

# INSOLVENCY SERVICE REFORMING DEBTOR PETITION & EARLY DISCHARGE CONSULTATION PAPER

Response by the Money Advice Trust (February 2010)



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# INTRODUCTION

## About the Money Advice Trust

The Money Advice Trust (MAT) is a charity formed in 1991 to increase the quality and availability of money advice in the UK. We work with the UK's leading money advice agencies, government and the private sector to increase the availability of money advice, improve its quality, and enhance the efficiency and effectiveness of its delivery.

MAT's vision is to reduce levels of unmanageable debt by:

- Ensuring high-quality money advice through training and support for advisers
- Collecting and disseminating information on debt, credit and the money advice sector
- Improving efficiency and effectiveness within the money advice sector via research and policy work
- Providing advice via National Debtline and Business Debtline
- Raising funds for the sector.

## How we have drawn up this response

In preparing this response, we have consulted our partner agencies in the free-to-client money advice sector in order to achieve a consensus view. These partners include:

- Advice NI
- Advice UK
- Citizens Advice
- Citizens Advice Northern Ireland
- Citizens Advice Scotland
- Institute of Money Advisers
- Money Advice Scotland
- National Debtline and Business Debtline
- Payplan.

Some of these partner agencies will also submit their own separate responses to this consultation paper. These submissions may include issues not covered below. Please note, our partner agencies may not have provided views on this response where this consultation paper does not cover their specific jurisdiction.

Please note that we consent to public disclosure of this response.

## Responses to individual questions

### **Question 1 What skills and experience do you think it is appropriate that a Decision Maker should have in order to make bankruptcy orders administratively?**

We are unable to give specifics as to the skills and experience necessary for the Decision Maker role to function effectively. Clearly, the role will require considerable experience in bankruptcy decision-making and expertise in bankruptcy legislation and rules. We feel that the Insolvency Service would be best placed to make this judgement.

### **Question 2 Should the Decision Maker role sit within The Insolvency Service or elsewhere?**

We support the proposal that the Decision Maker role should sit within the Insolvency Service. As long as this role is a separate function to the role of the official receiver who will deal with the post-bankruptcy administration, we do not see a conflict of interest here.

We are also unable to identify a suitable alternative body that would be appropriate to host the role of Decision Maker. If this is envisaged to be a centralised function, then there would be no advantage for locating Decision Makers in local courts or Official Receiver's offices.

### **Question 3 What links should there be between the Decision Maker and other bodies?**

In order for the Decision Maker to function at an optimum level, we would suggest they would need electronic links into HMRC and DWP systems to establish identity, as well as the appropriate bodies to establish the applicant's Centre of Main Interest is in England and Wales.

We would also suggest links to the main not-for-profit free, independent debt advice providers would be crucial to develop partnerships and appropriate referral protocols.

**Question 4** **Would a requirement on debtor applicants, to confirm both that the consequences of bankruptcy have been read and understood and that they still want to submit the application, be sufficient to ensure that those who apply for their own bankruptcy appreciate the seriousness of taking this step?**

We agree that this requirement, if presented in plain English terms would assist applicants to appreciate the seriousness of petitioning for bankruptcy. It is difficult to assess whether this measure would be enough in itself, as applicants may not completely understand the implications of what they have read, and may not even read the statement properly before signing. We strongly suggest that such a declaration should be accompanied by warnings highlighting that bankruptcy is a serious step and indicating sources of free advice that the applicant can consult before proceeding.

We would go further, and suggest that the requirement should also include an indication from the applicant that they have sought free, independent advice and its source. If the applicant indicates that they have not received advice, then at the very least a pop-up warning should encourage them to do so before they proceed with their application. Ideally, we would like to see a mechanism to prevent applicants from proceeding with the application until advice has been sought, but appreciate that this may be perceived to be a step too far.

**Question 5** **Would information about other debt relief mechanisms, provided as part of the application process, be enough to ensure that debtors have sufficient opportunity to consider whether opting for bankruptcy is the right decision for them?**

We support the inclusion of information about other debt relief mechanisms as part of the application process. However, it is complicated to identify the appropriate debt option for each individual, as this depends upon their circumstances. We would urge the Insolvency Service to include information on the whole range of options as identified in the recent publication available on the Insolvency Service website "*In debt-dealing with your creditors*" which was developed as a collaborative process with the advice sector.

