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Your Ref:

24 February 2015

Mr Quek Sze Hao
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Ministry of Law
100 High Street, #08-02
The Treasury
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BY POST & EMAIL
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Dear Sir

PUBLIC CONSULTATION OF THE BANKRUPTCY (AMENDMENT) BILL

We refer to your email of 23 January 2015 inviting the Law Society to provide feedback on the above consultation.

2 The consultation was referred to our practice committees and has been considered by Council.

3 The views of the Insolvency Practice Committee and the Civil Practice Committee of the Law Society on the same are set out in **Annex A** and **Annex B** respectively for your consideration.

4 The Law Society is grateful to MinLaw for engaging members in the consultation.

Yours faithfully

Delphine Loo Tan
Director (HoD), Representation and Law Reform

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ANNEX A – VIEWS OF THE INSOLVENCY PRACTICE COMMITTEE

VIEWS OF THE INSOLVENCY PRACTICE COMMITTEE

The views of the Insolvency Practice Committee on the public consultation on the proposed Bankruptcy (Amendment) Bill ("Bill") are set out below:

S/N	DISCUSSION	RECOMMENDATION
1.	***The Role of Institutional Creditors***	
	A blanket rule where Institutional Creditors must appoint private trustees in all instances may not sufficiently give recognition to the fact that the OA may at times be better placed as compared to a private trustee in bankruptcy in administering the assets of the bankrupt. This can be seen from the following perspectives: a. Official Assignee of Singapore may be in a better position to be recognised in Malaysia, given reciprocal recognition (and assistance) regime Malaysia has in favour of the Singaporean Official Assignee. A private trustee does not have such an advantage and it may not make much sense to have the OA actively involved where there is a substantial Malaysian angle and yet have a public trustee in place. b. There are various restrictions that the Bankruptcy Act ("**BA**") places on the private trustees that do not apply to the OA. Private trustees are not allowed to:- i. Delegate their powers; ii. Administer oaths; and iii. Annul bankruptcy order where composition or scheme is accepted by creditors.	The Committee is of the view that the Institutional Creditor should have a debt owing of $200,000 from the bankrupt (the "**Debt Threshold**") before they are required to nominate a private trustee. This would allow Institutional Creditors to still grant some credit to parties that are at risk of bankruptcy without the potentially much larger liability of nominating a private trustee. Next, by having a Debt Threshold, it imposes the obligation on Institutional Creditors to ensure that when it grants substantial credit (i.e. above the Debt Threshold) it has to bear the costs associated with the debtor Bankruptcy, if any. Third, by having a Debt Threshold, the risk and reward of the Institutional Creditor seeking debt recovery becomes more balanced. Without the Debt Threshold, an Institutional Creditor seeking the return of i.e. S$15,000 could potentially have to pay much more as a result of the private trustee's fees. This would potentially lead to Institutional Creditors shying from using Bankruptcy proceedings against a debtor until and when the sums owing are more substantial. However, a more substantial debt becomes far more difficult for the bankrupt to administer.

	c. When the bankrupt wishes to commence litigation against another party, it is uncertain if the private trustee can do so on his behalf. While s 36 of the BA vests the powers and functions of the OA in the trustee in bankruptcy, there is doubt as to whether it extends to the power to commence litigation as per s 76(1)(c) of the BA where the underlying cause of action vests in the OA. It may well be that the property of the bankrupt continue to vest in the OA, and it must be assigned to the trustee in bankruptcy before the trustee can bring action. These requirements may result in delays. d. In *Manharlal Trikamdas Mody v Sumikin Bussan International (HK) Ltd* [2014] 3 SLR 1161, the High Court held at [54] that "statutory rights under ss 76(1)(c) … of the BA are indeed personal to the OA and are thus not capable of assignment at law." If this is correct, then the OA may yet have a critical role in respect of claims which are not assignable. The above discussion raises questions whether the private trustee is the best person to administer the bankruptcy based on the current bankruptcy regime. As the above demonstrates, the court should be vested with certain powers for OA to be appointed rather than have a blanket rule requiring an institutional creditor to appoint a trustee in bankruptcy. The issue is more than just one of costs and of administration, as the differences between appointment of the OA and private trustee in bankruptcy may result in loss of important privileges on the part of institutional creditors. The private trustee's fees are paid out of the bankrupt's estate in priority to other debts. The risk of the bankrupt's estate being	In addition to the above, the court should still have the residual right to appoint the OA if it is of the opinion that such an appointment is more suitable to the present facts.

