



House of Commons
Regulatory Reform Committee

Draft Legislative Reform (Insolvency) (Miscellaneous Provisions) Order 2009

Eighth Report of Session 2008–09

*Report, together with formal minutes and
written evidence*

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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 was approved on 4 July 2007.

Current membership

Andrew Miller (*Labour, Ellesmere Port & Neston*) (Chairman)
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Lorely Burt (*Liberal Democrat, Solihull*)
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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).

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Summary

The draft Legislative Reform (Insolvency) (Miscellaneous Provisions) Order 2009 and Explanatory Document (ED) were laid before the House of Commons on 13 May 2009 under section 14 of the Legislative and Regulatory Reform Act 2006 (LRA) by the Department for Business, Enterprise and Regulatory Reform (BERR) (now the Department for Business, Innovation and Skills (BIS)) with a recommendation that the draft Order be proceeded with by means of the super-affirmative procedure. The draft legislative reform order (LRO) contains a total of seven proposals for changes to insolvency procedure, scheduled to come into force in April 2010. These are:

- To permit remote attendance at meetings
- To permit use of websites as a means of communication
- To permit the use of e-mail
- To remove requirements for documents to be verified by affidavit
- To remove the requirement for certain annual meetings
- To remove the requirement for certain routine reports to be filed at court in Individual Voluntary Arrangements
- To remove the requirement that liquidators and trustees in bankruptcy obtain sanction (i.e. approval) for compromises made in realising assets.

The LRO's stated purpose is "to amend miscellaneous provisions of the Insolvency Act in order to reduce burdens on users of the legislation, thereby benefiting the creditors of insolvent companies, the members of solvent companies, and individuals through increased dividends."¹

We recommend that the LRO be proceeded with unamended.

1 ED, paragraph 2

1 What the draft Order proposes

Introduction

1. Insolvency proceedings in England and Wales are governed mainly by the provisions of the Insolvency Act 1986 (the Act). Further detail is provided by the Insolvency Rules 1986 (the Rules), which have been frequently revised and updated. The Rules are made by the Lord Chancellor with the consent of the Secretary of State for Business, Innovation and Skills, after consultation with the Insolvency Rules Committee whose members include members of the judiciary, legal practitioners and other professionals with insolvency expertise.² The draft Order is part of a project that began in July 2005 to consolidate and modernise insolvency law by amending certain aspects of the Act and the Rules.

2. Insolvency law in Scotland is largely a matter for the devolved institutions. However, two of the proposals (A and B below) will have some limited application to corporate insolvency in Scotland. The ED explains that the relevant offices of the Scottish Executive are content with the draft Order and that the Scottish Executive is considering whether more extensive implementation in Scotland would be possible by means of Scottish legislation.³

The proposals

3. There are seven proposals in the LRO:⁴

- a) Proposal A: To permit remote attendance at meetings (including by telephone or videoconferencing) unless there is objection from 10% of creditors by value or of members by voting right
- b) Proposal B: To permit use of websites as a means of communication at the discretion of insolvency practitioners in order to reduce the burden of providing printed information, but subject to a right for creditors to request printed copies free of charge
- c) Proposal C (Reference to things “in writing” and “post”): To replace provisions in the Act and in the Rules to permit the use of e-mail
- d) Proposal D: To remove requirements for documents to be verified by affidavit in England and Wales and replace them with a less burdensome requirement for a statement of truth
- e) Proposal E: Removal of the requirement for certain annual meetings rarely attended by creditors or members and replacement (by means of separate rules) with a written progress report

2 For Scotland, rules are made by the Secretary of State – see ED paragraph 81

3 ED paragraph 89

4 The A to G letter designations employed here for convenience are not used in the ED but correspond to the Annexes in the ED

- f) Proposal F: Removal of the requirement for certain routine reports to be filed at court in Individual Voluntary Arrangements
- g) Proposal G: Removal of the requirement that liquidators and trustees in bankruptcy obtain sanction (i.e. approval) for compromises made in realising assets.

Parliamentary procedure

4. Under the LRRRA, the super-affirmative procedure provides for an extended parliamentary scrutiny period of 60 days, together with the opportunity for the Committee to suggest changes to a draft LRO.⁵ The ED states that, although the draft LRO is not believed to be controversial or of wide public or political importance, the super-affirmative procedure was recommended in the present case because of: the complex and technical nature of insolvency law and its practice by a small number of specialists; the technical nature of the proposals within that field of law; the prevailing economic conditions; the wide public interest in insolvency matters; and the fact that property and rights would be affected by the draft Order.

