



House of Commons
Regulatory Reform Committee

**Draft Legislative
Reform (Insolvency)
(Advertising
Requirements) Order
2009**

First Report of Session 2008–09

*Report, together with formal minutes and
written evidence*

*Ordered by the House of Commons
to be printed 20 January 2009*

The Regulatory Reform Committee

The Regulatory Reform Committee (previously the Deregulation and Regulatory Reform Committee) is appointed to consider and report to the House on draft Legislative Reform Orders under the Legislative and Regulatory Reform Act 2006. Its full remit is set out in S.O. No. 141, which were approved on 4 July 2007.

Current membership

Andrew Miller (*Labour, Ellesmere Port & Neston*) (Chairman)
Gordon Banks (*Labour, Ochil and South Perthshire*)
Lorely Burt (*Liberal Democrat, Solihull*)
Mr Quentin Davies (*Labour, Grantham and Stamford*)
Mr James Gray (*Conservative, North Wiltshire*)
John Hemming (*Liberal Democrat, Birmingham, Yardley*)
Mrs Sharon Hodgson (*Labour, Gateshead East & Washington West*)
Mr Stewart Jackson (*Conservative, Peterborough*)
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Mr Mark Prisk (*Conservative, Hertford and Stortford*)
Mr Jamie Reed (*Labour, Copeland*)
Mr Anthony Steen (*Conservative, Totnes*)
Phil Wilson (*Labour, Sedgefield*)

Criteria against which the Committee considers each draft legislative reform order

Paragraph (3) of Standing Order No.141 requires us to consider any draft legislative reform order against the following criteria:

... whether the draft legislative reform order —

- (a) appears to make an inappropriate use of delegated legislation;
- (b) serves the purpose of removing or reducing a burden, or the overall burdens, resulting directly or indirectly for any person from any legislation (in respect of a draft Order under section 1 of the Act);
- (c) serves the purpose of securing that regulatory functions are exercised so as to comply with the regulatory principles, as set out in section 2(3) of the Act (in respect of a draft Order under section 2 of the Act);
- (d) secures a policy objective which could not be satisfactorily secured by non-legislative means;
- (e) has an effect which is proportionate to the policy objective;
- (f) strikes a fair balance between the public interest and the interests of any person adversely affected by it;
- (g) does not remove any necessary protection;
- (h) does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise;
- (i) is not of constitutional significance;
- (j) makes the law more accessible or more easily understood (in the case of provisions restating enactments);
- (k) has been the subject of, and takes appropriate account of, adequate consultation;
- (l) gives rise to an issue under such criteria for consideration of statutory instruments laid down in paragraph (1) of Standing Order No 151 (Statutory Instruments (Joint Committee)) as are relevant;
- (m) appears to be incompatible with any obligation resulting from membership of the European Union.

Publications

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the Internet at www.parliament.uk/regrefcom. A list of Reports of the Committee in the present Session of Parliament is at the back of this volume.

Committee staff

The current staff of the Committee are John Whatley (Clerk), Neil Caulfield (Inquiry Manager) and Liz Booth (Committee Assistant). Assistance was also provided for this report by Helen Emes, Assistant Counsel, House of Commons Legal Services Office.

All correspondence should be addressed to the Clerk of the Regulatory Reform Committee, Delegated Legislation Office, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general enquiries is 020 7219 2837; the Committee's email address is regrefcom@parliament.uk.

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Summary

The Legislative Reform (Insolvency) (Advertising Requirements) Order 2009 and Explanatory Document were laid before the House on 4 December 2008 under section 14(1) of the Legislative and Regulatory Reform Act 2006 (LRA).

Currently, where a company is in voluntary liquidation, there is a requirement to convene a creditors' meeting under section 95 or section 98 of the Insolvency Act 1986. In both these instances, an advertisement to that effect must be placed in at least two local newspapers as well as in the Gazette. The purpose of the draft Order is to amend the 1986 Act in order that the requirement to advertise the creditors' meeting locally will be removed and replaced with a discretion to undertake additional advertising as appropriate in each case.