	insufficient to pay his fees is thus borne by the private trustee. As a result, a private trustee may well only accept the assignment if the party that nominated him (i.e. the Institutional Creditor) is willing to indemnify their expenses. This may create additional concerns on three fronts. a. First, Institutional Creditors may be discouraged from using bankruptcy applications, as they may potentially have to pay the costs of the administration of the bankruptcy. This in turn potentially creates a moral hazard where the debtor should be declared bankrupt but is not, simply because his creditors are unwilling to pay for the bankruptcy application. b. Second, as a result, the Institutional Creditor will be less willing to grant credit to parties that they deem to be credit risks. While the overly loose granting of credit should be correctly discouraged, this regime may result in Institutional Creditors being overtly reluctant to grant credit. c. Further, while Institutional Creditors who take on many bankruptcy applications may be able to reap economies of scale, Institutional Creditors who do not take on so many applications would not have said economies of scale, and hence have to pay more per bankruptcy application. There are thus two competing considerations at play here; the desire to make Institutional Creditors play a bigger role in Singapore's bankruptcy administration versus importance of Institutional Creditors continuing to grant credit to deserving debtors. In light of the above, to place the onus on Institutional Creditors to ultimately pay for the costs of the private trustee seems	

	unfairly harsh especially if the credit granted by them is relatively small *vis-a-vis* the other debts owed by the bankrupt as well as the liability they undertake in applying for bankruptcy. Further, this is not a new problem, the Cork Committee had in their report[1] regarding the revamp of the insolvency regime in England also had to deal with the proposal of the total withdrawal of the Official Receiver on all issues of personal bankruptcy. The Committee's eventual view was to disagree with the aforesaid proposal. Some of the key reasons of the Committee, which we suggest are equally relevant in Singapore are as follows: a. It is important that the responsibilities is charged with an impartial public office and not by the debtor or a petitioning creditor as there may be potential conflict of interest[2]; and b. There is a need to maintain commercial morality such that regardless of financial circumstances and/or attitude of the debtor or the creditor bankruptcy proceeding would still apply to investigate into the affairs of the debtor[3]. There is a need to maintain public confidence in the personal bankruptcy regime and to remove and possible accusation of conflict of interest, therefore the role of the Official Assignee as a neutral party is still a relevant consideration. Further, as highlighted previously, the ability of the bankrupt estate to fund bankruptcy should not be the paramount consideration on whether bankruptcy proceedings are adopted. Rather, it is	

[1] Report of the Review Committee on Insolvency law and Practice (1982) Cmnd 8558
[2] Ibid at para 716.
[3] Ibid at 717.

	suggested that the relevant consideration should be to maintain commercial morality by ensuring that a bankrupts' affair is always investigated into regardless of whether his/her estate is able to bear the costs of investigation.	
2.	***The Alternate Hong Kong model of appointing trustees***	
	The existing bankruptcy regime places the cost of administering bankruptcies on the OA, if no private trustee is appointed. In contrast, the proposed reform as per the Summary provided and the Bill places some of the cost on Institutional Creditors by mandating that private trustees have to be appointed by Institutional Creditors. It is a drain on State resources to have to continually administer bankruptcies. The creditors are the parties that have granted (excessive) credit to the bankrupt, yet the Official Assignee is faced with the cost of administering the bankruptcy. From this perspective, it seems unfair that the State is saddled with the cost while the creditor gets the reward. On the other hand, the administration of bankruptcy can be viewed as a form of public service that taxpayers are entitled to. It is unfair for one creditor to be potentially out of pocket in seeking to enforce his legal rights when there are other creditors that have also granted credit to the bankrupt. While arguments and justifications can be made in support of both propositions, perhaps we should allow the State to appoint a private trustee instead. Such a model already exists in Hong Kong, albeit in the context of corporate insolvency. Historically, the Hong Kong Official Receiver's Office ("**ORO**") carried out much of the management of compulsory insolvency	It is proposed that private trustees in Singapore can be placed on a list similar to Panel B (the "**Singapore Panel**"). When the creditor bringing a bankruptcy application is unwilling to appoint his own private trustee the court can nominate a private trustee from the Singapore Panel to administer the bankruptcy. In joining the Panel, practitioners agree that their fees upon being appointed as private trustee of a bankrupt would be a fixed sum to be determined and to be paid out of the deposit to be paid by the Institutional Creditor. It is further suggested that for such cases, an increase can be made to the deposit sum to ameliorate the financial risk of the private trustee when they take on such appointments. The fees of the private trustee appointed by the court are paid out of the estate of the bankrupt. The private trustee bears the risk of assets of the bankrupt being unable to cover the fixed fee, and no indemnity is given to him. The Committee further suggests that membership on the Singapore Panel be a prerequisite of being a private trustee/insolvency practitioner in Singapore. This would incentivise practitioners into being members of the Panel. This also serves as an indirect subsidy being given by insolvency practitioners to the Official Assignee's office. Further studies should be done on the feasibility of this proposal, and further consultations with potential private trustees should be conducted.

