

Purpose and type of consultation

This Consultation Paper sets out the proposals to introduce a new form of bankruptcy which gives more discretionary power to the Viscount.

Closing date 12th April 2013

Summary

A new form of relief for debtors who find themselves in a never-ending cycle of debt is being proposed. The new law would give the Viscount discretionary power, on the recommendation of an authorised intermediary, to freeze all debts that have been specified in a document that is to be called a Viscount's Remission Order (VRO).

The economic and social implications of the case will be taken into consideration without the need for lawyers and formal court proceedings. This would provide prompt assistance for debtors who are the victims of adversity.

Subject to a qualifying period of residence in the Island, individuals will be eligible for a VRO if;

- their debts do not exceed £25 000
- they do not own a motor vehicle worth more than £2 000
- they do not possess other assets exceeding £5 000: and
- their disposable income does not exceed £100 a month (after deduction of tax, social security contributions and normal household expenses)

An intermediary, currently the Jersey Citizen's Advice Bureau, will forward an individual's application, along with their own initial assessment, to the Viscount who will consider the application.

Once a VRO is registered all debts specified within the order will be frozen and creditors to whom they are owed will not be able to call them in. Affected creditors will be issued a copy of the VRO and will be given the opportunity to respond. All objections will be considered and the Viscount may ask for more information. Until a

query has been resolved the Viscount may decide to suspend the VRO. Once a decision has been reached the VRO can be revoked or amended where necessary. After a year the debtor will be discharged of all debts specified in the VRO.

The main impact of this change is the discretionary nature of the VRO and the quick resolution to an individual's debt problems. It is designed for people without any reasonable prospect of repaying their debts. It does not mean debts are not taken seriously and it will allow creditors to voice any concerns they may have during the VRO process. A variety of offences will be created for cases of dishonesty

A similar scheme in England and Wales, the Debt Relief Order, currently charges a £90 fee. Consideration is being given to a similar charge for a VRO, but it may be that even a nominal amount may be too much for people likely to benefit from a VRO.

Please send your comments to:

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This consultation paper has been sent to the following individuals / organisations:

Treasury & Resources Department
Social Security Department
Jersey Association of Trust Companies
Institute of Directors
Jersey Financial Services Commission
Jersey Finance Limited
Jersey Bankers' Association
Law Society
Law Commission

REPORT AND BRIEF ON PROPOSED REFORMS OF THE LAW RELATING TO 'SOCIAL DESASTRE'

A. *Introductory*

1. **The Report of** the Jersey Law Commission of March 2011¹ entitled "Social Désastre" raised the possibility of introducing a new form of bankruptcy that conferred a wider discretion to make orders for bankruptcy, a discretion that would enable the court to consider "*not only the economic but also the social implications of the case*" and whereby "*such implications could include not only the prejudice caused to debtors who find themselves in a never ending cycle of debt with no reasonable prospect of payment [but] also the genuine concern of society to ensure that all individuals take debts seriously*".
2. The Legislation Advisory Panel has given consideration to possible forms of process by which such a goal might be attained. Indeed the Panel has gone slightly further and has sought to identify a summary process – avoiding the need for lawyers and formal court proceedings – which would afford respite and eventual discharge to certain insolvent debtors in good faith who had been the victims of adversity.

For convenience, such process – involving the Viscount as will be seen below – is referred to in this Paper as a process leading to a 'Viscount's remission order' ("Vro").

3. Fundamentally any such process and remedy should –
 - a. be discretionary
 - b. relate only to certain qualifying types and amounts of debt
 - c. be subject to a qualifying period of residence in Jersey
 - d. not affect any current bankruptcy proceedings
 - e. be made to the Viscount through the intermediary of the Jersey Citizens Advice Bureau ("JCAB")²
 - f. be decided quickly *i.e.* –
 - i. by the Viscount
 - ii. without having to go to court,
 - iii. but still enabling the creditor(s) to object
 - g. contain adequate sanctions in cases of dishonesty.

¹ Topic report No. 1/2011/TR.