We are surprised at the narrow focus of the draft Order and that its effects are minor. Given the widespread concerns about insolvency procedures, including the fees structure, we believe that it would be more appropriate for the proposal to be considered together with the other proposals expected from the Department as part of the overall project to modernise insolvency legislation.

1 What the draft Order proposes

1. Insolvency proceedings in England and Wales are mainly governed by the provisions of the Insolvency Act 1986. Further detail is provided by the Insolvency Rules 1986, which have subsequently been amended on many occasions.

2. The draft Order is part of a project, which began in July 2005, to consolidate and modernise the Insolvency Rules and other relevant provisions. The Department carried out a consultation exercise in September 2007 for eight proposals. However, due to “unforeseen issues”¹ only one proposal is being taken forward at this stage.

3. In light of widespread concerns about existing insolvency procedure, including the fees structure, and given the potential volume of changes anticipated from the Insolvency Service, we are surprised at the narrow focus of the draft Order.

4. The proposal in the draft Order relates to the initial meetings of creditors in a voluntary liquidation. The current position is governed by section 95 of the 1986 Act (for a members’ voluntary liquidation, otherwise known as a “solvent” winding up) or section 98 of the same Act (for a creditors’ voluntary liquidation). In both situations, the liquidator (or the company itself) is required to advertise the meeting in the Gazette and in at least two local newspapers.

5. As part of the insolvency procedure, individual notices are sent to all known creditors, informing them of the insolvency and giving details of the initial creditors’ meeting. The advertisement provisions are intended to ensure that, if any other creditors exist, then they are informed of the meeting.

6. Under the terms of the draft Order, the existing duty to advertise in the Gazette will remain. However, the draft Order proposes to amend sections 95 and 98 of the 1986 Act by:

- removing the requirement to advertise in two local newspapers;
- replacing it with a discretion to carry out additional advertising;
- and, in cases where that discretion is used, allowing additional advertising in whatever manner the liquidator or company thinks is appropriate.

2 Assessment of the proposal against the tests in the Legislative and Regulatory Reform Act 2006 and in Standing Order No. 141(3)

7. Section 1 of the Legislative and Regulatory Reform Act 2006 states that the Minister may by Order make any provision which he considers would serve the purposes of removing or reducing any burden, or the overall burdens, resulting directly or indirectly for any person from any legislation. Section 1(3)(a) includes a financial cost in the definition of a “burden”.

8. The Explanatory Document states that the proposal will remove the current requirement to incur the cost of local newspaper advertisements in all cases.²

9. We agree that the Order will remove or reduce a burden which results from sections 95 and 98 of the Insolvency Act 1986.

10. We note, however, that although the Order will remove a financial cost from the insolvent estate, in many cases this is unlikely to result in further funds being available for creditors. In many insolvency cases, little or no funds remain once the insolvency practitioner dealing with the estate has been paid. While we recognise the necessary work which is carried out by practitioners in this field, it is unfortunate that creditors are often left with their claims reduced or unresolved.

3 Pre-conditions and terms

11. Section 3(2) of the LRRRA requires the Minister to be satisfied that the draft Order meets certain preconditions. These are that:

- a) The policy objective could not be satisfactorily secured by non-legislative means;
- b) The effects of the proposed changes to the law are proportionate to the policy objective;
- c) The proposed changes strike a fair balance between public and private interests;
- d) The proposed change to the law does not deprive anyone of a necessary protection;
- e) It will not prevent anyone from continuing to exercise a right or freedom that they might reasonably expect to continue to be allowed to do;
- f) It is not of constitutional significance.

