Submission by the Irish Society of Insolvency Practitioners to the Department of Justice on changes to Personal Insolvency Legislation

June 2017

Submission to the Department of Justice and Equality

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1. BACKGROUND TO ISIP

1.1 **ISIP** was established in 2004 to create a forum to enhance knowledge and expertise of its members and to allow members to share experiences between those accountants and lawyers in Ireland who specialise in turn around and insolvency and among practitioners working in the insolvency profession in Ireland. Its membership is drawn from the leading firms of insolvency practitioners, accountants, solicitors and barristers in the country. Its members act on behalf of debtors in financial difficulty, and also on behalf of creditors who are dealing with debtors in financial difficulty.

1.2 ISIP is regularly consulted by various Government Agencies such as the Revenue Commissioners on areas of mutual interest. ISIP has a representative on the Company Law Review Group.

1.3. ISIP has been heavily involved with the Insolvency Service of Ireland ("ISI") in developing procedures and protocols under the Personal Insolvency Act 2014.

1.4 The current members of ISIP's Council are:

Chairman – Doug Smith (*Eugene. F. Collins*)
Secretary Judith Riordan *(Mason Hayes & Curran)*
Treasurer Derek Earl *(Somers Murphy Earl)*
Andrew O'Leary *(KPMG)*

Sean McNamara (*Smith & Williamson*)

Brendan Colgan *(Matheson)*

Des Gibney *(McStay Luby)*

Jim Stafford *(Friel Stafford)*

Mark Woodcock *(McDowell Purcell)*

1.5 The objectives of ISIP are partially achieved by the work of the following committees:

LAW REFORM COMMITTEE

Chairman: Mark Woodcock, McDowell Purcell

Bobby Waters, PwC

Colin Farquharson, Ernst & Young

Gavin Smith, Walkers Global Solicitors

Mícheál Leydon, Outlook Accountants

Niamh Counihan, Matheson Solicitors

Owen Henson, Kane Tuohy Solicitors

Stephen Scott, RSM Ireland

Shane McCarthy, KPMG

Declan De Lacy, O'Connor Leddy Holmes

Ruairi Rynn, William Fry

Paul McDonnell, Gartlan Furey

EDUCATIONAL SUB COMMITTEE

Chairman: Des Gibney, McStay Luby

Marsha Coghlan, A & L Goodbody

Jill Callanan, LK Shields

Robin McDonnell, Maples

Joanne Cooney, McDowell Purcell

Anne O'Dwyer, Duff & Phelps

Eoin Mullowney, Byrne Wallace

Jennifer Fay, O'Grady Solicitors

Karen Reynolds, Matheson

Roisin Peart, Eugene F. Collins

Conal Keane, Mason Hayes & Curran

G. Dunne, G. Dunne Solicitors

Representation Committee

Chairman: Jim Stafford, Friel Stafford

Terry Leggett, Eugene F. Collins

Neal Morrison, McInerney Saunders

Michael Butler, Butler & Co.

Jim Luby, McStay Luby

Hugh Ward, Hugh Ward Solicitors

Gareth Steen, Mason Hayes & Curran

Sean Carr, Excel Partners

Kevin Gahan, Matheson

John Coulston, Moore Stephens Nathans

2. SUBMISSIONS

Key Amendments

The position of **ISIP** is that as many individuals as possible should be encouraged to avail of the personal insolvency solutions detailed in the Personal Insolvency Act 2012 (as amended) (the "**Act**"). Barriers to availing of these solutions should be removed. We therefore propose the following amendments to the Act:

- €3 million cap on Personal Insolvency Arrangements (Section 91) to be removed;
- Revenue Commissioners status as excludable creditor to be removed; and
- Prohibition on making a proposal for either a Debt Settlement Arrangement or a Personal Insolvency Arrangement if a Protective Certificate issued in the preceding 12 months to be removed.

Removal of €3 million Cap

A significant number of debtors are precluded from entering into a Personal Insolvency Arrangement due to this cap.

Individuals with secured creditors over €3 million are excluded from availing of a Personal Insolvency Arrangement unless all secured creditors agree to same. Most individuals with debts of over €3 million will have debt made up of both secured and unsecured elements. It is particularly common, for example, amongst individuals involved in the construction sector. A typical situation is that such individuals will have unsecured debt on foot of a personal guarantee entered into for a business loan coupled with secured debt in respect of their principal dwelling. In many cases the debt has moved through a number of different owners and it can be very difficult to obtain permission. Furthermore, the Act provides no timelines in terms of how long a creditor has to respond. ISIP members have reported cases were no response at all has been forthcoming and there is no obligation on the creditor to do so under the Act.