<http://www.insolvency.gov.uk/pdfs/guidanceleaflets/pdf/indebt-web.pdf>

We would also like to highlight that Money Advice Trust is working on an on-line tool. This uses rule-based software for identifying debt options which are tailored to the user's individual circumstances. This is due to be launched shortly. A link to this resource would also help ensure that anyone considering bankruptcy makes the right decision and has considered the other options.

It is not clear how the role of the telephone support service is envisaged. Although we imagine that the role will concentrate on practical help on how to fill in the on-line petition, this could go further. It would be helpful for the operators to receive training in basic money advice to ensure they can identify other potential debt options. They should also be able refer callers to suitable sources of independent, free debt advice when appropriate.

### **Question 6 Should debtors be encouraged to consider alternative debt resolution procedures before submitting an application for bankruptcy?**

We consider this to be crucial to ensure that people do not go bankrupt unnecessarily where another option would have been more appropriate for them. In some cases, the decision to go bankrupt could have disastrous consequences for an individual, perhaps where they had equity in their home or other substantial assets. If they have not received appropriate advice before making the decision to go bankrupt, they could be in a considerably worse position as a result.

We therefore strongly support the proposal that people should be encouraged to consider alternative debt resolution procedures before submitting the application for bankruptcy. All suitable mechanisms for imparting this message should be employed. This could include the following:

- Signposting to sources of free, independent advice by the telephone advice team;
- Information on the on-line application form site directing potential applicants to sources of free, independent advice;
- Information on the on-line application form site on debt options;
- Links to the Insolvency Service *“In debt-dealing with your creditors”* guide;
- Links to the Money Advice Trust on-line debt options tool;
- Pop-up messages identifying suitable debt options within the on-line bankruptcy petition itself;
- Including a warning about debt options in the consequences of bankruptcy confirmation that the applicant must sign up to before submitting their application.

Clearly, the on-line application will need more sophisticated functionality if it is to include appropriate pop-up messages identifying debt options whilst the user completes the form.

## **Question 7 Is there a need for the Decision Maker to be given power to direct someone into an alternative debt relief mechanism?**

In our opinion, there is a need for the Decision Maker to be given powers to direct someone into an alternative debt relief mechanism.

We do not support the following contention in the paper:

*“We believe that it is most important to encourage such advice and that, if we put mechanisms in place that facilitate this, there would be no need for the DM to decide which remedy might be more suitable and to direct the debtor accordingly.”*

Although it is vital to put mechanisms in place to facilitate pre-emptive advice, we are not convinced that Decision Maker powers to direct applicants to alternative debt remedies would serve to *“confuse and complicate the role of a DM.”* Where it is clear that an applicant would be better placed in a debt relief order or IVA, for example, then the Decision Maker should be able to ensure that the applicant obtains the appropriate remedy. We do not see why this would be confusing or complicate the role.

## **Question 8 Should there be any exemptions or remissions of the application fee?**

Yes. In our experience, a substantial number of our clients who approach the not-for-profit free advice services find it extremely difficult to afford the bankruptcy deposit and the court fee. In many cases, the costs are such a deterrent that the client is unable to access the remedy of bankruptcy and carries on making token payments and dealing with their creditors demands. Currently, many of our clients will seek charitable help, for example from utility trust funds, towards the costs of the deposit. Such has been the demand on trust funds that many have had to impose huge restrictions on eligibility for help to avoid depleting their resources.

We cannot support a proposal to increase the amount of the deposit still further. This is already a substantial burden on our client group, which includes some of the most socially vulnerable consumers. Whilst those on certain benefits and low incomes, can currently at least apply for fee remission for the court fee element, under your proposals this ability will be lost. The burden of the increased costs in the proposed enhanced deposit will fall disproportionately on those who are least likely to be able to meet these costs.

We would argue that the whole deposit should be eligible for remission. However, at the very least, the increase in the deposit amount should be eligible for remission to ensure that the costs of the move from court to Insolvency Service administered bankruptcies do not fall upon vulnerable applicants.

We do not support the contention in the paper that:

*“Payment of the full amount should also focus the minds of applicants and ensure those who are serious about bankruptcy access the regime.”*

Our client groups are often unable to access bankruptcy as a remedy. They are not in an income bracket that allows them to decide to go bankrupt frivolously or on a whim. We do not think that the requirement to pay the full amount can have the desired effect on those in vulnerable low income groups. They are already penalised by the amount of the current deposit, and an increase can only penalise them further.