2 Consultation

5. The proposals arose from two distinct exercises which were the subject of separate consultation exercises: a review of the Rules led to proposals A, B, C, D, E and G, and a review of the working of Individual Voluntary Arrangements (IVAs) led to proposal F. The consultation on the first exercise took place between 19 September and 10 December 2007 and initially extended to a total of 11 separate proposals. However, one of those was dealt with by way of the Legislative Reform (Insolvency) (Advertising Requirements) Order 2009, and four others are not being proceeded with at present. Views were solicited from 26 bodies identified as being likely to have an interest in the proposals, and replies were received from 16 of them. Insolvency practitioners were informed of the proposals through the Insolvency Service's 'Dear IP' newsletter. In addition, the consultation was available on the Insolvency Service website and copies were sent to interested parties who contacted the Insolvency Service.

6. The initial consultation stage included a proposal that information on insolvency proceedings would be received only by parties who expressly opted in to receiving that information (many interested parties only being interested in the final outcome of such proceedings). That proposal (the "opt in" proposal) was abandoned on the basis of various objections from consultees, including that interested parties would be unable to change their minds about involvement on the basis of new information that by definition they would not have received, the possibility of vexatious parties being able to exert disproportionate influence compared with less active parties, and the argument that most of the savings from such a proposal could be obtained from the use of website communication without any such "opt in" provision. Her Majesty's Revenue and Customs (HMRC) and the Association of Business Recovery Professionals (known as "R3") were among those who raised these and other concerns, but after the decision not to proceed

5 See LRRRA section 18

with the opt-in proposal and after correspondence and meetings with HMRC and R3, the remaining concerns with withdrawn.

7. As a result of the decision not to pursue the opt-in proposal, it was decided that the proposal permitting website use should be amended so that, instead of consent being required, creditors would merely receive notification of proposed website use (with the right to request a hard copy of website material). In the light of that modification a further consultation took place for six weeks from 15 August 2008. There were ten responses, all of which supported the modified proposal.

8. The consultation on IVAs took place between 8 May and 3 August 2007 and concerned a total of six proposals, only one of which is being proceeded with in the present draft Order. With one or two exceptions, which were essentially objections to the IVA procedure overall rather than to the proposal itself, the proposal received substantial support.

9. Paragraph 67 of the ED explains that the nature of the bodies consulted (i.e. trade and professional bodies that were able to speak on behalf of substantial numbers of members) compensates for the relatively low response rate in consultation (16 responses to the principal consultation, for instance). On balance, it appears that a cross-section of bodies involved in insolvency practice on a frequent basis was indeed consulted. However, it is perhaps regrettable that the Department did not seek to undertake any consultation with small businesses or other parties with only limited experience of insolvency proceedings, who might have offered a different perspective.

10. Nevertheless, we conclude that subject to the specific matters raised in section 4 of this Report, the proposals have been the subject of, and have taken appropriate account of, adequate consultation.

3 Preconditions and tests

11. In addition to considering whether proposals remove or reduce burdens, the Committee is charged with assessing whether the proposals meet the other preconditions in the LRRRA, and with examining them against various tests (those set out in Standing Order No. 151, appropriateness for delegated legislation, and compatibility with European Union obligations). In the present case it would appear that the tests that raise matters for substantive scrutiny are:

- a) whether each provision taken as a whole strikes a fair balance between the public interest and the interest of adversely affected persons;
- b) whether necessary protections are removed; and
- c) whether the provisions prevent any person from continuing to exercise a right that that person might reasonably be expected to continue to exercise.

Proposal A: Remote attendance at meetings

12. This proposal would permit those responsible for convening meetings required under the Act (office-holders) to allow partial or entirely remote attendance where they believed as a matter of professional judgment that that was appropriate, subject to appropriate arrangements being in place for the exercise of voting and speaking rights and subject to 10% or more of creditors by value or of members by voting rights being able to force a meeting in person.⁶ The Department observes that this would provide more flexibility than the current proxy voting system, whose disadvantage is that voting decisions must be made in advance, without the opportunity for dialogue. Furthermore, the Department points out that the proposal might enhance involvement in meetings by making participation easier, especially in the case of overseas creditors or members.

