



Department of Trade and Industry

Productivity and Enterprise

Insolvency - A Second Chance



INSOLVENCY – A SECOND CHANCE

THE INSOLVENCY SERVICE

*Presented to Parliament by the Secretary of State for Trade and Industry
By Command of Her Majesty
July 2001*

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FOREWORD



The Rt Hon Patricia Hewitt MP
Secretary of State for Trade and Industry

In the last Parliament this Government built a platform of economic stability with strong and stable growth and employment at record levels. We began a major programme of structural economic reform, including a new Competition Act and insolvency reforms. Now is the time to build on these achievements. We want an enterprising economy to make the UK the best place in the world to do business.

On 18 June the Chancellor and I announced our intention to make enterprise and productivity the cornerstone of the Government's economic reforms in this Parliament. Promoting enterprise will boost UK business and improve productivity. Our Enterprise Bill will strengthen competition and the power of consumers by radically reforming competition law, transforming our approach to bankruptcy and corporate rescue and promoting new safeguards for consumers. We believe that promoting enterprise will release the entrepreneurial skills of the British people.

In this White Paper I am setting out my proposals for the reform on insolvency law. Companies in financial difficulties must not be allowed to go to the wall unnecessarily. Administrative receivership which places effective control of the direction and outcome of the procedure in the hands of the secured creditor is now seen by many as outdated. There are many other important interests involved in the fate of such a company, including unsecured creditors, shareholders and employees. We propose to create a streamlined administration procedure which will ensure that all interest groups get a fair say and have an opportunity to influence the outcome. As an integral part of this package of reforms, we propose to remove the Crown's preferential rights in all insolvencies, a step which will bring major benefits to trade and other unsecured creditors, including small businesses. Similarly, our "Fresh Start" proposals for personal bankruptcy are based on the recognition that honest failure is an inevitable part of a dynamic market economy. Our radical liberalisation of the bankruptcy regime will mean a fresh start for many, backed by a very tough regime for those whose conduct of their financial affairs is irresponsible or reckless.

Through these reforms, and other far reaching measures such as our review of company law and reform of employment law, we will put in place a modern business framework with enterprise and productivity at its heart. We will strengthen UK business helping them get to the future first through enhanced competition and stronger consumers.

A handwritten signature in black ink, which appears to read "Patricia Hewitt". The signature is written in a cursive style with a large, looping initial "P".

CONTENTS

	Page
Foreword	
Executive Summary	
1 Bankruptcy Proposals	1
2 Corporate Insolvency Proposals	9
Annex A: Examples of Current Restrictions on Bankrupts	13
Annex B: The 1999 Review of company rescue and business reconstruction mechanisms	15
Annex C: A Comparison of the Procedures of Administrative Receivership and Administration	17
Annex D: Draft Regulatory Impact Assessment	21

EXECUTIVE SUMMARY

The proposed measures will modernise the framework of the law of personal and corporate insolvency. They will encourage responsible risk taking, facilitate the rescue of viable businesses and provide certainty and fairness to creditors and other stakeholders. Our proposals will address the fear of failure and reduce the stigma of bankruptcy. This will encourage those who have failed honestly to try again while providing a robust and effective remedy against the small minority who abuse their creditors.

Personal Insolvency Reforms

We propose the following changes to the personal insolvency regime:–

- a reduction in the discharge period for most bankrupts from the current three years to a maximum of 12 months. This will mean that a person is free of the restrictions imposed by the bankruptcy order at an earlier stage which will aid rehabilitation and business start-ups and re-starts (paragraphs 1.10 – 1.20);
- reducing the stigma of failure by reviewing the relevance of statutory restrictions on undischarged bankrupts that appear unnecessary or outdated (paragraphs 1.21 – 1.24); and
- providing for a tougher regime of restrictions on bankrupts whose conduct has been irresponsible, reckless or otherwise culpable (paragraphs 1.25 - 1.39).

Corporate Insolvency Reforms

The package of reforms in the corporate sector is designed to create a fairer system in which there is a duty of care to all creditors and all creditors are able to participate. It should also help to maximise economic value by aligning incentives properly and will ensure that companies in financial difficulty do not go to the wall unnecessarily. The proposals will:–

- restrict the right to appoint an administrative receiver to the holders of floating charges granted in connection with certain transactions in the capital markets (paragraphs 2.2 - 2.6 and 2.18); and
- seek to streamline the administration procedure so that it becomes a fully effective procedure in all circumstances (paragraphs 2.7 – 2.17).

Abolition of Crown Preference

Finally, as an important and integral part of our proposals, we shall proceed with the abolition of Crown preference **in all insolvencies**.

Financial Regime

The purpose of the changes to the financial regime under which The Insolvency Service operates will be to:–

- support the policy reforms on insolvency by giving a better and fairer deal to creditors and to modernise the way in which The Insolvency Service works (paragraph 1.51).

BANKRUPTCY PROPOSALS

INTRODUCTION

“Government must help create an ambitious business culture, which enables people from all walks of life to realise their creativity, innovative ability and entrepreneurial potential. We must help any person with the will and the ability to create and grow a successful business. And honest business failure should not mean that you cannot have another go.”

(Chapter 5.2 – Opportunity For All In a World of Change)

1.1 In order to ensure that we enjoy the benefits of an increasingly dynamic and successful economy, the framework – legal, economic and social – within which individuals are prepared to risk their capital, their energies and their time, has to be thoroughly modern. The government can improve the incentives and rewards for people to succeed but we have to recognise that in a dynamic market economy some risk taking will inevitably end in failure. Fear of failure can act as a powerful disincentive to potential entrepreneurs and the actual cost of failure can deter many whose first failure was honest from trying again. Therefore, the Government intends to legislate for a major package of reforms to personal bankruptcy, to modernise the framework and to encourage entrepreneurship and responsible risk taking, which will contribute to the creation of wealth and employment. These reforms will streamline the process and reduce the stigma for the vast majority of individuals, and encourage those who have failed, through no fault of their own, to try again. At the same time, the Government will legislate to provide for robust and effective remedies against the small minority who have acted recklessly, irresponsibly or dishonestly.