**Question 9 If yes, how would you suggest that the cost of any fees forgone could be met in order to keep the application process self-financing?**

We would suggest the fund for court fee remissions relating to bankruptcy petitions is transferred for the same purpose of offsetting the costs of the increase in the bankruptcy deposit for those who qualify for remission. This system could mirror the court fee remission rules for the sake of simplicity and consistency.

**Question 10 Do you think that there should be differential pricing of a bankruptcy application, according to whether it is made electronically or on paper?**

Whilst we appreciate that the costs of administering a paper application would be greater, it is important to look at the reasons why an application would be made on paper. It is more likely that lower-income or more potentially vulnerable groups such as the elderly would not have internet access or lack the skills to use the internet. We would suggest that an increase in the fees for a paper application would therefore be likely to hit the most disadvantaged group hardest.

We therefore support the suggestion in the paper that the costs could be reflected in a fee that is set to reflect the average cost of any application, whether made electronically or on paper. This needs again to be subject to a remission regime. See our response to question 9.

**Question 11 Should there be a facility to enable debtors to make their bankruptcy applications on paper forms?**

Yes, for the reasons outlined above. We cannot see how internet access can ever become all encompassing. There needs to remain in place a mechanism for those who need to make applications on paper, to enable them to do so. We would also suggest that further thought be given to the needs of blind and partially-sighted applicants to ensure full access to both the online and written application processes.

**Question 12 Should there be a facility to enable payment to be made on line at the same time as the application form is submitted?**

We support the provision of a facility to enable payment to be made on line at the same time as the application form is submitted.

**Question 13 Is a maximum of 10 days an appropriate period of time to allow between receipt of acknowledgement of the application and payment of the fee that covers both the cost of administering the application and the deposit?**

We are not sure why a 10 day period has been selected. If this is to give an element of breathing space for the applicant to review their decision, then it does not seem to be a sufficient time period to do so. We would suggest 14 days to be a more appropriate time period.

If the 10 day period is just to allow for payment administrative hiccups then it may be reasonable. However, it is not made explicit in the paper as to whether the applicant has 10 days to make the payment, or if the Insolvency Service must have received the payment within 10 days. We draw your attention to the Debt Relief Order guidance for Intermediaries which states in relation to fee payments:

*“Please note that once an application has been submitted, the applicant will need to ensure that their application fee has been received by the Insolvency Service Finance Department within 10 days of submission. Due to the various automated interfaces that take place, in reality the debtor will need to ensure that the application fee is paid in full on the day of submission or sooner.”*

If the system for payment of the fees for bankruptcy applications is similar, then in reality the 10 days allowed for payment of the fee as envisaged in the paper, will not exist in reality.

**Question 14 If you have answered “no” to the previous question, what period do you consider appropriate and why?**

See our answer to question 13 above. This depends upon whether the 10 days payment period exists in practice.

**Question 15 Should the application form automatically expire if payment is not made within a specified period of time?**

We are not convinced that the penalty envisaged where the application expires if payment is not received within the 10 day period is reasonable. We would support a lengthier period of grace before the applicant has to complete the petition form in its entirety. We appreciate that the information supplied on the form will become outdated over time, but a calendar month may be a more appropriate timescale.

**Question 16 Have we suggested any powers for the Decision Maker that you think are unnecessary? If so, which powers and why might they be unnecessary?**

We are unable to identify any powers that could be deemed unnecessary from the proposals in the paper.

**Question 17 Are there any additional powers that the Decision Maker should have? If so, what powers and why do you think these are necessary?**

It would be beneficial for the Decision Maker to have the power to use their discretion to extend the period of time that the debtor should be required to provide further information. This could be done on a case-by-case basis, and only where the applicant has substantial reasons why the information cannot be provided within the set timescale.

We also suggest the Decision Maker should be given the powers to direct someone into an alternative debt relief mechanism. We have outlined our reasons in our response to question 7 above.

**Question 18 Within what set period of time should a debtor be required to provide further information, after which time the application will be deemed withdrawn? Please provide reasons for your choice.**

Whilst 14 days appears reasonable, there will be information requests that it is not possible to comply with, within that time period. The Decision Maker should be given discretion to extend the period as they see fit, in individual cases.

**Question 19 Should the Decision Maker have a general power to stay a bankruptcy application? If yes, would you please explain your reasons and outline the circumstances in which you think such a power would be useful.**

So far, we have only been able to identify two scenarios where the Decision Maker may require the power to stay a bankruptcy application:

- Circumstances where the Decision Maker may need to extend the time period for provision of information, as outlined in our response to question 18;
- To allow direction into an alternative debt relief mechanism as outlined in our response to question 7.