² Similar to the procedure for a 'debt relief order' in England and Wales under Part 7A of the Insolvency Act 1986 of the United Kingdom – see further below under 'Qualifying debts' and footnote 3. As will be seen, this Paper envisages that JCAB and the Viscount will effectively work in collaboration to facilitate the availability of the remedy.

B. Basic principles and procedure

Discretionary remedy

4. The remedy is intended to be available to an insolvent debtor who cannot pay his or her debts by reason of adversity; that is adversity in the dictionary definition sense of: “*The condition of adverse fortune; distress, trial, or affliction; an adverse circumstance; a calamity etc.*” [Shorter Oxford English Dictionary 3rd Ed.]
5. There will also be a requirement of good faith. In other words, the relief obtained by the debtor will be in the nature of an equitable remedy, thus attracting the ‘clean hands’ requirement for applications such as for the grant of a *remise de biens*. [See *In re Mickhael*, 2011 JLR 1.]
6. Further provision will be made in relation to factors evidencing bad faith – to which we shall come in C. below.

Insolvency

7. First and foremost the debtor must be an individual who is unable to pay his or her debts.

*Qualifying debts*³

8. Such an individual (if 4. and 5. above are met) may seek a Vro in respect of his or her qualifying debts. A “qualifying debt” means a debt which—
 - a. is for a liquidated sum payable either immediately or at some certain future time;⁴ and
 - b. is not an excluded debt.⁵
9. A debt is not a qualifying debt to the extent that it is secured.
10. Specifically –
 - a. the debtor must owe less than **£25,000**⁶ in qualifying debts;

³ In relation to what constitutes a qualifying debt the Panel has drawn inspiration from the régime of ‘Debt Relief Orders’ (“DROs”) introduced by Part 7A of the Insolvency Act 1986 of the United Kingdom (sections 251A *et seq* inserted by the Tribunals, Courts and Enforcement Act 2007 (c. 15) ss. 108(1), 148(5), Sch. 17; S.I. 2009/382, art. 2).

⁴ Note that, in England and Wales, income tax debts that are determined (by returns or assessments) by HM Revenue and Customs at the date of the application for the DRO are considered to be liquidated debts and thus qualifying debts for the purposes of a DRO. But see paragraph 12c.

⁵ See paragraphs 11. & 12.

⁶ or such other sum(s) as the Minister for Treasury & Resources (“the Minister”) may by Order prescribe.

- b. the debtor may own a car to the value of **£2,000**⁷ but the total value of his/her other assets must not exceed **£5,000**⁸;
- c. after deduction of tax, social security contributions and normal household expenses, the debtor's disposable income must be no more than **£100 a month**⁹.

Excluded debts

- 11. An excluded debt is a debt of any description prescribed by Order of the Minister as excluded from being a qualifying debt.
- 12. Such excluded debts would generally be – ¹⁰
 - a. any fine imposed for an offence (including an obligation to pay a lump sum or to pay costs) including a compensation order;
 - b. any obligation (including an obligation to pay a lump sum or to pay costs) arising under an order made in family proceedings, including any maintenance order within the meaning of Article 1 of the Maintenance Orders (Enforcement) (Jersey) Law 1999;
 - c. all sums payable to the health Insurance Fund under the Health Insurance (Jersey) Law 1967, to the Social Security Fund under the Social Security (Jersey) Law 1974 and to the Comptroller of Taxes under the Income Tax (Jersey) Law 1961.
 - d. any obligation arising under a confiscation order made under the Drug Trafficking Offences (Jersey) Law 1988 or the Proceeds of Crime (Jersey) Law 1999;
 - e. any debt which consists of a liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other duty, being damages in respect of the death or personal injury to any person;
 - f. any debt incurred by fraud.

Qualifying age and residence

- 13. The debtor must have reached full age (18) at the time an application is made and have been ordinarily resident in Jersey during the **3 years** prior to the application date.

Existing bankruptcy proceedings

- 14. The debtor must not, when the Vro is made, be bankrupt within the meaning of Article 8 of the Interpretation (Jersey) Law 1954.
- 15. The debtor must not have been the subject of a Vro within the 5 years preceding the application for the Vro.