13. Consultees agreed that there were advantages to the proposed procedure. However, some (notably HMRC) were concerned that certain key or large meetings might be inherently unsuitable for remote attendance. The Department's response is that would be a matter for a responsible decision by the office-holder.⁷ HMRC was also initially concerned that there could be problems with the use of technology to replace meetings in person, but withdrew its concern on the basis that the proposal as a whole would provide adequate protection. The Department plans to introduce rules to safeguard against potential problems in this regard.⁸

14. Two respondents to the consultation said that there could be increased scope for challenging the validity of meetings through claims that there had been breakdowns in technology. The Department's view is that insolvency practitioners are responsible and accountable professionals who will only opt to use technology when satisfied that it is sufficiently robust and secure.⁹ However, whilst that argument might mitigate concerns about the reliability of technology itself, it does not necessarily mitigate concerns about the scope for procedural questioning of its use and the potential administrative burdens that might result.

15. Although the Department states in paragraph 20 of ED Annex A that

“We do not consider that any persons are adversely affected by this proposal”,

that statement is at odds with the comment in paragraph 23 that:

“Where...less than 10% of the creditors by value/members by voting rights desire a physical meeting, but cannot require one, we consider that *although they may be adversely affected*, a fair balance is struck having regard to the wishes of the great majority of creditors by value/members by voting rights” (emphasis added).

16. The questions to be considered would therefore appear to be:

6 It is important to note that the exercise of that right of objection would not automatically result in the meeting becoming a meeting in person of everyone concerned, but would merely give the right for those creditors or members who objected to be provided with a venue at which they could attend in person.

7 See ED, Annex A, paragraph 29

8 See the response to Question 4 from the Committee Inquiry Manager in the Annex to this Report

9 See ED, Annex A, paragraph 28

- whether the proposal taken as a whole strikes a fair balance between on the one hand the wishes of small minority parties on the one hand and on the other hand the advantages of reducing burdens and achieving potential savings to creditors and members (estimated at some £400,000 per year), together with the potential for greater involvement through remote participation, given that minority creditors and members will retain the right to speak at meetings by remote attendance;
- whether the right of minority creditors and members always to be able to speak in person in meetings is a “necessary protection” and/or a right that might reasonably be expected to continue;
- whether the envisaged change to electronic communication removes a necessary protection.

17. In light of the balance of consultation responses, we take the view that those questions should be answered in favour of approving the proposal. However, we recommend that implementation of the proposal be reviewed and consulted on after not more than two years from commencement to assess whether there are objections (particularly from minority creditors and members) that require reconsideration. We make the same recommendation for review in relation to Proposals B, C, E and G.

Proposal B: Use of websites as a means of communication

18. This proposal would give insolvency practitioners discretion to use websites for communicating information and sending documents required to be distributed under the Act. Initial contact would continue to be in writing unless the intended recipient had already consented to email contact, and recipients would retain the right to request free hard copies of website document except in cases where a Court had specifically ordered otherwise. The proposal was previously part of the “opt-in” proposal whereby interested parties would have had to expressly elect to receive information about insolvency proceedings, but that proposal was abandoned for the reasons mentioned in paragraph 6. The slimmed-down proposal was the subject of the further consultation mentioned in paragraph 7, which elicited unanimous support.

19. The Department estimates savings of some £0.6m per year from this proposal, referring in particular to the reduction in burdens that would result from removing the requirement to distribute multiple sets of lengthy documents. Consultees pointed out that the current rules often result in redundant communications being distributed, and that websites would enable interested parties to select the information they actually needed. Separate rules will be made under the Act to govern the use of websites—it is these that will provide for free hard copies. The rules are currently under consideration by the Insolvency Rules Committee, but the draft provided to the Committee seems satisfactory.

20. We take the view that, provided appropriate rules are made, the proposal will reduce burdens while maintaining adequate safeguards, and should therefore be approved. We consider that independent scrutiny of the proposed subsidiary Rules by the Insolvency Rules Committee assists in mitigating concerns that the Rules have not been submitted in final form, but that Departments should in future avoid situations in which the Committee is asked to consider legislative reform orders that are essentially

contingent on the nature of other documents. We request that the Department draw its Report to the attention of the Insolvency Rules Committee.