12. In examining these, we particularly note the following points:

Pre-condition b) the effects of the proposed changes to the law are proportionate to the policy objective:

The proposal does not remove the requirement that the creditors' meeting must be advertised in the Gazette. Other requirements, such as sending notices to all known creditors and updating the company's website with details of the insolvency³ also remain in place. The Department states that the proposal is intended to allow the insolvency practitioner, who is professionally qualified and regulated, to judge whether additional advertisements would serve a useful purpose in each case.

We are concerned that the effects of the proposal are so minor as to cause doubt as to its usefulness.

Pre-condition c) The proposed changes strike a fair balance between public and private interests;

The Newspaper Society has raised objections to the proposal, pointing out that local newspapers will lose revenue if the changes are made. However, the current regime operates in a completely mandatory manner, not in a way which takes account of whether there is any real need for the advertisements in each case.

Pre-condition d) The proposed change to the law does not deprive anyone of a necessary protection;

The current advertising requirements are intended to ensure that if creditors exist, but the insolvency practitioner is not aware of them, they should be able to attend the creditors' meeting. However, the Department states that "the geographical profile of creditors has changed since this obligation was first put into the legislation" and also that technological developments have occurred since 1986.⁴ Whereas unknown creditors may previously have lived locally, and may therefore have been expected to see a notice printed in the local newspaper, with more widespread use of technology such as the internet, creditors may now be spread over a much wider area. In addition, greater access to and use of technology as a source of information means that many creditors will not be reliant upon the local press for relevant information.⁵

13. The Explanatory Document refers to a statement⁶ that the current provisions for advertising in local newspapers result in a previously unknown creditor coming forward in an estimated one in fifty cases. It is important to ensure that those creditors do not lose the protection which is afforded by the current regime. **We are not satisfied that the retention of requirements to advertise in the Gazette, even when taken with the availability of information from other sources including the internet, will necessarily protect them.**

3 ED p3 para 12

4 ED Annex Ap2 para 9

5 ED Annex A p3 para 12

6 ED Impact Assessment para 9

14. Some respondents to the consultation exercise questioned whether the proposal, by making the requirement for additional advertising into a discretion, may lead to potential liability for liquidators in cases where others may disagree with their decision.⁷ The Department states that the courts are unlikely to interfere in the decisions of regulated practitioners, who are required to make many judgment-based decisions in the course of insolvency proceedings, and that guidance will be issued.⁸ We agree with the Department that risks of liability are remote.

15. We are charged with assessing whether the pre-conditions in the Legislative and Regulatory Reform Act 2006 have been met, as well as examining various tests (those set out in Standing Order No. 151, appropriateness for delegated legislation and compatibility with European Union obligations). Having examined these, we have reservations as set out above.

4 Consultation

16. The Department carried out a consultation exercise between 19 September and 10 December 2007.⁹ The exercise covered eight proposals, of which only one is proceeding at this stage. The Explanatory Document gives details of the consultation exercise.

17. Two bodies raised substantial objections to the proposal. The Newspaper Society stated that the proposal underestimates the effectiveness of local newspaper advertisements and that it appeared to be attempting to discourage liquidators from using local newspapers. Despite meeting with the Insolvency Service, these objections have not been withdrawn. However, we are satisfied that the Department has taken them into account in deciding to proceed.

18. In addition to the Newspaper Society, the Association of Business Recovery Professionals (R3) objected to the proposal, stating that local newspaper advertisements were a useful method of informing creditors. However, R3 subsequently confirmed that they did not object to the removal of the current mandatory requirement, provided that liquidators were given a discretion to advertise if appropriate and to use whatever medium that they decided. This is the format of the proposal.