⁷ or such other sum(s) as the Minister may by Order prescribe.

⁸ or such other sum(s) as the Minister may by Order prescribe.

⁹ or such other sum(s) as the Minister may by Order prescribe.

¹⁰ Similar to the position in relation to Debt Relief Orders in England and Wales.

Application through authorized intermediary

16. Application to the Viscount for a Vro may only be made by an individual, and must be made through an approved intermediary.
17. Approved intermediaries will be those persons, corporate or otherwise, prescribed by Order of the Minister. As already indicated¹¹, the Minister will, initially at least, prescribe JCAB for this role, but other bodies may be prescribed. This Paper, however, assumes throughout that JCAB is the sole duly authorized intermediary.
18. JCAB will be required to—
- a. assist the debtor in making the application;
 - b. check that the application has been properly completed; and
 - c. send the application to the Viscount with JCAB's conclusions.
19. The word 'conclusions' is used in the same sense as conclusions in *e.g.* Article 3 of the *Loi (1862) sur les teneures en fidéicomis et l'incorporation d'associations* under which the *Partie Publique* offers its conclusions to the Court on any objection there may be to an application under that Law.
20. Thus it will fall to JCAB to make an assessment of the application against the discretionary criteria – see 4. 5. and 6. above – and offer conclusions to the Viscount to assist him in actually exercising the discretion (on much the same principle as the *Partie Publique* offers its conclusions to assist in the Court to exercise its discretion).
21. The requirement is upon JCAB to 'send the application to the Viscount'. If certain basic factual criteria are not met, it is unlikely that JCAB will need to burden the Viscount with an application that in law is bound to be refused. Thus if JCAB ascertains that the debtor –
- is not insolvent
 - owes more than £25,000 in qualifying debts
 - has assets exceeding £5,000
 - has a disposable income of more than £100 a month
 - has not been ordinarily resident in Jersey for the last 3 years
 - has not attained the age of 18
 - is subject to current bankruptcy proceedings, or
 - has been the subject of a Vro within the last 5 years,
- JCAB will make it clear to the would-be applicant what JCAB's conclusions on the application would be.
22. But the basic responsibility falls upon JCAB to send the application to the Viscount. To that end JCAB will be required, in connection with its responsibilities under 18. above, to work with the debtor to create an application

¹¹ See 3.e above.

for a Vro in the name of the debtor and to ensure that the application is completed in full.

23. JCAB will need to draw the debtor's attention to—

- a. all the conditions to which an application for, and the making of, a Vro is subject;
- b. the following –
 - i. that checks may be made to verify that the debtor complies with the conditions for granting a Vro and that the debtor needs to consent to such checks being made,
 - ii. that JCAB must give its conclusions on the application to the Viscount and that the debtor will be informed of such conclusions when the application is sent to the Viscount;
- c. the consequences, including criminal liability, of the debtor making any false representation or omission in connection with the application.

24. When the application is sent to the Viscount it will need to include—

- a. a list of the debts to which the debtor is subject at the date of the application, specifying –
 - i. the amount of each debt (including any interest, penalty or other sum payable in relation to the debt) and
 - ii. the creditor to whom it is owed;
- b. details of any security held in respect of any of those debts; and
- c. such other information about the debtor's affairs (including his/her creditors, debts and liabilities and his/her income and assets) as may be prescribed by Order.

25. Further provision will be able to be made by Order as to—

- a. the form of an application for a Vro;
- b. the precise manner in which an application is to be made; and
- c. information and documents to be supplied in support of an application.

The rôle of the Viscount

26. Applications will be determined by the Viscount in right of that office and not as an arm of the Royal Court.

27. The scheme is intended to enable applications to be decided quickly but not so as to operate unfairly on the creditor. How both objectives are achieved will become clear from the following paragraphs.

28. An application for a Vro will normally be considered 'on the papers'¹² – in the manner of a *cause de brièvement*.¹³ The Viscount will nonetheless be able to require further information if need be (as we shall see).