Proposal C: Reference to things “in writing” and “post”

21. Currently, there is ambiguity as to whether references in the Act to the sending of documents in writing and/or by post allow email communication. This proposal would settle the ambiguity in the primary legislation by making appropriate amendments to the Act. Ancillary rules would be made to stipulate that consent must be given to email communication before it could be used. The rules have been provided in draft and seem satisfactory (specifically, in that they stipulate the need for ongoing—that is, unrevoked—consent).

22. The savings anticipated from this proposal are ancillary to savings that are expected to be made as part of the wider introduction of electronic communication under the Rules, and therefore the ED does not provide specific savings figures. However, it seems evident that savings will be made, and consultation showed very high levels of support for increasing the use of electronic communication on that basis.

23. Subject to the same points as are set out in paragraph 20 above, and specifically the request that the Committee’s Report be drawn to the attention of the Insolvency Rules Committee, we conclude that the proposal as a whole will reduce burdens, includes adequate safeguards, and should be approved.

Proposal D: Removal of requirements for documents to be verified by affidavit

24. This is an uncontroversial proposal that would bring procedure into line with that in other areas of civil litigation by replacing the need for most affidavits with a statement of truth. It is contempt of court and perjury to make a false statement in a statement of truth.

25. The current cost of swearing or affirming an affidavit before a solicitor is £5 plus £2 per exhibit. Consultation produced unanimous support for this proposal, including from the Law Society. Savings are estimated at some £100,000 per year.

26. We recommend that this proposal be approved.

Proposal E: Removal of requirement for certain annual meetings

27. The Act currently requires annual meetings to take place at which company liquidators lay before creditors and/or company members a report of the conduct of proceedings and of acts and dealings during the year. The ED explains that such meetings are often poorly attended, that there is no requirement for any decisions be taken, and that what takes place is in practice often no more than a notional presentation of accounts that in any event are available from Companies House, albeit currently at a cost.¹⁰ (The cost is currently £4 and the ED argues—reasonably—that this is less than the cost of attending a meeting.¹¹) The

¹⁰ See ED, Annex E, paragraph 6

¹¹ See ED, Annex E, paragraph 14

proposal would therefore remove the requirement for annual meetings. It is proposed that rules should be introduced at the same time as the draft Order to require the free provision of the information that is currently provided at the annual meeting, together with additional information about liquidator remuneration.

28. The cost of arranging annual meetings, including the hire of an appropriate venue, must be borne from the assets of the company in liquidation. The Department estimates that savings of £5.2m per year could be made from dispensing with this statutory requirement.

29. The ED proceeds on the basis that the statutory purpose of annual meetings is redundant. However, it might be considered that an incidental purpose of annual meetings, even if it is not necessarily one expressly envisaged by the Act, is to allow for a face-to-face exchange of views on the conduct of proceedings. The ED states that the ancillary rules will give rights of challenge of remuneration.¹² Draft rules have been provided that address provision of information but not (at least as yet) the right of challenge.

30. Consultation showed strong support for the proposal subject to creditors and members being able to receive the information currently communicated at meetings by other means. The ED points out that creditors and members will retain the right to ask questions of liquidators and to challenge liquidator actions by application to court. There is also a right for 10% of creditors to requisition a meeting. However, it is noteworthy that in its recent report on the Insolvency Service, the Business, Innovation and Skills Committee (then the Business and Enterprise Committee) commented on the need for the service to have greater disciplinary powers over licensed members, and the case for establishing an insolvency ombudsman.¹³

31. The estimated savings from this proposal constitute some 67% of the anticipated overall savings from the set of draft proposals.

32. Subject to the same points as are set out in paragraph 20 above, and specifically the request that the Committee's Report be drawn to the attention of the Insolvency Rules Committee, and subject to the recommendation for post-implementation review contained in paragraph 17 (which should consider whether valuable opportunities for communication with insolvency practitioners have been prejudiced) we conclude that the proposal as a whole will reduce burdens, includes adequate safeguards, and should be approved.

Proposal F: Removal of requirement for certain documents to be filed at court in Individual Voluntary Arrangements

33. This proposal would remove the current obligation to file routine reports with the court in IVAs in instances where the court has no role to play and where in practice the relevant reports are merely filed and not acted upon. There would be no requirement to file at all in the case of slow-track IVAs, and in the case of fast-track IVAs the requirement to

¹² See ED Annex E, paragraph 11

¹³ <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmberr/198/198.pdf>

file with the court would be replaced (for technical reasons deriving from provisions of the Act) with a requirement to file with the Secretary of State. However, the number of fast-track IVAs is small.

