Submission from the Law Society of Hong Kong on the Bankruptcy (Amendment) Bill 2004

Comments[1]	Response of the Administration
1. While in general principle we welcome the concept that solicitors be candidates for appointments as provisional trustees if they wish, we have reservations as to whether the system currently being proposed is likely to attract solicitors to accept such appointments. Accepting office involves an obligation to undertake a range of duties that are prescribed under the bankruptcy legislation (and are not capable of being limited or otherwise circumscribed). Potentially a wide range of obligations may arise in the course of the office. In some cases the work involved could be extensive. In the system being proposed, practitioners will typically face a situation where at the time of appointment the only certainty is that funding is available to the extent of the filing fees of $5,000 in order to meet the fees. This may possibly be supplemented by whatever estate assets are capable of being traced and realised. It will also be apparent that there is a variable and unpredictable time commitment for the officeholder to properly discharge his or her obligations as dictated by the	We believe that there should be sufficient interest from PIPs in tendering and that the outsourcing proposal should be commercially viable. First, the Official Receiver's Office (ORO) aims to outsource debtor-petition summary bankruptcy cases **only** (i.e. asset of bankrupt not likely to exceed $200,000). In the great majority of these cases, the bankrupts have very limited assets and income, or no asset and no income at all. Given the profile of the bankrupts, experience shows that a number of the arrangements under the Bankruptcy Ordinance have not been resorted to in practice for bankruptcy cases with limited or no assets. These include investigation procedures that require substantial funds or the distribution of dividend. The bankruptcy cases intended to be outsourced are "*relatively limited in terms of scope and time commitment*", using the wording in paragraph 4 of the Law Society's submission. Second, even with no additional asset realized and no income contribution made by the bankrupt, an amount in the range of $5,000 to $6,000 [$8,650 deducted by the expenses/fees

[1] For details, please refer to the submission made by the Society.

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bankruptcy legislation and the circumstances of the case. Our perception is that there tend to be relatively few available assets in the case of personal bankruptcies. Whatever the case, it is likely to become quickly apparent that in the majority of cases there will be insufficient funding to pay for the work required.	incurred by the ORO ($2,000 to $3,000)] would be made available to cover the disbursement and remuneration of the private sector insolvency practitioners (PIPs), plus the costs of any person employed by the PIPs etc. Third, the cases will be allocated in batches (say 1,000 cases per year) so that PIPs can achieve economies of scale.
2. Taking office will therefore tend to be seen as involving a speculative time investment for most practitioners. If there is a tension between officeholders' statutory obligations to investigate and administer the estate under the terms of the legislation and their ability to be fairly remunerated from the funds available, it is likely to produce two possible reactions. In most cases practitioners would recognise the financial limitations and difficulties of the situation relatively quickly. This would tend to cause them simply to decline such appointments. Some less experienced practitioners may accept appointments, at least initially, but then face difficulty in properly discharging the office. That may encourage practitioners to try to tailor their efforts to match the available funding.	Regarding the remark that the proposed tendering arrangements "*may encourage practitioners to try to tailor their efforts to match the available funding*", we have the following responses: (a) The PIPs are officers of the court and act in a fiduciary capacity (re: section 84 of the BO). They are also subject to monitoring under various statutory, non-statutory and supporting measures, details of which are set out in paragraphs 20 to 27 of our paper "Responses to Specific Questions Raised by the Bills Committee" issued to the Bills Committee on 8 December 2004. (b) In making any bids for the contracts, the PIPs, being professionals governed by their professional code of conduct, are expected and required to make their bids on the basis that they need to discharge their fiduciary

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	duties fully and conscientiously in administering all cases assigned to them. There is no ground to suspect that the professional PIPs would bid at prices where they cannot/choose not to fulfill their fiduciary duties as set out in the BO and the contract of appointment with the ORO.
3. It appears to us that there are potential solutions. A better and more realistic course is for there to be a basic fee subsidy provided through the OR's Office, as is the case with summary company liquidations. It seems to us that this recognises the desirability of having the bankruptcy system operate properly and is in the public interest and interests of the business and general community at large. It is also the only realistic basis upon which solicitors (and probably most other PIPs) can be expected to undertake this office.	As explained above, we believe that there should be sufficient interest from PIPs in tendering and that the outsourcing proposal should be commercially viable. Hence, there should be no question of government subsidy. In any case, we do not see any ground for and have no plan to provide subsidy in the outsourcing of summary bankruptcy cases.
4. Alternatively, in some cases there may be a justification to establish an additional fund which the OR could make available on a discretionary basis in the event there is some demonstrably cost effective recovery exercise which would benefit the estate and its creditors in question and also ultimately to compensate for funding concerned.	If there is a demonstrably cost-effective recovery exercise which would benefit the estate and the creditors of a bankrupt, the concerned PIP should be able to obtain additional funding from creditors for chasing after the assets. We do not see any justification for the ORO's involvement in such process.

5.	Our view is also that a panel system should be established. This would involve a review of the qualifications and experience of practitioners undertaking office and also that an equitable system for the allocation of appointments to panel members be established.	Only PIPs meeting a number of pre-qualification criteria are able to qualify as a tenderer. The criteria will be similar to those adopted for the current scheme for contracting out of summary liquidation cases. The PIPs would need to be a member of the specified professional body i.e. Hong Kong Institute of Certified Public Accountants, Law Society of Hong Kong or Hong Kong Institute of Company Secretaries**,** and should also have a certain number of years of post qualification experience and a minimum number of professional or chargeable hours in respect of insolvency work. Given these pre-qualification criteria, we do not see any need for establishing a panel of PIPs.