	cases in-house. In view of the increasing case load, the Administrative Panel of Insolvency Practitioners for Court Winding-up or "Panel A" was created. Large court-ordered insolvency (i.e., those with realisable assets which, in the view of the ORO, are likely to exceed HK$200,000) was allocated to private sector practitioners where the creditors were not able to identify a suitable liquidator themselves. For smaller insolvency cases where the realisable assets were not likely to exceed HK$200,000, they were outsourced by appointment to smaller insolvency practice firms known as "Panel B". The court thus allocates corporate insolvency cases to these firms on Panel A or Panel B for an agreed fee. While cases assigned to Panel A are more lucrative, the requisite experience levels of their practitioners are correspondingly higher. Firms are thus incentivised to take on work on Panel B which may be less lucrative as they gain more experience to be placed on Panel A in the future.	
3.	***The threshold for definition as Institutional Creditors***	
	The Committee notes the rationale provided that the Official Assignee, being a public agency, will then be able to focus its resources on administering cases where the applicant creditor is either an individual or a small business. Although the intention is laudable, it is suggested that to use annual sales turnover and number of employees as a gauge to decide if a creditor should fall within the definition of an Institutional Creditor is potentially not effective. This is because even if a company has a high sales turnover and it employs a significant number of employees it could enjoy only thin profit	It is proposed that a third factor of the prior three year average annual profit of S$10 million be considered. This ensures that only companies with a certain amount of annual profit have to bear the costs of appointing private trustees.

	margins in each of its trade with its debtors. Also, the use of sale turnover and employee number can be easily circumvented by the incorporation of subsidiaries which essentially engage in the same activity. Alternatively, a company may not have high annual turnover or a large number of employees but have substantial profits.	
4.	***The opposition of discharge of an OA-administered bankruptcy***	
	The new regime (as noted in paragraphs 33-34 of the Summary) requires the objecting creditor to nominate a private trustee. The private trustee must then consent to take over the case from the OA in the event that the objection is granted. The OA, in seeking to discharge the bankrupt, is unwilling to expend further costs in administering the said bankruptcy. In appointing a private trustee to take over the administration, the private trustee bears the risk of the assets of the bankrupt being insufficient to pay his fees. A private trustee will take on this assignment only if the creditor is willing to indemnify their expenses. If a creditor wishes to oppose the discharge, it is only fair and reasonable to require the objecting creditor to appoint a private trustee. As the OA is unwilling to expend further costs, the creditor that objects to the discharge should be the one that foots the bill. This can result in a moral hazard for the bankrupt and injustice for the creditor. A bankrupt may be more willing to flout the bankruptcy order as he is aware that upon discharge by the OA, creditors will be unwilling to appoint private trustees to take over the bankruptcy administration. A recalcitrant bankrupt	Should the creditor be willing to fund the private trustee, he can still apply to object the discharge order as envisioned under the new regime. Should the creditor be unwilling or unable to fund the private trustee, he can apply to the OA to continue the administration of the bankruptcy. The OA should still continue to administer the bankruptcy if the bankrupt is a recalcitrant offender of various 'disqualifying acts' similar to that noted in paragraph 29 of the Summary. We propose that such acts include:- a. Being unemployed for more than half the duration of the bankruptcy order; b. Going overseas without seeking prior approval from the OA; c. Remaining overseas after approval from the OA has expired; d. Failing to pay his monthly contribution on time and/or in full; e. Under-declaring/dissipation of assets; and f. Any other form of negative findings made by the OA/private trustee. Should the OA unreasonably refuse, the creditor can apply to court for review of the OA's decision. The court is well placed to adjudicate as to whether it is fair for all parties that the OA continues to administer his duties or if the creditor should have to nominate a private trustee.