19. We believe that the proposal has been the subject of, and taken appropriate account of, adequate consultation.

5 Impact Assessment

20. The Impact Assessment¹⁰ assesses that the proposal will save an estimated £3,360,000 per year. This is based on a cost of £300 per advertisement. The figure also assumes that 80% of cases would not require additional advertising if it were not mandatory under the

7 ED Annex C para 137

8 ED Annex A p2 para 7

9 See ED Annex C for details of the representations received and the government's response to them

10 ED Annex B

current provisions. The figure is “anecdotal”¹¹. These provisions of the 1986 Act apply to cases of voluntary insolvency – the Department states that, as a result, directors may be expected to co-operate with the insolvency practitioner and to comply with the statutory requirement to deliver up all of the company’s accounts. They believe that, in most cases, these records should include a full list of known creditors, leaving relatively few cases where further advertisement is thought to be necessary. **We find this unconvincing.**

6 Conclusion

21. The Department has recommended the affirmative resolution procedure, since the proposal will have an impact on creditors and the assets of insolvent companies. In addition, the proposal will have a financial impact on the publishers of local newspapers.¹²

22. We have considered the draft Order and assessed whether the pre-conditions in the Legislative and Regulatory Reform Act 2006 have been met, as well as the tests set out in Standing Order No. 151, and, whilst we do not intend to recommend that no further proceedings should be taken in relation to it, it is our view that the draft Order should not be approved, although we consider the affirmative resolution appropriate were it to proceed.

11 ED Annex B p8 para 29

12 ED p3 para 7

Appendix

Letter from the Chairman, Business and Enterprise Committee to the Chairman of the Regulatory Reform Committee

Draft Legislative Reform (Insolvency) (Advertising Requirements) Order 2009

I am writing to you before the Regulatory Reform's Committee's consideration of the Legislative Reform (Insolvency)(Advertising Requirements) Order 2009 because one of the people who responded to the Business and Enterprise Committee's call for evidence in advance of our meeting with the Chief Executive of the Insolvency Service, had concerns about the proposal.

As you are aware the draft order removes the requirement to advertise notice of a creditors' meeting, regarding the winding up of a company, in two local newspapers as well as in the Gazette. This is to be replaced with "a discretion to undertake additional advertising" which can be done in forms other than an advert in a local paper.

It is likely that if this draft order is passed, the placing of creditor meeting advertisements on the internet will become a substitute for the use of local papers. However, 99.9% of UK businesses are small and medium sized enterprises and not all may have access to the internet. I am surprised that the extent of small business access to the internet was not explored in the regulatory impact assessment.

Moreover, even though the Gazette is free to search on line it is not particularly user friendly for small businesses trying to keep up to date on their suppliers or customers. It is not searchable by area or name but only by date of publication.

If adverts in local newspapers are replaced with notices on various internet pages and the requirement to check the Gazette on-line, small businesses will need to actively seek information on relevant companies from various sources.

I acknowledge that insolvency practitioners also try to contact all creditors in writing and the requirement to advertise is an additional measure. Nonetheless I ask you to consider carefully whether the Order leaves suitable safeguards for creditors in place.

15 January 2009

Formal Minutes

Tuesday 20 January 2009

Members present:

Andrew Miller, in the Chair

Gordon Banks
John Hemming

Judy Mallaber
Dr Doug Naysmith

Draft Report (Draft Legislative Reform (Insolvency) (Advertising Requirements) Order 2009, proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 22 read and agreed to.

Summary agreed to.

A papers was ordered to be appended to the Report

Resolved, That the Report be the First Report of the Committee to the House.

Ordered, That the Chairman make the Report to the House.

[Adjourned till Tuesday 27 January at 9.30 pm

List of Reports from the Committee during the current Parliament

Session 2007-08

First	Draft Legislative Reform (Local Authority Consent Requirements) (England and Wales) Order 2007	HC 135
Second	Draft Legislative Reform (Health and Safety Executive) Order 2008	HC 398
Third	Draft Legislative Reform (Consumer Credit) Order 2008	HC 939
Fourth	Draft Legislative Reform (Local Authority Consent Requirements) (England and Wales) Order 2008	HC 940
Fifth	Getting Results: the Better Regulation Executive and the Impact of the Regulatory Reform Agenda	HC 474-I and II
Sixth	Draft Legislative Reform (Lloyd's) Order 2008	HC 1090