34. Only two consultees from a total of 52 were opposed to the proposal on the basis that it would reduce protection or remove a necessary right, and these objections were to the IVA procedure overall rather than to the specific proposal. Savings of some £300,000 per year are envisaged.

35. Safeguards exist in that there are statutory rights of challenge to the conduct of practitioners. In any event, the current arrangement arguably does not provide any particularly valuable protection, either theoretically or practically.

36. We recommend that this proposal be approved.

Proposal G: Removal of requirement for sanction (i.e. approval) for certain acts of the office-holder

37. The current position is essentially that liquidators and trustees in bankruptcy must obtain approval from the relevant creditors or from the court before making compromises in realising assets. That causes both an administrative burden in itself and can also lead to lost opportunities for maximising the assets of the insolvent estate. The proposal would remove the requirement for sanction to be obtained. Practitioners would still be accountable to creditors for their decisions on realisation of assets.

38. The Department envisages savings of £1.2m per year from the proposal. Insolvency practitioners were supportive in consultation (although there was a particularly low number of responses on this proposal) and cited examples of where the present process had worked against the best interests of the insolvent estate. The Insolvency Technical Managers Forum indicated that the present system can even on occasions make it more cost effective to write off a small asset such as a book debt than to obtain sanction for a compromise in realising it. HMRC initially expressed concern, saying that after-the-fact accountability was not ideal, but ultimately withdrew its objections. The Institute of Credit Management (i.e. a creditor representative body) saw some benefit to the sanctions system but one of its members commented that creditors tend in reality to be unenthusiastic about involvement in such procedures in the middle of the insolvency process.

39. The ED concedes that the proposal would on the face of it remove an existing right but argues that it strikes a fair balance between competing interests (that of a creditor or creditors to challenge a decision on realising assets and that of generally improving the position for realising assets in most cases). It argues that the protection of sanction is not needed because of the requirement for practitioners to account for their actions and the possibility for creditors to apply to the court for directions to challenge practitioners' actions. It might be questioned whether the latter remedy with its associated delays and costs would be of use in retrospect but it might also be agreed that this would act as a control on practitioners' future actions.

40. We are conscious that there are concerns about the process of realising assets in insolvency proceedings. The sanction of creditors, if not of the court, for compromises in asset disposal currently provides an opportunity for transparency. Nevertheless,

subject to those concerns, which we recommend be considered in the post-implementation review referred to in paragraph 17, we recommend that the proposal be approved.

4 Impact Assessment and potential savings

41. The Impact Assessment envisages total annual savings of some £7.8m. The ED says that “it is not possible to say that in every case the costs saved will result in a direct and commensurate increase in dividends for all creditors.”¹⁴ It adds: “It is not appropriate to ring-fence the savings and make them the subject of a one-off dividend to the creditors because there are rules for the payment of dividend which themselves gives rise to such costs (such as advertising intention to pay a dividend, admitting claims for dividend purposes) and payment of dividends should be done on as few occasions as necessary.”¹⁵

42. Notwithstanding that, in the debate on the Legislative Reform (Insolvency) (Advertising Requirements) Order 2009 that took place on the Floor of the House on 19 March 2009, the Chairman of our Committee asked the Minister for Employment Relations and Postal Affairs to clarify that he expected savings from that measure to be passed on to creditors and not to be held by insolvency practitioners, and the Minister indicated that he was content with that representation of the situation.

43. We express our strong wish that that statement be noted by the insolvency practitioner profession in the context of the current proposals.

44. In its recent report on the Insolvency Service, the Business and Enterprise Committee said:

It may be inevitable that insolvency practitioners' remuneration is perceived as unduly high by many creditors. There must, however, be sufficient opportunity and information to allow creditors to ensure that fees are reduced where that perception is justified. We therefore welcome the Insolvency Service's commitment to monitor whether insolvency practitioners are complying with the current practice statement governing the approval of their fees. We urge the Insolvency Service to make its findings publicly available. We also urge the government to respond to these findings and to consider the case for strengthening control - possibly through independent arbitration - of insolvency practitioners' remuneration beyond the limited power to do so currently exercised by creditors.¹⁶

45. We note the intention to provide for greater challenge to remuneration through amendments to the Rules.¹⁷ However, in light of the Business and Enterprise Committee's findings, we repeat our concern that savings should be passed on to creditors and members and recommend that the effect of the draft Order be reviewed from that perspective after a period of 24 months from implementation.