	who has consistently failed to fulfil his obligations under the bankruptcy order could simply be discharged when his creditor is unwilling to provide an indemnity for the private trustee. Taken to the extreme, this may result in the bankruptcy regime losing its impact on bankrupts, as creditors will be unwilling to oppose discharge applications made by the OA. In light of the above, the proposed regime should thus seek to strike a balance between two present considerations: the saving of costs for the OA, as well as the need to ensure that bankrupts properly discharge their obligations. In addition, what about cases where for reasons given above it is determined that the OA is the best person to do the job? This would justify having the OA continue.	
5.	***The Determination of Monthly Contribution***	
	As noted in para 18 of the Summary, the proposed bankruptcy regime determines Monthly Contributions based on income. The Monthly Contribution (as defined in the Summary) is based on *inter alia*, the income of the bankrupt and the expenses for the necessary maintenance of himself and his family. Under such a regime, the regular income a beneficiary receives under an estate would not be counted as "job income" and would not be recognised for the purposes of calculating monthly contribution. The bankrupt would thus have a lower Monthly Contribution. Similarly, the capital gains enjoyed by the owner of assets such as stocks or real property would also not be recognised for said purpose.	It is fairer for all parties if monthly contributions of the bankrupt were determined based on the cash flow of the bankrupt. This wider test allows the determined Monthly Contribution to be better linked to the overall financial situation of the bankrupt.

	To restrict the calculus in determining the monthly contribution to that of income seems unnecessarily narrow, in light of the multiple ways a person can get "income" in today's diverse economy.	
6.	***Deadline for Proof of Debts***	
	The proposed regime requires that creditors file their proofs of debts ("**PODs**") promptly, within 4 months after the imposed Administration Date (as defined in the Summary). A creditor who does not file his POD within the deadline will be excluded from the benefit of any distributions made from the bankrupt's estate, and extension of time will be granted only upon application to court. It is commendable for the new regime to be harsh on creditors who are late, as the efficient conduct of a bankruptcy is beneficial to all parties. Having said that, requiring *all* creditors who are late in filing their PODs to seek court approval can result in the court being burdened by unnecessary applications.	The OA should be allowed to extend time for the late filing of Proof of Debts so long as good reasons are demonstrated. It is only when the OA declines to extend the time that the aggrieved creditor would apply to court. Such a recommendation would obviate unnecessary court applications. The OA is more than capable to assess whether the reasons offered by the late creditor justify the extension of timelines.
7.	***The extension of time for secured creditors to file their Proof of Debts***	
	The proposed amendment to s 76(4) BA grants the secured creditor 12 months from the date of the bankruptcy order to realise his security or such further period as the OA may determine, failing which he is not entitled to any interest in respect of his debt. The ILRC noted the sound policy reasons behind this rule. A secured creditor is entitled to use the proceeds of realisation of the security to discharge interest accruing on the secured debt after the making of a bankruptcy order. If the value of the	

	security is sufficient to cover the interest, there may be little incentive on the part of the secured creditor to realise the security expeditiously. This delay may then prejudice the interests of the unsecured creditors of the bankrupt estate in the residual value of the security. The ILRC recommended that the rule be retained, and that the default timeline may be extended by the Official Receiver or liquidator, or by application to court. The above-mentioned amendment to s 76 thus seems a bit different from what the ILRC is saying. The ILRC recommendation seems to allow the secured creditors whose interests have been compromised to apply to court to keep s 76 in abeyance, albeit in the context of insolvency. In contrast, the amendment only allows the OA to determine if an extension of time should be granted, and the aggrieved creditor cannot apply to court. An aggrieved creditor can of course apply to seek judicial review of the OA's action. In light of that, there is merit in giving a residual right to the aggrieved creditor to apply to court to extend the time period. The court can settle the dispute when the OA and the creditor are in disagreement as to whether the time limit should be extended.	
8.	***Investigative powers of the private trustee***	
	The powers of the private trustee as provided for in s 36(3) of the BA is being expressly amended to exclude the new 132A, which gives the OA additional powers to investigate the affairs of the Bankrupt.	The private trustee should have the same powers as the OA, and hence s 36(3) of the Bill should not exclude s 132A from private trustee.