¹² See e.g. RCR Rule 15/3C under which the Greffier may consider and determine certain planning appeals on the basis of the documents filed and without oral arguments by the parties.

¹³ A *cause de brièvement* was not subject to the normal rules of pleading.

29. To be able to act quickly the Viscount will be able to apply certain presumptions when determining an application *viz*:
- a. that the debtor meets the requirements for a Vro if such appears to be the case from information supplied and there is no reason to believe that the information is inaccurate or incomplete or that the debtor's circumstances have changed;
 - b. that the debts specified at the date of the application are qualifying debts unless he has reason to believe otherwise.
30. The Viscount may nonetheless stay consideration of the application until he has received answers to any queries raised with the debtor or with JCAB in relation to anything connected with the application.
31. The involvement of JCAB should mean that most applications are well-founded. But at all events, if the Vro is made, the Viscount will be required to notify the creditors affected by it.
32. Where an objection is made to the Vro or it is discovered that the order arguably should not have been made, the Viscount will *then* look into the case in greater detail (see below '*The position of the creditor*').
33. If the Viscount refuses an application he must give reasons for his refusal to the debtor. The Viscount will at all events inform JCAB of the outcome of the application.

The position of the creditor

34. As has been seen, the presumptions made by the Viscount¹⁴ are designed to ensure a 'fast-track' decision. This is important for the debtor and fundamental to the whole scheme. As we shall see in more detail below, once the Vro is registered, a moratorium in respect of the debts specified in the Vro takes effect.
35. The application of the presumptions would, however, be unfair on the creditors affected by the moratorium if, on a more thorough analysis, there were grounds for refusing a Vro. Therefore it is equally important that any person specified in a Vro as a creditor to whom a specified qualifying debt is owed may object to—
- a. the Vro having been made;
 - b. the inclusion of the debt in the list of the debtor's qualifying debts; or
 - c. the accuracy of the details of the debt specified in the Vro.
36. Such an objection will need to be made to the Viscount in the prescribed manner. It will need to be –
- a. made during the moratorium period relating to the Vro and within a prescribed period for objections (at all events not more than 28 days after the creditor has been notified of the making of the Vro);

¹⁴ See 29. above.

- b. based on a prescribed ground;
 - c. supported by information and documents as might be prescribed.
37. The Viscount will have to consider every such objection made to him. The Viscount will be able —
- a. as part of his consideration of an objection, or
 - b. on his own initiative,
to carry out an investigation if it seems appropriate.
38. Depending on his findings, the Viscount may revoke or amend the Vro. In certain circumstances he may refer a matter to the Royal Court (see further 41. below).
39. The Viscount will be able to require any person to give him such information and assistance as he might reasonably require in connection with such an investigation.
40. This will be a more expeditious remedy for a creditor in the first instance than seeking formal judicial review. However, the draft Law will still go on to provide that persons dissatisfied with the actions of the Viscount may apply to the Royal Court,¹⁵ which may give directions or make any order it thinks fit. Such order may include quashing a decision of the Viscount and revoking or amending the Vro.
41. The Viscount will also be able to make an application to the Royal Court for directions or an order in relation to any matter arising.

Making/Content of a Vro

42. It is for consideration whether a Vro will have to be made in a prescribed form (*i.e.* prescribed by Order of the Minister). At all events, the Vro must include a list of the debts which the Viscount is satisfied were qualifying debts of the debtor at the application date, specifying the amount of the debt at that time and the creditor to whom it was then owed.
43. The Viscount must—
- a. give a copy of the Vro to the debtor; and
 - b. make an entry for the Vro in a register (to be open to the public for inspection) containing the prescribed information about the order.
44. Provision will be made by Order as to other steps to be taken by the Viscount or the debtor on the making of the Vro. Such steps will include in particular notifying each creditor to whom a qualifying debt specified in the Vro is owed of—

¹⁵ Note the parallel here with *e.g.* Art 31(7) of the Bankruptcy (Désastre) (Jersey) Law 1990 in relation to a person served with notice of admission or rejection of proof of a debt who is dissatisfied with the decision of the Viscount.