Bankruptcy – A Fresh Start

1.2 In April 2000 The Insolvency Service published a consultation paper (“Bankruptcy – A Fresh Start”) which proposed changes to the law relating to personal insolvency. The overarching theme of the proposals was a move away from the “one-size-fits-all” approach that characterises the current regime in order to reduce the impact of financial failure on individuals and encourage a second chance. That theme was picked up in the joint DTI/DfEE White Paper, “Opportunity For All In a World of Change” issued in February this year.

1.3 Responses to the consultation showed strong support from both the public and the business community for measures to liberalise the bankruptcy regime. There was broad support for the proposal to make a distinction between bankrupts on the basis of their culpability, provided that the reasons for a bankrupt’s failure were tested with appropriate rigour. The proposed “Bankruptcy Restriction Order” regime was seen by most as offering real and effective protection for the public and the business community against the financially irresponsible or downright dishonest.

1.4 There was also general support for a radical review of the lengthy list of restrictions, prohibitions and disqualifications imposed automatically on all bankrupts and for the proposal that the Official Receiver should be able to act as the nominee and supervisor of post-bankruptcy individual voluntary arrangements, although most insolvency practitioners who responded did not support this proposal.

1.5 Some of the consultation’s proposals, such as the provision of financial counselling for bankrupts and the possibility that certain non-culpable bankrupts who had capitalised their businesses might be allowed to retain a proportion of any equity of redemption in their home, received little support and are not being taken forward at this time.

- 1.6** In summary, the proposals that are to be taken forward in the Enterprise Bill are:
- the vast majority of bankrupts will get an automatic discharge and release from bankruptcy restrictions after 12 months (or earlier where the Official Receiver has completed his enquiries);
 - the bankruptcy court will have the power to make a Bankruptcy Restriction Order which will have the effect of continuing bankruptcy restrictions for the small minority of culpable bankrupts;
 - we will reduce the stigma of bankruptcy by removing many of the disqualifications, prohibitions and restrictions which currently apply automatically to people who are subject to a bankruptcy order; and
 - we will provide for greater competition and choice in the provision of professional services to debtors and creditors by enabling Official Receivers to act as the nominee and supervisor in post-bankruptcy individual voluntary arrangements.

International comparisons

1.7 Traditionally those member states of the European Union which have civil code regimes have taken a conservative approach to individual financial failures and the possibility of rehabilitation and discharge. However, following the Lisbon and Feira councils in 2000 the European Commission carried out a comparative study of the effects of business failure on the economies of member states and the United States. The study examined the degree to which the various national insolvency regimes facilitated second chances and therefore entrepreneurial activity. It specifically examined the length of time a debtor remained subject to bankruptcy proceedings in the various states.

1.8 As a direct result of this study the European Commission has set up a programme for enterprise and entrepreneurship which commenced in 2001 and will continue until 2005. Furthermore, the European Commission sees an assessment of national bankruptcy laws in the light of good practice as a fundamental part of the programme. Both The Insolvency Service and The Small Business Service are playing a full part in the programme that continued in May of this year with the Seminar on Business Failure held in Noordwijk. The proposed reforms to our bankruptcy law will keep us in the lead in these European developments.

1.9 The consultation document also generated a good deal of comment to the effect that it was ironic that we should be proposing further liberalisation at a time when the United States, the country perceived to have the most liberal personal bankruptcy regime, was proposing major reform of a “debtor unfriendly” nature. In fact the reforms passed (but not yet enacted) by the US Congress will move the US system closer to ours by introducing the “can pay, should pay” principle for debtors with a significant level of income. This principle has long been a key element of our bankruptcy system and the Bill’s proposals will ensure that it remains so.

PROPOSALS FOR REFORM

Reducing the discharge period

- 1.10** Currently the general effects of discharge from bankruptcy are–
- to release the bankrupt from the restrictions that the law (both insolvency and other) applies to bankrupts, such as being unable to act in the management of a limited company without leave of the court, being unable to obtain credit of more than £250 without disclosing his bankruptcy; the requirement, if trading under a name other than that in which he was made bankrupt, to disclose his correct name; and being unable to act as a school governor or Justice of the Peace.

- with a few exceptions, to release a bankrupt from most of his bankruptcy debts. (Some debts, e.g. fines, cannot be included in bankruptcy proceedings in any event).

1.11 In most bankruptcies the bankrupt is discharged three years after the making of the bankruptcy order. There are some exceptions to this rule:

- cases in which the court has made an order for summary administration. (These are cases where the bankruptcy order is made on a debtor's petition, the bankruptcy debts amount to less than £20,000 and the debtor had not previously been adjudged bankrupt or come to an arrangement with his creditors within the preceding five years). In such cases the bankrupt is discharged after two years.
- in cases where the bankrupt does not comply with his obligations, the court can order suspension of the operation of the automatic discharge provisions for such period or on such terms as it sees fit.
- in cases where the debtor has previously been made bankrupt in the 15 years preceding his further bankruptcy or remains subject to a criminal bankruptcy order (a procedure which in fact ceased to be available in 1989) discharge can only be ordered by the court and no application can be made for at least five years after the making of the bankruptcy order.

1.12 Discharge does not return ownership or control of bankruptcy assets to the bankrupt or prevent the bankrupt's trustee from carrying out any of his remaining functions in relation to the bankrupt's estate. The bankrupt also has a continuing obligation to attend on and provide information to his Official Receiver or trustee, if required.

The Proposals

1.13 The provisions introduced by the Enterprise Bill will ensure that all bankrupts continue to be discharged from most of their debts and from the provisions of the Insolvency Act 1986 affecting after-acquired property. However, those bankrupts who have a Bankruptcy Restriction Order (see below) made against them will remain subject to the restrictions, prohibitions and disqualifications that attach to undischarged bankrupts for the length of the order.