	The Bill grants further powers to the OA to make investigations into the bankrupt's affairs. These further powers have been expressly denied to private trustees in the amended s 36(3) of the BA. The rationale for this exclusion is unclear; given that private trustees are envisioned under the Summary to ease the workload of the OA. From that perspective, it is inconsistent to restrict the powers of private trustee to administer the bankruptcy. Should the private trustee be of the view that further investigation is required and the powers prescribed under s 132A needs to be invoked, the OA would have to step in again.	
9.	***Discharge of Bankrupt***	
	The Bill proposes that the maximum amount of time a bankruptcy order can last is 9 years (for first-timers) and 11 years (for repeat bankrupt). Under the Bill, the maximum amount of time that the OA can keep the bankrupt is 9 years (for first-timers) and 11 years (for repeat bankrupts). Notwithstanding the long periods of time, there may be good reason to prevent the discharge of the bankrupt. It is thus prudent for the Court to retain jurisdiction to review the OA's decision to discharge the bankrupt. The threshold for court intervention has to be suitably high.	The court should have the right to review the OA's decision to discharge the bankrupt at the end of the relevant periods. S 126(8) of the Bill should be amended to allow said court review.

ANNEX B – VIEWS OF THE CIVIL PRACTICE COMMITTEE

VIEWS OF THE CIVIL PRACTICE COMMITTEE

The views of the Civil Practice Committee on the public consultation on the proposed Bankruptcy (Amendment) Bill ("Bill") are set out below:

S/N	ISSUE	COMMENT
1.	Increasing the Debt Threshold from $10,000 to $15,000	From a dispute resolution perspective, the effect of the increase would be to deprive creditors for debts up to $15,000 of an effective enforcement mechanism. Bankruptcy is one of the more effective enforcement mechanisms for not only judgments but at the pre-writ stage in achieving negotiated settlements. Additionally, it was observed that the rationale for the bankruptcy threshold to be pegged to household income is not clear. Rising household incomes should not make bankruptcies more difficult.
2.	Mandating Appointment of Private Trustees for Defined "Institutional Creditors"	While it appears agreeable to have "institutional creditors" such as Banks to appoint their own private trustees, there is concern that this may increase the costs of bankruptcy. These costs would have to be deducted from the bankrupt's estate leaving less for distribution to the creditors. These private trustees also need to be supervised by the Official Assignee.
3.	Introducing a Differentiated Discharge Framework	Specifying "timelines" for discharge may result in a system where bankruptcies are seen as an attractive option for the defaulting debtor. Such a system should be avoided. <u>Potential situations where the Monthly and/or Target Contributions can be reduced</u> In light of the fact that there may be certain situations where it is likely for the contributions to be reduced, it was suggested that there be flexibility for the Monthly and/or Target Contributions to be increased when the situations are reserved. The bankrupt should be discouraged from using his bankruptcy status as an excuse to be lackadaisical in his contributions. <u>Payments to the bankruptcy estate through third parties payments</u>

		One view was that allowing payments to the bankruptcy estate from external sources would be a potentially viable option to facilitate the discharge process. However, such an option may be subject to abuse in cases where the bankrupt has transferred his monies and the ownership of his assets to a third party. In such cases, it is feared that the bankrupt may manipulate the process by making payments from third parties. It is proposed that there should be full and frank disclosure as to the source of these third party payments as well as the relationship between the third parties and the bankrupts. <u>Three-tiered timeline for the discharge process</u> It was noted that the reasoning for the differing periods as proposed at paragraph 27 of the Summary of Key Reforms was not apparent. In particular, it was noted that a bankrupt may be caught by paragraph 27(b) if he was still within 5 to 7 years from the date of administration but, should the 7-year period lapse, the bankrupt could avoid his obligations to pay the Target Contributions altogether under paragraph 27(c). Clarification appears to be required with respect to the time periods under the proposed three-tiered timeline. It was further suggested that a clear distinction in the time prescribed at paragraph 27(c) may be considered, e.g. after 8 years. <u>What can be a “disqualifying act”?</u> It was suggested that, in order to ensure that the proposed discharge regime is not subject to abuse, there is a need for greater disclosure from the bankrupt. To this end, it is proposed that a situation where the bankrupt has not made truthful disclosure of his state of affairs, e.g. source of the third party payments, could constitute a “disqualifying act”.