- a. the making of the order and its effect,
- b. the grounds on which a creditor may object (see 35. & 36. above), and
- c. any other prescribed information.

The moratorium

45. A moratorium commences on 'the registration date', that is to say, when the Viscount enters the qualifying debt specified in the Vro on the register kept by his Department for that purpose (see 43b. above).
46. During the moratorium, the creditor to whom such a qualifying debt is owed—
- a. has no remedy in respect of the debt, and
 - b. may not—
 - i. apply for a declaration of *désastre* in reliance on the debt, or
 - ii. otherwise commence any action or other legal proceedings against the debtor for the debt, except with the permission of the Royal Court and on such terms as the Court may impose.
- a. the moratorium terminates early; or
- b. the moratorium period is extended by the Viscount or by the Royal Court (see further below).
49. The Viscount may only extend the moratorium period for the purpose of—
- a. carrying out or completing an investigation (see 32. – 39. above); or
 - b. taking any action he considers necessary (whether as a result of an investigation or otherwise) in relation to the Vro.
50. The Viscount may not extend the moratorium period beyond the end of the period of 3 months beginning after the end of the initial period of 1 year.
51. The moratorium period may be extended more than once, but any extension must be made before the moratorium would otherwise end.¹⁶

Discharge from qualifying debts

52. At the end of the moratorium applicable to a Vro the debtor is discharged from all the qualifying debts specified in the Vro (including all interest, penalties and other sums which may have become payable in relation to those debts since the date on which the application was lodged by JCAB with the Viscount).

¹⁶ Compare section 251H of the Insolvency Act 1986 of the United Kingdom.

53. However, this does not apply if the moratorium terminates early, nor does it apply in relation to any (apparently) qualifying debt which the debtor actually incurred in respect of any fraud or fraudulent breach of trust to which the debtor was a party.
54. The discharge of the debtor does not release any other person from—
- a. any liability (whether as partner or joint owner/tenant of the debtor or otherwise) from which the debtor is released by the discharge; or
 - b. any liability as guarantor for the debtor or as a person in the nature of such a guarantor.
55. If the Vro is revoked by the Royal Court (see 40. above) after the end of the moratorium period, the qualifying debts specified in the Vro shall, so far as practicable, be treated as though the moratorium had never applied to them.

Assisting the Viscount

56. A debtor has certain duties to the Viscount after the making of an application for a Vro. The debtor must—
- a. give to the Viscount such information,
 - b. attend on the Viscount at such times, and
 - c. do all such other things,
- as the Viscount may reasonably require for the purpose of carrying out his functions in relation to the application or, as the case may be, the Vro made as a result of the application.
57. The debtor must notify the Viscount as soon as reasonably practicable if he or she becomes aware of—
- a. any error in, or omission from, the information supplied to the Viscount in, or in support of, the application;
 - b. any change in his or her circumstances between the application date and the determination date that would affect (or would have affected) the application.
58. These duties apply after, as well as before, the determination of the application, for as long as the Viscount is able to exercise functions referred to above.
59. If a Vro is made as a result of the application, the debtor must notify the Viscount as soon as reasonably practicable if—
- a. there is an increase in his or her income during the moratorium period applicable to the Vro;
 - b. he or she acquires any property or any property is devolved upon him or her during that period;
 - c. he or she becomes aware of any error in or omission from any information supplied by him or her to the Viscount after the determination date.

C. Good faith, safeguards, offences etc.

Factors evidencing bad faith

60. We have seen at 5. above that there is a requirement of good faith. It will need to be clear, primarily for JCAB's purposes, that certain conduct in particular is deemed to breach such requirement.
61. The following¹⁷ – while not exhaustive of factors determining the 'clean hands' test – will rank as disqualifying conduct by the debtor:
- a. within the 3 years prior to the application for the Vro –
 - i. failing to keep or produce records which account for a loss of property by the debtor, or by a business carried on by him/her,
 - ii. entering into a transaction at an undervalue;
 - b. within the 12 months prior to the application for the Vro, giving a preference;¹⁸
 - c. trading/incurred a debt knowing that he/she would be unable to pay the debt(s) or being reckless as to such ability;
 - d. failing to account satisfactorily for a loss of property or for an insufficiency of property to meet his/her debts;
 - e. carrying on any gambling, rash and hazardous speculation or unreasonable extravagance which may have materially contributed to or increased his/her inability to pay his/her debts;
 - f. careless neglect of business affairs materially contributing to or increasing his/her inability to pay his/her debts;
 - g. fraud or fraudulent breach of trust;
 - h. failing to co-operate with JCAB or with the Viscount.