1.14 Most bankrupts will be discharged by a maximum of 12 months from the date of the bankruptcy order. However, if the Official Receiver has concluded that the affairs of the bankrupt do not require any further investigation, and has filed in court a notice to that effect, the bankrupt will receive an even earlier discharge.

1.15 In outline the new procedure will be as follows:

- The Official Receiver will identify and protect the estate and enquire into the circumstances of the bankrupt's failure.
- On being satisfied that no further enquiry or investigation is needed, the Official Receiver will give notice to creditors (and any trustee in office) of that fact and that, at the expiry of a prescribed period (we suggest 28 days), he proposes to certify it to the court.
- The Official Receiver will consider all objections received within the 28 day period.
- If there are no objections, or after all objections have been dealt with, the Official Receiver will file a certificate at court, the date of which will, subject to a right of appeal by any objecting party, be the effective date of discharge.

I.16 The existing statutory provisions that impose obligations on a bankrupt to cooperate with the Official Receiver both before and after discharge will remain in force. And, importantly, discharge will not be a bar to subsequent civil or criminal action relating to any concealment of or failure to disclose assets or other relevant documents or information.

I.17 At present, the Official Receiver is required by law to make reports to creditors about the affairs, assets and liabilities of the bankrupt, to notify his decision as to whether to call a meeting to appoint a trustee and, where appropriate, to give notice of his intention to apply for his release as trustee. Whilst preserving the requirement for timely reporting the Bill will enable the Official Receiver to combine several reports into one document, thus streamlining the administration of many smaller cases.

Transitional Arrangements

I.18 Anyone undischarged from bankruptcy proceedings when the new regime comes into effect will be discharged automatically 12 months after the coming into force of the new provisions, or at the point at which they would have been discharged under the current provisions, if that is earlier. However, in cases where, prior to the coming into force of the new provisions, operation of the automatic discharge provisions has been suspended by the court, the transitional provisions will not apply. It will remain possible for the Official Receiver to apply to the court for such a suspension on existing grounds.

I.19 The transitional provisions will also not apply to anyone who remains subject to a criminal bankruptcy order, but a second time bankrupt under the current legislation will be discharged automatically after five years or on the coming into force of the new provisions if he had been adjudged bankrupt more than five years before that date.

Income Payments Orders

I.20 Across the broad spectrum of civil debt enforcement the government is committed to ensuring that those who can pay should pay. In order to ensure this happens – and against the background of a very much reduced period of bankruptcy – the Enterprise Bill will make it clear that bankrupts will be liable to make an affordable contribution from their income for up to three years from the date of the bankruptcy order regardless of whether they are discharged.

REDUCING THE STIGMA OF FAILURE

Statutory Restrictions on Undischarged Bankrupts

I.21 Bankruptcy law in this country treats everyone subject to it in the same way irrespective of whether the bankrupt was dishonest or irresponsible or whether his failure was honest and above-board. There are numerous other enactments that impose restrictions, prohibitions or disqualifications on bankrupts solely on the basis of the existence of the bankruptcy proceedings. This automaticity of approach may be capable of justification in some cases but requires a belief in the proposition that the debtor, by becoming bankrupt, is not someone in whom society can have trust or confidence. This approach takes no account of the risks that are an everyday part of business life, and warrants substantial re-appraisal.

I.22 Insolvency legislation itself imposes automatically a range of restrictions on bankrupts. Those which have the most practical impact are prohibitions on –

- acting as a director of, or in the management of a limited company without the court’s permission.
- obtaining credit above a prescribed limit (currently £250) without disclosing the bankruptcy.
- carrying on business in a different name from that in which they were made bankrupt without revealing their earlier name.

I.23 Restrictions such as these are imposed in the public interest for the protection of the public generally and the business community in particular. Breach of the restrictions is a criminal offence and exposes the bankrupt to the risk of imprisonment for up to two years and/or a fine.

I.24 It is the nature of risk-taking that, on occasions, there will be failure. But in a society which is genuinely enterprising the cost of failure must not be set so high that it acts as a deterrent to economic activity. **The Enterprise Bill will provide an opportunity to revisit this area and to review the relevance of restrictions that appear unnecessary or outdated, whilst at the same time leaving in place a proportionate and effective regime to protect the public and the business community from dishonest or unscrupulous bankrupts.**

PROTECTING THE PUBLIC AND COMMERCIAL COMMUNITY

Bankruptcy Restriction Orders (“BRO”)

I.25 For well over 100 years the law has required that, in the public interest, there be an enquiry into the affairs and causes of failure of individual bankrupts. Such enquiries are the responsibility of the Official Receiver who, when he discovers evidence which may indicate that a criminal offence has been committed, will report it to the Department of Trade and Industry for investigation for possible criminal action. In the five years to 31 March 2001 there were a total of over 100,000 bankruptcies and prosecution (or a warning letter) followed in about 3% of these cases.

I.26 Evidential requirements in criminal proceedings are very high and it is not always possible to meet that exacting standard. As matters stand now, although the Official Receiver’s enquiries may bring to light evidence of behaviour which, whilst unacceptable, falls short of the criminal standard, there are no measures that can be invoked to protect the public from the consequences of such behaviour in the future.

I.27 We therefore propose that the court will be able to make a Bankruptcy Restriction Order (BRO) so that the bankrupt concerned will continue to be subject to the restrictions of bankruptcy for a period of between two and 15 years. The new procedure will be broadly analogous to that which has operated under the Company Directors Disqualification Act 1986 (“CDDA”) and earlier legislation in relation to directors whose conduct makes them unfit to be involved in the management of the affairs of limited companies.

I.28 However, one important difference will be that whereas a disqualification application based on a corporate insolvency normally has to be made within two years of the date of the relevant insolvency event (for example, a winding-up order) an application for a BRO will normally have to be made within 12 months of the bankruptcy order. This reflects the new default discharge period.

I.29 An application for a BRO will be made where the Official Receiver has reported to the Secretary of State and it appears to her that it is expedient in the public interest that such an order should be made. The applications will be made by the Secretary of State or, if the Secretary of State directs, the Official Receiver. We anticipate that Official Receivers will, in practice, make all such applications. The application will be made in the insolvency proceedings and not, as in director disqualification, in separate proceedings.