Example:

In a recent case involving one of our members, Bank A (State owned) refused to enter into a Personal Insolvency Arrangement and Bank B did not have the ability to work with the debtor outside of the formal arrangement. As such the debtor who has been positively attempting to address his financial difficulties for the past 7 years was left in an invidious position. Despite numerous attempts by the debtor including the voluntary surrender of the properties, Bank A refused to allow the debtor legally voluntary surrender his properties to allow him enter a PIA.

ISIP's view is that the cap has acted as a limit on the availability of Personal Insolvency Arrangements. Its inclusion in the Act has gone against the objectives and the spirit of the Act which were to encourage as many individuals as possible to return to solvency whilst giving creditors a greater return than would be obtained in bankruptcy.

We believe that removing the €3 million limit will encourage more individuals with significant debt to avail of Personal Insolvency Arrangements. Given the nature of the economic collapse, a large cohort of this group are made up of small to medium size construction entrepreneurs. Given the acute housing shortfall being experienced it is accepted that it is important to get such individuals back to work.

Our members have extensive experience of dealing with distressed debtors who have been unable to do PIAs as a result of the cap. Some of the distressed debtors impose a strain on the already overburdened Health Services as a result of their medical needs.

The cap was initially legislated to protect the banks' balance sheets. However, the banks' balance sheets have since improved, and indeed most of the troubled loans have since been sold to various funds. Accordingly, there is simply no justification for retaining the cap.

Revenue Commissioners – Removal of Status as Excludable Creditor

ISIP recommends that the Revenue's status as an excludable creditor be reviewed. There is a significant group of individuals that simply have no option but to avail of a personal insolvency solution. Giving Revenue the option to either include or exclude tax liabilities operates as a barrier to availing of personal insolvency solutions. Removal of their status as an excludable creditor would not impact on their preferential status, and therefore they would not be unfairly prejudiced by its removal.

Removal of Prohibition on Second Protective Certificate in 12 Month Period

The prohibition on applying for a second Protective Certificate within a 12 month period should be removed. Our view is that this creates a barrier to availing of personal insolvency solutions for individuals whose circumstances have changed. Under the current regime such individuals may have to wait a considerable period of time before applying again for a Protective Certificate.

3. Creditors' Entitlement to Appoint Trustee in Bankruptcy

We note that the Department only requested submissions on Part 3 of the Personal Insolvency Acts 2012-2015. However, we believe that the Department should also consider amending the Bankruptcy Act 1988 in respect of the specific matter set out below.

Sections 110 -114 of the Bankruptcy Act 1988 as amended by the Bankruptcy (Amendment) Act 2015 provide, *inter alia*, that any creditor whose debt has been admitted in the bankruptcy may apply to Court at the statutory sitting for liberty to put a proposal to the creditors of the bankrupt that the estate be wound up by a Trustee and a committee of inspection.

Three fifths in number and value of the creditors voting at the meeting is the threshold required for the purposes of passing a declaration resolving that the estate of the bankrupt be wound up by a Trustee and a committee of inspection.

Under English Law, as soon as practicable and within twelve weeks of the Bankruptcy Order being made, the Official Receiver should determine whether it is right to summon a meeting of the bankrupt's creditors for the purposes of appointing a Trustee. If he decides that there is no reason to summon a creditors meeting and therefore no reason to appoint a Trustee, notice of this determination will be sent to the creditors. From that date, the Official Receiver will be the Trustee of the bankrupt's estate.

Where the Official Receiver has decided within twelve weeks of the bankruptcy order to summon a meeting of creditors, a venue for the meeting will be fixed not more than four months after the date of the bankruptcy order.

Where the Official Receiver has decided not to summon a meeting of creditors, the creditors can still request the Official Receiver to summon a meeting, provided that the request is with the concurrence of not less than one quarter in value of the bankrupt's creditors and provided a deposit of security for the expenses of the meeting is provided.

At the meeting of creditors, a resolution is passed when a majority in value of those present and voting, in person or by proxy, have voted in favour of the resolution.

It is ISIP's view that the current Irish Law should be amended in relation to the majority required at the creditors' meeting. ISIP would propose that Ireland should adopt the majority in value provision set out under English Law.