14 Paragraph 33

15 Paragraph 27

16 Conclusion 5 and paragraph 29

17 See Proposal E

5 Conclusion

46. When the draft Order was laid, the Government recommended that the super-affirmative procedure should apply. This enables us to propose amendments if we so wish. In this instance, we did not choose to do so, but have made a number of observations and suggestions for action, which we hope will be utilised. Accordingly, we recommend that the draft Order be proceeded with unamended.

6 Annex

Response by the Insolvency Service to written questions

I refer to Neil Caulfield's letter of 4 June concerning this draft Order. I have copied the questions in that letter in bold and our comments follow.

Q 1 Paragraph 8 of the Explanatory Document says that the savings to be made as a result of the proposal "might in some cases make the difference between the payment, or not, of a dividend or in other cases increase the amount of the dividend." Are there any available statistics on the number of "typical" insolvency cases that would be tipped from non-payment into payment were the total anticipated savings to be achieved ("typical" insolvencies meaning insolvencies that represent, say, 50% of cases around the mean value of insolvent estates)? If those figures are not available, please provide a distribution chart showing insolvent estate value against numbers of cases to indicate the likely impact of the savings in the context of overall insolvency numbers.

I regret that I am unable to prove the information you have requested.

These changes are being brought forward on the assumption that the reduction of costs is a desirable outcome in itself provided, of course, that the pre-conditions are met. We have attempted to address the question of how the savings would feed through to the creditors whilst acknowledging that there will not in all cases be a £ for £ benefit for the creditors. Whilst we can appreciate your wish to have a more detailed analysis of the direct effect on the creditors, I am afraid that the information is simply not available.

Given the individual nature of the body of insolvency cases and the fact that the Secretary of State does not have any direct role in the conduct of certain types of cases¹⁸, there is no central record of the outcome of all cases created for that purpose. Certain key information is placed on the public record (for example at Companies House or with the court) but the purpose of that is to enable someone with an interest in the particular case to find information concerning it rather than to provide a source of information about the generality of the cases.

We are of the view, which we think must be right, that the persons who must have information concerning a particular case are the creditors and the insolvency legislation seeks to do that. It is perhaps worth re-iterating at this point that parallel changes are being made to the Insolvency Rules 1986, intended to come into force on the same date as the LRO, which are intended to provide better information to the creditors so as to enable them to make an informed decision as to the reasonableness of the costs and expenses charged by insolvency office-holders. The power to approve these lies, we think, properly with the creditors and is not generally subject to scrutiny of an external authority, unless they are referred to the court for review.

There are generally no circumstances under the Insolvency Act 1986 in which the Secretary of State is asked to agree remuneration. That is a matter for the creditors or a committee of the creditors and if they do not make a resolution then, depending on the proceedings, the office holder can only claim the scale rate¹⁹ or have the matter considered by the court.

In voluntary arrangements, remuneration is entirely a matter for the terms of the arrangements as proposed by the debtor, individual or company, and approved by the creditors, and is not subject to any external scrutiny.

¹⁸ The Secretary of State takes no part in creditors' and members' voluntary liquidations, administrations, company voluntary arrangements and individual voluntary arrangements (other than Fast track voluntary arrangements).

¹⁹ See Schedule 6 to the Insolvency Rules 1986

It is possible to say in very broad terms that payment of a dividend is more likely in a rescue (such as administration or voluntary arrangement) than a terminal procedure (such as bankruptcy or liquidation) but even within those broad categories the levels of return to the creditors can vary.

You have suggested that we could provide estimates for a “typical” insolvency case being based on a % of cases around the mean value of insolvency estates. This is similarly unworkable. “Assets” are not as clear cut as they might appear as they can include:

- Assets subject to a fixed charge
- Assets subject to a floating charge
- “Prescribed part”²⁰ of floating charge assets
- Potential fruits of action by the office holder to boost the assets for the benefit of the creditors (e.g. the recovery of money for the estate from a wrongful trading action against the directors) which are unlikely to be listed by the directors as assets

Furthermore, the final realisations will often vary considerably from the book value or the realisable value estimated at the commencement of the insolvency procedure.