**Question 20 Should the Decision Maker have the power to appoint a trustee? If yes, would you please explain your reasons and outline the circumstances in which you think such a power would be useful.**

We have no comments to make on this proposal.

**Question 21 Do you think that assets may be at risk in the period between a bankruptcy application being accepted and a bankruptcy order being made?**

As our client group does not generally have considerable liquid assets, we do not have experience in this area. We would have thought it is unlikely to be a substantial problem.

**Question 22 In order to ensure that assets at risk are protected, should the Decision Maker have the power to appoint an interim receiver in the period between a bankruptcy application being accepted and a bankruptcy order being made?**

As we do not envisage this to be substantial problem, we would suggest that your proposals as outlined in the paper should be sufficient.

*“If the DM is aware of any such assets, he/she could immediately make a bankruptcy order. This would have the effect of appointing the official receiver as receiver and manager of the bankruptcy estate, who could then take appropriate steps to protect the assets.”*

**Question 23 If you have answered “no” to the previous question, can you describe a better way of ensuring that such assets are protected?**

We support the Insolvency Service position in the paper. See above.

**Question 24 Do you agree with the duties we have outlined for the Decision Maker?**

We agree with the duties as outlined in the paper. However, we feel that the Decision Maker should have the discretion to extend the 14 days period to allow the applicant to obtain further information as outlined above.

**Question 25 Have we suggested any duties that you consider are unnecessary? If so, which ones and why?**

We have not identified any duties that we consider unnecessary.

**Question 26 Are there any other duties the Decision Maker should have? If so, what are they and why do you think they are necessary?**

We have not been able to identify any additional duties that should be required of the Decision Maker.

**Question 27 Do you think that two working days, from when an application is deemed to have been submitted, is an appropriate period of time within which to require the Decision Maker to make a decision?**

We welcome a clearly defined timescale for a decision to be made. We are not best placed to be able to judge if this is a feasible timescale.

However, on the face of it, this timescale seems extremely short. We are concerned that this may not be a feasible timescale in practice. We would also be concerned that there would be a substantial pressure to ensure adequate resourcing of the Decision Maker function, to ensure adherence to a two day timescale. We query whether this will result in backlogs elsewhere in the system such as in the stage where the Decision Maker is deemed to have accepted the application.

**Question 28 Do you think that the two working days within which the Decision Maker is required to make a decision should be stayed if the Decision Maker stays his or her consideration of a bankruptcy application pending receipt of further information and/or evidence?**

Yes, this seems an eminently sensible approach.

**Question 29 Should failure to respond to a request for further information be treated as the application being withdrawn by the debtor?**

In most cases this should be the case. However, we have made the point that the Decision Maker should have the power to use their discretion to extend the 14 days period for receipt of further information. In those circumstances, the application should not be treated as “withdrawn” by the applicant.

**Question 30 Would 14 days be sufficient time to give to the debtor to ask the Decision Maker to review his/her decision? If not, why? How long do you think it should be?**

We consider that 14 days should be a sufficient period to allow the applicant to ask the Decision Maker to review their decision. However, the paper states as follows:

*“It is important that a request to review a decision is only made on the basis that the DM did not consider or take into account relevant facts.”*

We would suggest that it is also important to allow a review where there has been an administrative error or error in procedure. A scenario might be where paperwork has not been received by the applicant as it has been sent in error to the wrong address, or misaddressed.

**Question 31 Do you think that early discharge should be repealed?**

We have some concerns regarding the repeal of early discharge. On balance, we are not persuaded that early discharge should be repealed. See below.

**Question 32 If you do not think that early discharge should be repealed, what specific benefit do you think there is in keeping early discharge? Please provide figures if you can.**

After discussion, we have thought of the following benefits:

- There is an argument to say that if the purpose of bankruptcy is to give someone with unmanageable debt a fresh start then the sooner that this can be made to happen the better.
  
- Early discharge means that a bankrupt person can potentially be free of the stress caused by the debt situation as soon as possible. This could be beneficial for someone who may be vulnerable due to health issues, mental health problems or other reasons.
  
- Early discharge was as we understand it, particularly intended to benefit sole traders and small businesses. In the current economic climate, this may be an option the Insolvency Service may wish to retain, given the current rate of business failure.

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