I.30 The court will be required to make a BRO where it is satisfied that, having regard to the conduct of the bankrupt both before or during his bankruptcy, the public requires protection. The court will have regard amongst other things to a statutory but non-exhaustive schedule of unfitted conduct. Some examples of how the relevant CDDA schedule might be modified for application to BROs are given below for illustrative purposes:

CDDA	Bankruptcy Restriction Orders
Failure to supply any goods or services which have been paid for in whole or in part	Failure to supply any goods or services which have been paid for in whole or in part
Failing to ensure that the company kept accounting records	Failure to maintain business accounting records
Responsibility for company entering into undervalue or preference transactions	Entering into undervalue transactions or giving preferences
Failure to co-operate with the insolvency officeholder	Failure to co-operate with the Official Receiver or trustee

I.31 Other examples of misconduct that might be included in the schedule are:

- Incurring any bankruptcy debt without reasonable expectation of being able to pay it.
- Failure to account satisfactorily for any loss or deficiency of assets.
- Rash and hazardous speculation, unjustifiable extravagance in living, gambling or culpable neglect of business.
- A previous bankruptcy within the preceding six years.
- Fraud or fraudulent breach of trust.

I.32 We propose that the existing criminal offences in relation to gambling and failure to keep adequate accounting records should be repealed. For the future such activities or omissions can be dealt with more effectively as matters of misconduct leading to a BRO.

I.33 Provision will be included to enable the Official Receiver to apply for an interim BRO, which would have the effect of keeping the bankruptcy restrictions in place, pending substantive hearing of the application.

I.34 Where the court makes a BRO, the effect will be that:

- the bankrupt cannot without the leave of the court be involved in the management of a limited company;
- the bankrupt cannot obtain credit of more than £500 without disclosing that he is subject to a BRO; and
- if he trades in a name other than that in which he was made bankrupt, he must disclose that earlier name.

I.35 An order will operate for a minimum of 2 years and a maximum of 15 years.

I.36 Breach of the terms of an order will be a criminal offence punishable by a fine and/or imprisonment.

I.37 In line with provisions introduced by the Insolvency Act 2000, the Bill will allow applications for a BRO to be settled by the bankrupt giving an undertaking to the Secretary of State. That undertaking will have the same legal effect as a BRO and breach of an undertaking will have the same legal consequences as breach of a restriction order.

I.38 A person subject to a BRO or to an undertaking will be able to apply to the courts to vary the order either as to its length or specific provisions.

I.39 A public register of BROs will be maintained.

- Enquiry into and Investigation of Bankrupts' Conduct and Affairs** **I.40** Currently, it is the duty of the official receiver to investigate the conduct and affairs of every bankrupt and to make any report to the court he thinks fit, except in a summary case, when he need only investigate if he thinks necessary.
- I.41** The existing distinction is made on the basis that cases with relatively small liabilities do not require as extensive a deployment of the Official Receiver's investigative resource as cases where the debts, and consequently creditors' losses, are larger. However there may be cases where the bankrupt's debts are large, e.g. where he has guaranteed the liabilities of a limited company, in which in reality little or no investigation is required. Similarly some small cases can be complex and require considerable investigation. We therefore consider that an automatic obligation to investigate every case is unnecessary and that the Official Receiver should, on the basis of information which becomes available in the course of his administration, be able to exercise a discretionary power to investigate the conduct and affairs of any bankrupt.
- Official Receivers' Power to act as Nominee and Supervisor of Post-Bankruptcy Individual Voluntary Arrangements** **I.42** A proposal in the Fresh Start consultation that the Official Receiver should be able to act as the nominee or supervisor of post-bankruptcy individual voluntary arrangements ("IVA") was widely welcomed by both debtors and creditors.
- I.43** Under current legislation, in order to act as the nominee or supervisor of an IVA, a person is required to be qualified to act as an insolvency practitioner, such qualification being dealt with in Part XIII of the Act.
- I.44** As United States experience of Chapter 13 of the US Bankruptcy Code (payment plans by debtors) shows, economies of scale in this area have meant substantially higher returns to creditors. It is anticipated that similar substantial economies of scale could be generated if Official Receivers were able to put proposals to creditors and act as supervisors of post-bankruptcy IVAs. The Official Receiver would already have information regarding the bankrupt's affairs so that there would be little additional cost in assisting the preparation of a proposal. **In considering such proposals creditors and debtors would have a choice as to who should administer the arrangement between private sector insolvency practitioners and the Official Receiver, on whose behalf the administration of receipts and payments could be undertaken centrally. Even with the Official Receiver recovering his costs in full, substantially reduced costs in smaller IVAs (smaller in terms of both assets available and debts owed) would almost certainly ensure that creditors would be better off.**
- Reform of Personal Insolvency Law – A Continuing Process** **I.45** In the last fifteen years the availability of personal credit has grown substantially. This in turn has led to a fundamental change in society's view of both personal debt and personal insolvency. The likelihood is that such changes will accelerate in the future and so it is only right that the Government should keep under review the machinery that is in place to deal with all individual over-indebtedness.

I.46 The following table shows the numbers of bankruptcies and the approximate percentage that were “consumer bankruptcies” in the period 1992-2000.

Year	No. Bankruptcies	Consumer (%)
1992	32016	12581 (39)
1993	31016	12455 (40)
1994	25634	10520 (41)
1995	21933	8651 (39)
1996	21803	9136 (42)
1997	19892	8623 (43)
1998	19647	9227 (47)
1999	21611	10888 (50)
2000	21550	11598 (53)

Note: consumer bankruptcies are those where the bankrupt has not carried on a business

I.47 We appear to be moving towards the models present in the United States, Canada and Australia where consumer bankruptcies form a very significant majority of cases.