I hope you will therefore appreciate that the collation of this information is not straightforward, even if all office holders in all cases are asked to provide it.

Q 2 Paragraph 55 of the Explanatory Document refers to the requirement for obtaining court sanction causing loss in value to insolvent estates in certain cases. In what proportion of cases is that the case?

We do not have firm figures for this and have largely relied on the views expressed by the insolvency specialists who responded to the consultation.

Q 3 There are large differences between the estimated savings figures given in the draft ED and those given in the final ED, although the overall total is not dissimilar (in fact some 20% larger). For instance, the savings anticipated from allowing remote attendance at meetings to take place have decreased from £1.4m to £0.4m and the savings anticipated from use of websites from £3.5m to £0.6m, while the savings anticipated from abolishing annual meetings have increased from £3m to £5.2m. What is the reason for the differences? What factual information changed between the draft and the final version?

At the point at which you were provided with the draft Explanatory Document (ED) in March, which included a summary of the draft Impact Assessment (IA), there was still a good deal of work to do to finalise the IA. There were a few reasons for the changes thereafter which I have summarised for each proposal below, but most significantly it is to recognise that insolvency case numbers in 2010/11 are projected to be greater than they would have been had these provisions been commenced during 2009/10. You are correct to point out that in some cases the estimated benefits have been down-sized, that is because in relation to one or two of the proposals we considered some of the earlier presumptions to have been over-optimistic and in one case failed to take account of costs which needed to be offset.

Remote Attendance at Meetings (£1.4m to £0.4m)

As work has progressed on this proposal, we have taken the view that the previous estimates of the proportion of cases in which insolvency office-holders would have the confidence to allow attendance at meetings via non-physical means may be lower than previously anticipated. This is perhaps the most novel of the modernisation measures that are proposed and although, anecdotally, we have been told by stakeholders that the change is to be welcomed, in the first year following commencement the estimated benefits have been adjusted to factor in a more cautious view as to take-up (from 5%-10% to 2% of all meetings held).

This is expected to increase over time.

²⁰ The “prescribed part” is that part of an asset secured by a floating charge which is applied in certain circumstances to the general body of creditors rather than to the holder of the floating charge.

Use of Websites (£3.5m to £0.6m)

The earlier draft IA made no provision for the cost of maintaining websites. In finalising the IA a cost estimate of £200 per case was factored into the cost/benefit calculation, resulting in a cost of some £3.5m needing to be offset against the gross benefit (which was itself uplifted on account of the higher projected case numbers for 2010/11).

Affidavits (£0.1m- no change)

The lack of any material change in this number, notwithstanding that projected case numbers have been increased, is attributable to the fact that we had miscalculated the number of affidavits that were submitted in members' voluntary liquidations and the estimated benefits relating thereto, causing the initial estimate of benefits for this proposal to have been overstated by some £57,000. However, the additional benefits that will result as a consequence of the projected higher number of creditors' voluntary liquidations in 2010/11 are now expected to broadly equate to that earlier overstatement.

Annual Meetings (£3m to £5.2m)

The estimated savings are based on projected case numbers for 2010/2011, which are 16,000 compared with 9,000 in the previous estimate.

Sanction (£1m to £1.2m)

This increase is largely attributable to an increase in the projected number of cases in 2010/11, although in finalising the calculations some revision has been made as to the estimated proportion of cases in which requests for sanction will be made to creditors. These estimates are partially based upon information provided by colleagues within the Insolvency Service who collate data from our Official Receivers' offices.

Q 4 So far as remote attendance at meetings is concerned, what precautions will apply in the event of a technological breakdown in the means of remote communication to ensure that meetings do not continue despite the potential loss of important contributions to the meeting, and how will those precautions be enforced? How is the concern of the Insolvency Managers Technical Forum answered, that the validity of a meeting might be challenged on the basis of inability of a particular creditor to achieve technical access?

We have considered the point you have made and agree that it will be necessary to make provision in the Rules to cover this eventuality. We are discussing this with our lawyers.

Our current thinking is that we could give a discretion to the chairman of the meeting whether to continue if he becomes aware of the loss of a connection with a remote creditor and to enable a creditor who considers that they have been disenfranchised to requisition a further meeting (at a physical venue).

