruptcy and although we do not propose

taking away a creditor's right to petition, we consider that the court should have power to have regard to the views of the majority of the creditors."

Para.15 By Peter Avis:
"We envisage that there will no longer be a need for the absolute right of a creditor to insist on full bankruptcy. We are considering recommending that this right should not be available in a case where a "deed" has been approved by a certain proportion of creditors."

Para.15 Alfred suggests adding
"as in compulsory winding up" to the end of the para.

Para.20 John Copp feels that we should clarify the real difference between this procedure and a DAO.

Para.23 (line 7) Ritchie suggests adding:
"or the public interest" after "debtor's conduct".

Para.23 (last line) Peter Avis would like: "including misconduct as a director of a company" added after the word "misconduct".

Paras 26 and 27 Peter Millett suggests adding to the end of 26:
"We should like to see a greater degree of harmonisation in the commencement of insolvency proceedings for individual and corporate debtors."
Deleting the rest of 27.

Para.4. Edward suggests amending last sentence:
"They are unable to abandon individual pursuit of the debtor as in bankruptcy because the order might well be rescinded, returning them to the status ante quo."
(Accept).

Para.6(10) Edward feels that "beyond the bankruptcy figure" should be amplified.

Para.12 Edward questions the meaning of line 6.

Chris suggests we refer to the major improvement proposed by Blagden.

Para.18 Chris says that so far as the I.G. is concerned this is not so; he is the Registrar, deals with many complaints and there are numerous prosecutions concerning Deeds of Arrangement.

(E) Geoffrey Drain accepts the Interim Report.

(F) General observations by Edward:-

"I have the following additional comments and you will see that my amended draft makes reference to the numbered points in this letter.

(1) I do not think that we should assume that the reader knows what an administration order involves. There needs to be inserted after paragraph 2 of Chapter II a short statement of the principal features of the AO.

(2) I do not believe that we can summarise "our proposals" for a DAO. The members of the main Committee have not yet seen the paper prepared by Ritchie Penny's Committee and the proposals in that paper have not yet been debated.

In my view we should give a far more general account of the way in which our thinking is proceeding as regards expanding and improving the AO and leave ourselves room to get the detail right, and indeed change our minds, if necessary.

(3) I do not understand why we need to insert point 5 of the Summary in paragraph 6. It does not seem to me to add anything to point 4 and I cannot see why we need to refer to co-operation from the debtor and the provision of information in the case of one type of creditor application, and not in another.

(4) Point 8 of the Summary of the proposals as regards the DAO contemplates the Court acting "of its own motion". I think this raises very serious questions, particularly as to the level and calibre of staffing in the County Court, and the part played by the County Court, and emphasises why I am extremely nervous at the prospect of our going firm on detail without the benefit of debate, argument and counter-argument.

(5) Again, I do not understand from point 9 how post-order creditors are to fit into the overall scheme. What can they do to collect their debts? It is difficult to understand the usefulness of the DAO in the context of our overall proposals on insolvency procedures if one does not understand how and where the later creditors feature.

(6) It seems to me that the description of the DAO fails to get to the substance of what it is about.

(a) What does the debtor have to do: and what happens if he does not do it?

(b) What happens to the creditors and their individual powers; particularly to those creditors not party to the application for the DAO?

(c) What is the administrative machinery?

(7) I think there is some inconsistency between paragraph 23 of Chapter I and paragraph 23 of Chapter II. Will the size of liabilities compared to assets, of itself, warrant immediate bankruptcy?

I think the flexibility of the system should be given emphasis: in particular the switch into full bankruptcy at any time if subsequent disclosures or events warrant it.

(8) In my view this interim report should be restricted, rigorously, to the particular point addressed to us by the Government. There is no need to state any of the ancillary matters and it is dangerous so to do since we are far from making up our minds.

My general comment is that I would like to see Chapter II made far less detailed."