I.48 With this change of emphasis in mind, The Insolvency Service has been in discussion with the Lord Chancellor’s Department (LCD) concerning the LCD’s review of the county court administration order scheme. It is clear that there are a large number of areas common to both bankruptcy and county court administration orders. For instance, they share broadly the same objectives: they both aim to rehabilitate the debtor and provide respite from enforcement proceedings while paying off debts. There are also a few inconsistencies that it might be desirable to address by means of the consolidation of the two regimes into a reformed personal insolvency regime with increased availability to debtors. We intend to undertake further research in this area.

Devolution I.49 The Scottish Executive has indicated that it will study carefully the extension of the proposed provisions on personal bankruptcy to Scotland. Personal bankruptcy is almost wholly devolved and legislation to modernise the law in this area would be a matter for the Scottish Parliament.

I.50 The Act currently ensures that certain bankruptcy offences encompass a bankrupt’s activities outside England and Wales. We intend that this should also apply to any offence arising out of a breach of a BRO.

Financial Regime I.51 The financial regime under which The Insolvency Service operates was established in the 19th Century. Whilst it produces large revenues for the government (and, indeed, surpluses in recent years) it does not enable income generated by dealing with cases to be used to provide resources to enable such cases to be properly dealt with. The requirement that funds from voluntary liquidations be placed in the Insolvency Services Account does not recognise the regulatory regime that has existed since 1986 and the payment of the bulk of the interest generated on insolvency funds to the Consolidated Fund can no longer be justified. The Enterprise Bill will contain proposals for substantial reforms in this area.

Introduction **2.1** For the last twenty-five years or so, the focus of insolvency law reform in the United Kingdom has increasingly been on the promotion of a rescue culture, a trend which started with the work of the Cork Committee, chaired by Sir Kenneth Cork. The Cork Report recommended encouraging the continuation and disposal of a debtor's business as a going concern wherever possible. The Government responded by introducing new mechanisms to facilitate these objectives – Administration and Company Voluntary Arrangement (CVA) procedures – in the Insolvency Act 1986. However the take-up of those procedures since 1986, whilst on an increasing trend, has been seen by many as disappointingly low. There was also widespread concern that the large number of administrative receivership appointments in the early 1990s may have represented precipitate behaviour on the part of lenders, causing companies to fail unnecessarily. More recently the Government initiated a review of company rescue and business reconstruction mechanisms as described in Annex B.

The Position of Unsecured Creditors **2.2** Throughout this period there has also been widespread concern as to the extent to which administrative receivership as a procedure provides adequate incentives to maximise economic value. There has, equally importantly, been concern about whether it provides an acceptable level of transparency and accountability to the range of stakeholders with an interest in a company's affairs, particularly creditors. For secured lenders, administrative receivership is an important mechanism, not least given that it is one over the inception of which they have complete control. Since 1986, a person acting as an administrative receiver of a company has had to be an authorised insolvency practitioner. There is little doubt that the existence of professional obligations on insolvency practitioners has had a beneficial effect on the way in which they discharge their duties. But the fact remains that, notwithstanding recent case law, an administrative receiver's principal obligation is towards his appointor. At law, they remain substantially unaccountable to any other creditor for the way in which a company's assets are dealt with. There is no equivalent of the duty owed by an administrator in an administration procedure to act in the interests of the creditors as a whole.

2.3 The maximisation of recoveries and the minimisation of costs are areas where the lack of a wider and more general accountability, and with it the absence of properly aligned incentives, can impact very substantially on the interests of unsecured creditors in an administrative receivership. For example, an administrative receiver is entitled to solely consider the interests of his or her appointor when determining the timing of a sale of a business. Where an offer is made which is sufficient to satisfy the secured creditor's claim and the administrative receiver's costs, there would appear to be little incentive for the receiver to delay the sale with a view to obtaining a better offer which might provide some return for unsecured creditors. Furthermore, it should be borne in mind that unsecured creditors have no right to challenge the level of costs in a receivership, even though they have an identifiable financial interest where there are sufficient funds to pay the secured creditor in full. The Insolvency Act 1986 (Sections 46, 48 and 49) did introduce requirements on administrative receivers to notify and report to creditors and provides for the possibility of a committee of creditors being established. But, in practice, very few such committees are appointed. Finally, it seems clear that the increasing importance of the international dimension in insolvency is likely to highlight the poor fit between international law, based on collective procedures, and administrative receivership. Taking all these factors into account, we do not believe that the present framework for administrative receivership provides an adequate basis for accountability or properly aligned incentives in relation to the bulk of cases giving rise to administrative receivership.

The Way Forward **2.4** In deciding how best to take forward the modernisation of insolvency law in this area, the Government has had regard to the methodology adopted by the review group which focused extensively on the relative merits, cost and benefits of administrative receivership and administration. By way of recapitulation, we now set out at Annex C a comparative analysis of the two procedures. (The results of an empirical study undertaken by Professor Julian Franks and Dr Oren Sussman of the London Business School were published with the Review Group's report in November 2000).

2.5 The Government's view is that, on the grounds of both equity and efficiency, the time has come to make changes which will tip the balance firmly in favour of collective insolvency proceedings – proceedings in which all creditors participate, under which a duty is owed to all creditors and in which all creditors may look to an office holder for an account of his dealings with a company's assets. It follows that we believe that administrative receivership should cease to be a major insolvency procedure. We therefore propose to restrict the right to appoint an administrative receiver to the holders of floating charges granted in connection with transactions in the capital markets as described in paragraph 2.18.

2.6 In taking this step we recognise that in order to ensure the position of secured creditors within collective procedures there will need to be substantial reform to the process of administration so as to make it more effective and accessible. Whilst our aim is to guarantee unsecured creditors a greater say in the process and its outcome, secured creditors should not feel at any risk from our proposals. We see no reason why, given the changes we propose to make to the administration procedure (and which are set out below), their interests should not be protected equally well by an administrator as by an administrative receiver. Indeed we are confident that, over time, secured creditors will come to see administration as their remedy of choice for maximising value.