Offences – preliminary observation

62. It follows from the fact that the Vro scheme relies in many respects upon the *bona fides* of the applicant in providing information about the state of his or her financial affairs (and in keeping that information updated) that the draft Law will need to cater for a variety of offences of dishonesty in connection with applications under the scheme.

¹⁷ Based broadly on the criteria applied in England when considering whether or not to make a DRRO (*i.e.* a Debt Relief Restrictions Order). See Insolvency Act 1986 of the United Kingdom – Schedule 4ZB.

¹⁸ There are definitions in the Bankruptcy (Désastre) (Jersey) Law 1990 of 'entering into a transaction at an undervalue' and 'giving a preference', but they will not necessarily be the same as the respective definitions for the purposes of this Law. It is not practicable to enter into a prolonged analysis here, but the Law Officers' Department will be able to assist the Draftsman in due course on the detail required.

63. The following is a provisional outline of the offences that it would be proposed to include in the draft Law, and of the penalties proposed for the offences.

64. The penalty for the most serious of such offences will be 7 years imprisonment or an unlimited fine or both – which corresponds to the maximum under Article 36(3) of the Social Security (Jersey) Law 1974.¹⁹ The lesser offences will attract a maximum of 2 years imprisonment or an unlimited fine.²⁰

Offences – false representations and omissions

65. The debtor – as we have seen (56.-59. above) – must provide complete and accurate information, and remains under an obligation to provide information to the Viscount once the Vro is made. A debtor who deliberately provides false information or omits pertinent information commits an offence.

Offences – concealment or falsification of documents

66. A failure to produce books, papers or other documents to the Viscount, or concealment, falsification etc., is an offence. The offence may be committed before making the application for the Vro, and during both the application process and the moratorium period.

67. It is irrelevant that the Vro may have been revoked subsequent to an offence being committed.

Offences – fraudulent disposal of property

68. A debtor who obtains a Vro is guilty of an offence if he or she fraudulently disposes of any property during the three years before the application date or during the moratorium period.

69. It is irrelevant that the Vro may have been revoked subsequent to an offence being committed.

Offences – fraudulent dealing with property obtained on credit

70. It is an offence for the debtor to dispose of property obtained on credit for which he or she has not paid, or for a person knowingly to receive such property.

71. No offence is committed if the disposal or acquisition was in the ordinary course of the debtor's business, but particular attention will be given to the price paid for the property.

72. The offence may be committed before the application for the Vro has been made, and during the application process.

¹⁹ And also to the penalty on indictment under e.g. section 251O(1) of the Insolvency Act 1986 of the United Kingdom – see s. 430 and Schedule 10.

²⁰ This is intended to echo the maximum penalties for the broadly corresponding offences under ss. 251O – 251S of the Insolvency Act 1986 of the United Kingdom.

Offences – obtaining credit or engaging in business

73. It is an offence for the debtor to obtain credit during the moratorium period (either alone or jointly with another person) to the extent of a prescribed amount, or to trade in a name other than that in which the Vro was made, without disclosing the debtor's status.
74. "Obtaining credit" includes obtaining goods under a hire purchase agreement.

Offences – acts done outside Jersey

75. It is not a defence that the conduct or transaction complained of was done or effected outside Jersey.

D. Miscellaneous

Fee/Stamp duty?

76. It is for consideration whether or not the debtor should pay a fee or other sum – if only of a nominal amount – in connection with the making of an application for a Vro.
77. It is understood that a fee of £90.00 is levied in England and Wales in relation to the making of Debt Relief Orders.