Q 5 Please clarify what residual rights of meeting will apply if the requirement for an annual meeting is indeed abolished. In particular, what residual right of challenge will apply to allow the issue of insolvency practitioner fees to be raised on a face-to-face basis? What other rights of feedback in person will exist? Did the Insolvency Service consider allowing annual meetings to take place on the initiative of 10% of creditors, as with objection to remote attendance?

As the ED makes clear the provisions relating to annual meetings do not give any "right" of challenge the fees on a face to face basis. There is no provision either in the Act or in the Rules for any business other than the laying of the accounts and the intention of the existing provisions is to do no more than to ensure that the information is received.

In practice we accept that if a creditor did wish to challenge the information provided, he might well seek to use the forum of the annual meeting to do so and we would expect the liquidator to consider what the creditor/contributory says when doing so, in the same way that we would expect them to consider any other enquiry.

The changes proposed will in our view improve the position of the creditors in that it will provide an explicit route (via the Rules) for seeking further information concerning receipts and payments. This is, we would

contend, preferable to the present position when such a route can only be inferred to exist in connection with the summoning of the annual meetings.

Given that creditors rarely attend these annual meetings, we did not consider that it would serve any useful purpose to retain the right to requisition a meeting under sections 93 and 105, especially when a creditor can just as easily make contact with the office holder.

Furthermore 10% of the creditors have an existing general right to requisition a meeting under the Insolvency Act 1986 (under section 168 of the Insolvency Act 1986 applied to voluntary liquidations by section 112 of the same Act) and that is unaffected by the proposed LRO.

Q 6 Notwithstanding what is said in the ED, what is the likelihood that savings will be passed on to creditors? The Institute of Credit Management raised this, saying that “the underlying premise of cost reduction and increased return to creditors is flawed.” Likewise, although it concluded by giving a cautious welcome to the proposals, HMRC said that “the savings on individual cases when divided amongst all creditors will be too insignificant to benefit anyone other than the IP”, adding that costs might, however, be passed on. The £4.50 saving envisaged in relation to non-filing in IVA cases is at such a low level that it particularly risks being swallowed up by general claims of increased practitioner expenses. How will that be avoided?

The figure of £4.50 is not, we would submit, a good example as it is an estimate of the cost of a very short amount of time in sending one piece of paper to the court and itself makes up a very small part of the estimated benefits.

Our general contention is that there is no reason why an insolvency practitioner being a member of a regulated profession should seek to inflate costs as a device in order to absorb savings as the result of something not done or done in a more cost effective manner.

Q 7 Is it correct that there will be no obligation to circulate the information currently laid at annual meetings until such time as new Insolvency Rules are introduced, and that in the meantime that information will need to be obtained from Companies House, with a fee being payable for its provision? Has the Insolvency Service considered negotiating a position or issuing guidance whereby that information will in the interim be provided free of charge?

The amended rules are intended to come into force on the same date as the changes proposed in the draft Order so we do not think this situation will arise. However, the fee for obtaining documents from Companies House is generally no more than £4.

You asked about the general right to requisition a meeting, not directly linked to the annual meeting. There are general provisions across the insolvency legislation to requisition meetings in the various forms of insolvency procedures.

Formal Minutes relating to the report

Tuesday 7 July 2009

Members present:

Andrew Miller, in the Chair

Gordon Banks
John Hemming
Judy Mallaber

Dr Doug Naysmith
John Penrose

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

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

Paragraphs 1 to 46 read and agreed to.

Summary agreed to.

A paper was ordered to be annexed to the Report

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

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

[Adjourned till Tuesday 14 July at 9.30 am

List of Reports from the Committee during the current Parliament

Session 2008-09

First	Draft Legislative Reform (Insolvency) (Advertising Requirements) Order 2009	HC 181
Second	Draft Legislative Reform (Minor Variations to Premises Licences and Club Premises Certificates) Order 2009	HC 209
Third	Draft Legislative Reform (Supervision of Alcohol Sales in Church and Village Halls &c.) Order 2009	HC 210
Fourth	Draft Legislative Reform (Local Government) (Animal Health Functions) Order 2009	HC 399
Fifth	Draft Legislative Reform (Minor Variations to Premises Licences and Club Premises Certificates) Order 2009	HC 400
Sixth	Draft Legislative Reform (Limited Partnerships) Order 2009	HC 794
Seventh	Draft Legislative Reform (Dangerous Wild Animals) (Licensing) Order 2009	HC 795

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