Streamlining the Administration procedure **2.7** The recognition of administration as an important tool in providing a company in financial difficulties with a breathing space in which to put together a rescue plan or, alternatively, in providing a better return to creditors than would be likely in a liquidation, has increased steadily in recent years. Nonetheless, if administration is to become a fully effective procedure in all circumstances, it will need to be streamlined.

2.8 We shall take steps to facilitate entry into the administration procedure by reducing the formalities presently prescribed. We intend to provide for the holder of a floating charge to be entitled to an administration order on a petition to the court demonstrating that he holds a valid floating charge, that the company is in default in some particular and that money is due and owing from the company to the charge-holder. In such cases, we would specifically provide that there would be no requirement to submit a report under rule 2.2 of the Insolvency Rules 1986. We consider that this simplified procedure should provide secured lenders with a simple and assured route to realise their security where the company is in default.

2.9 Except in cases of urgency, there will be a requirement that the petition be served on the company and on any other party presently entitled to be served and notice of its presentation is to be given to any party presently entitled to receive notice. As now, the court would have the power to abridge the period of notice specified for service.

2.10 We recognise that secured lenders will have concerns about their ability to protect their interests in cases of urgency. We propose to address this by introducing a specific power for the holder of a floating charge or other security comprising a significant part of the company's property to petition for an administration order without giving notice. It has been rare in the past for a creditor or the company to petition for an administration order without notice but we consider that it is appropriate to provide such a power. In such cases, there would again be no requirement to submit a report under rule 2.2 of the Insolvency

Rules 1986. On the hearing of a without notice petition, the court would be empowered to make an interim administration order under which an interim administrator would be appointed. The interim administrator would be required to report to court within 14 days of his appointment as to whether, in his opinion, an administration order should be made and, if so, the purpose which it is intended to achieve. On considering the interim administrator's report, the court may either make an administration order or a winding-up order or such other order as it thinks fit.

2.11 Where there is any disagreement between the parties as to who should be appointed as administrator, the court shall have regard to the interests of the creditor or creditors who will be principally affected by the administration.

2.12 We believe that these provisions will provide the holders of floating charges and other security with a procedure that is as flexible and cost effective as administrative receivership whilst remedying the major defects of that procedure. In particular, as at present, the administrator will owe a duty of care to all creditors (rather than, as in the case of administrative receivership, solely to the floating chargeholder); unsecured creditors will have the opportunity for input and participation in the process; and the process will ultimately be subject to the oversight and direction of the court, in a public and transparent fashion.

2.13 We also wish to ensure that the procedure of administration continues to be the most favoured option for the directors of a company in financial difficulty where there are prospects of rescue. With that in mind, we suggest that it should continue to be open to the company to petition for an administration order as at present on notice to secured creditors (who would have no right of veto) and other interested parties. A report under rule 2.2 would generally be required: its absence would need to be explained to the court. At present, the administrator is required to send, within three months of his appointment, a statement of his proposals to the creditors for consideration at a meeting. Other than in exceptional cases, that seems too long for the creditors to have to wait for information on the state of the company's affairs. We therefore propose that this period be reduced to 28 days subject to the power of the court to extend it.

2.14 We will also widen the purposes for which an administration order may be made to permit an order to be made to enable the realisation of the security of a floating charge holder whilst taking into account, as far as possible, the possibility of preserving all or part of the company's business.

2.15 At present, the holder of a floating charge has the effective right to veto the making of an administration order. We would propose to remove that right except in certain specified circumstances where the charge was granted in connection with certain transactions in the capital markets.

2.16 Where a company's business cannot be rescued but there are, or may be in the future, sufficient funds to enable a distribution to be made to unsecured creditors, we intend to provide that the administrator should have the power to apply to the court for the company to be wound up and for his appointment as a liquidator. Where after payment of secured creditors' claims no funds remain the court would be able to order a winding up in the usual way.

2.17 At present, an administration order may only be made against a company formed and registered under the Companies Act 1985 or an earlier Companies Act. We will consider whether it would be appropriate to extend the administration procedure so that the business of a foreign company might benefit from its provisions.

Restricting Administrative Receivership **2.18** The Government recognises that the floating charge and the right to appoint an administrative receiver plays an important role in certain transactions in the capital markets. We will allow the right to appoint an administrative receiver to continue where floating charges are granted in relation to such transactions. Situations identified in Part VII of the Companies Act 1989 will fall outside the scope of our proposals.

Floating Charge Funds and the Abolition of Crown Preference **2.19** Finally, as an important and integral part of this package of measures, we will proceed with the abolition of Crown preference in all insolvencies. Preferential claims in insolvency originated in the late 19th century, but in recent years the trend in other jurisdictions has been towards restricting or abolishing Crown or State preference as, for instance, in Germany and Australia. We believe that this is more equitable. Where there is no floating charge-holder, the benefit of abolition will be available for the unsecured creditors. Where there is a floating charge-holder (in relation to a floating charge created after the coming into force of the legislation), we would ensure that the benefit of the abolition of preferential status goes to unsecured creditors. We will achieve this through a mechanism that ringfences a proportion of the funds generated by the floating charge.

2.20 The preferential status of certain claims by employees in insolvency proceedings, such as wages and holiday pay within certain limits, will remain, as will the rights of those subrogated to them.

Devolution **2.21** The corporate insolvency provisions of the Enterprise Bill will extend to Scotland, subject to the consent of Scottish Parliament to Westminster legislating on those limited aspects which are devolved. This will ensure that the same regime on corporate rescues applies on both sides of the border.

A

ANNEX A: EXAMPLES OF CURRENT RESTRICTIONS ON BANKRUPTS

Mandatory restrictions placed on undischarged bankrupts include being unable to:-

Nature of Restriction	Imposed by
Act as a charity trustee	Charities Act 1993
Sit in either House of Parliament	Insolvency Act 1986
Carry on business as an estate agent	Estate Agents Act 1979
Sit on an appeals tribunal	Wireless Telegraphy Act 1949
Act as a Justice of the Peace	Justices of the Peace Act 1997
Be a member of the National Patient Safety Agency Care Standards Commission	National Patient Safety Agency Regulations 2001
Hold office as a school governor	Education (School Government) (England) Regulations 1999
Be a member of a Valuation and Community Charge Tribunal	Valuation and Community Charge Tribunals Regulations 1989
Be a member of the National Board for Nursing Midwifery and Health Visiting for England	National Board for Nursing Midwifery and Health Visiting for England (Constitution and Administration) Order 1993

Discretionary powers to remove undischarged bankrupts include: -

Nature of Restriction	Imposed by
The Secretary of State may suspend or remove a member of a Local Probation Board	Local Probation Boards Appointments Regulation 2000
The National Park Authority may revoke the appointment of an Interim Monitoring Officer	National Park Authorities (England) Order 1996
The Lord Chancellor may revoke the appointment of the President of the Industrial Tribunals	Industrial Tribunals (Constitution and Rules of Procedure) Regulations 1993
The Secretary of State may remove a member of the Dental Practice Board	Dental Practice Board Regulations 1992

B

ANNEX B: THE 1999 REVIEW OF COMPANY RESCUE AND BUSINESS RECONSTRUCTION MECHANISMS

B.1 A review of company rescue and business reconstruction mechanisms was set up in 1999 by agreement between the Chancellor of the Exchequer and the Secretary of State for Trade and Industry. Its terms of reference were:

‘To review aspects of company and insolvency law and practice in the United Kingdom and elsewhere relating to the opportunities for, and the means by which, businesses can resolve short to medium term financial difficulties, so as to preserve maximum economic value, and to make recommendations.’

B.2 The review group issued a consultation document in September 1999 and in its report, which was published for consultation in November 2000, made a number of recommendations for change.

B.3 These included recommendations to improve the approach of the Inland Revenue and HM Customs and Excise toward business rescue, to which the revenue authorities have responded positively. In particular, a joint Inland Revenue/Customs & Excise unit – the Voluntary Arrangements Service – has been in operation since 1 April 2001.

B.4 The Report also recommended that The Insolvency Service and the insolvency profession discuss ways in which the reporting of directors’ conduct and the issue of disqualification proceedings based on those reports might be considerably speeded up; and that The Insolvency Service disclose, to any director who inquires, the fact that a decision not to take proceedings against him has been reached. The Insolvency Service is taking forward these proposals.

B.5 The Review Group also recommended certain legislative changes. Their proposal to subject landlords to the statutory moratorium in an administration has now been made law as part of the provisions of the Insolvency Act 2000. Others, in particular the recommendation that a floating charge holder should lose the right to veto the making of an administration order, have been considered further in the light of consultation, and the proposals in this paper are the Government’s response.

C

ANNEX C: A COMPARISON OF THE PROCEDURES OF ADMINISTRATIVE RECEIVERSHIP AND ADMINISTRATION

- General: Administrative Receivership** **C.1** The right of a lender to appoint a receiver (an administrative receiver since 1986) without recourse to the courts dates to the nineteenth century when floating charges were created.
- C.2** Administrative receivership is a quick and easy procedure to initiate for any lender whose security is backed by a floating charge, enabling a rapid response to a perceived crisis in the company's business. It is an effective way for secured creditors (holding both fixed and floating charges) to exercise their contractual right to realise their security and must therefore provide some encouragement to secured lending to business. Administrative receivership is not, however, a collective procedure and the holder of a floating charge can initiate it at any time the contract with the borrowing company allows. An administrative receiver owes a duty of care to his or her appointer, but only limited formal legal obligations to others.
- General: Administration** **C.3** The administration procedure was introduced by the Insolvency Act 1986 and was designed to provide companies in financial difficulty with a period of respite in which to put together a rescue package or alternatively to achieve a more effective realisation of the company's assets than would be possible in a liquidation.
- C.4** Despite the need for a court order, an administration can be put in place very quickly in response to the urgent needs of a company and its business. The company then has the benefit of a stay on all creditors' actions and the administrator has wide powers to deal with not only the company's assets but also those of third parties, subject, in some cases, to the Court granting leave for the proposed action. Administration almost always offers better returns to unsecured creditors than an immediate liquidation.
- Characteristics: Administrative Receivership** **C.5** The appointment of an administrative receiver may frustrate an application by a company to enter administration. Section 9(2) of the Insolvency Act 1986 states that notice of a petition for an administration order must be given to any person who has appointed, or is entitled to appoint, an administrative receiver of a company. The floating charge holder is then entitled to intervene and appoint such a receiver. In effect, an administration order cannot be made in such circumstances without the consent of the floating charge holder.
- C.6** As we have said, an administrative receiver owes little in the way of obligations to others. He is required to notify all creditors of the company of his appointment within 28 days. Within 3 months he is required to provide all creditors with a report which includes information relating to the disposal or proposed disposal by the receiver of any property of the company and the carrying on or the proposed carrying on of any business of the company, the amounts owed to the floating charge holder and to preferential creditors and the amount (if any) likely to be available for payment to other creditors. It should be stressed, however, that this is a report to the unsecured creditors of the actions taken or proposed to be taken by the administrative receiver; he is not, in any sense, seeking approval from those creditors.
- C.7** The report will be produced by the administrative receiver at a meeting where the creditors may establish a committee to represent them. However, we understand that committees are established relatively rarely and the powers of the creditors generally are limited when compared with collective procedures such as administration.
- Characteristics: Administration** **C.8** An administration procedure is initiated by a petition to the court. The petition will usually be presented by the directors of the company but the company itself or a creditor may also petition. The petition will be supported by an affidavit by the applicant and, in almost all cases, by a report prepared by the proposed administrator under rule 2(2) of the Insolvency Rules 1986.

C.9 The presentation of the petition imposes an automatic moratorium so that the company may not be put into voluntary liquidation nor may a winding-up order be made and generally no other legal proceedings may be commenced or continued against the company. The exception is, of course, the aforementioned right of the floating charge holder to appoint an administrative receiver.

C.10 On hearing the petition for administration, the court may make an order where it is satisfied that the statutory grounds for an appointment exist; namely that the company is or is likely to become insolvent and that an order would be likely to achieve one of the four purposes set out in section 8(3). An administrator is appointed who is responsible for managing the affairs of the company during the period the order remains in force. Following the making of the order, it is no longer possible to initiate a winding up nor may an administrative receiver be appointed.

C.11 Once appointed, the administrator must notify all known creditors of his appointment within 28 days. Within three months of the making of the order, the administrator must send to all creditors details of his proposals for achieving the purpose or purposes specified in the order and must summon a meeting of the creditors to consider them. The meeting may approve the proposals, with or without modifications, or may decline to do so in which case it is open to the court to discharge the administration order.

**The Powers
of the
Administrative
Receiver and the
Administrator**

C.12 The Insolvency Act 1986 provides that the powers of the administrative receiver, as set out in the instrument of debenture, shall include – amongst other things – the power to take possession of, collect and get in the property of the company, to sell or otherwise dispose of the property of the company and to carry on the business of the company. An administrator may do all things necessary for the management of the affairs of the company.

C.13 Schedule 1 of the Act sets out a specific range of powers which are available both to administrators and administrative receivers but which are not, of themselves, exclusive. However, it must be recognised that the roles of the administrator and administrative receiver are fundamentally different. The administrator is appointed to manage the affairs of the company; the administrative receiver's primary task is to realise the assets of the company for the benefit of the secured creditor who has appointed him.

C.14 An administrator does not have the right to refuse to adopt existing company contracts in the way that appears to be open to administrative receivers. However, section 15 of the Act does provide the administrator with a power to override security and property rights so as to enable him to dispose of the property in question. In the case of property subject to a floating charge he does not require approval of court. If the administrator exercises this power, in the case of a fixed charge, he must account to the charge-holder for the greater of the proceeds of sale or the market value and, in the case of a floating charge, the charge-holder will retain his same priority over the proceeds of the disposal. The administrative receiver has a similar power, in section 43 of the Act, but the exercise of that power will always require the approval of the court and the provision does not include the ability to deal with property subject to retention of title clauses.

**The
Administrative
Receiver's
Duties**

C.15 The benefits to a floating charge holder of the ability to appoint an administrative receiver are clear. A large measure of control is enjoyed by the floating charge holder, both before and after the appointment of an administrative receiver. They are afforded significant protection by the law: not only do they enjoy priority in the event of insolvency relative to other creditors, but the floating charge holder's power to appoint an administrative receiver who will act for their benefit can trump any proposal by the company to enter administration.

C.16 It is well established that the primary function of the receiver is to obtain payment of the floating charge holder's secured debt. In *Re B Johnson & Co (Builders) Ltd*¹, Evershed MR stated that a receiver–

“is not managing on the company's behalf but is managing in order to facilitate the exercise by him, for the mortgagees, of the mortgagee's power to enforce the security . . .

. . . it is elementary that a mortgagee seeking to realise his security has no duty of care to see that there is as much as possible left over for those who are interested in what is called “the equity.”

C.17 While subsequent decisions have created some limited qualifications to this principle, it remains the case that the receiver's primary duty is to serve the interests of the floating charge holder.

C.18 This primary duty of the receiver is to exercise his or her powers in good faith to try and bring about a situation in which interest on the secured debt may be paid and the debt itself repaid². The requirement of good faith demands only that the receiver act without dishonesty, improper motive or bad faith; negligence does not automatically equate to a lack of good faith. Provided that the receiver can demonstrate good faith, then, subject to certain specific duties, he or she is entitled to sacrifice the interests of the company in pursuit of that end³.

C.19 Given that the administrative receiver's primary duty is to the floating charge holder, he or she is entitled to refuse to carry on the business of a company, even though this may be viewed as detrimental by other stakeholders in the company⁴. Similarly, a receiver is free to consider only the interests of the floating charge holder in deciding whether to exercise their power of sale. It does not matter that, by waiting, a higher price could be obtained. Where the floating charge holder's interests conflict with those of the company, the receiver may give preference to the charge holder's interests.

C.20 This general duty is subject to certain specified duties. While a receiver is entitled to have sole recourse to the floating charge holder's interests when determining whether to carry on the company's business, if a decision is made to do so, the receiver then owes a duty to manage the business with due diligence, by taking reasonable steps to carry on the business profitably⁵. This is subject always to the primary duty of seeking repayment of the secured debt. Similarly, where a power of sale is exercised, the receiver is not merely under a duty to act in good faith, but also to take reasonable care to obtain the true market value of the mortgaged property at the moment he or she chooses to sell it⁶.

C.21 The floating charge holder's strong position in an administrative receivership procedure is bolstered by the fact of the unique relationship of agency with the company. The peculiarity of this relationship lies in the fact that, while the receiver is deemed to be an agent of the company, which traditionally connotes a relationship of singular loyalty, his or her primary duty is to the floating charge holder whose interests will be given primacy, in some cases to the detriment of the company. The nature of the statutory relationship of agency between the receiver and the company renders the company liable for certain wrongful acts committed by receiver while the receiver is pursuing the interests of the floating charge holder.

¹[1955] 2 All ER 775 at 779.

²*Medforth v Blake and others* [1999] 3 All ER 97, at 110.

³*Ibid*, at 102.

⁴*See Re B Johnson & Co (Builders) Ltd* [1955] 2 All ER 775, per Jenkins LJ at 790.

⁵*Medforth v Blake and others* [1999] 3 All ER 97.

⁶*Cuckmere Brick Co v Mutual Finance Ltd* [1971] 2 All ER 633.

The Duties of the Administrator **C.22** The basic duty of the administrator is to manage the affairs of the company in accordance with the order by which he was appointed and with the proposals approved by the creditors. An administrator is an officer of the court and is therefore subject to its overall control.

C.23 Administration can be distinguished principally from administrative receivership in that it is a collective insolvency procedure involving all creditors and giving all creditors a say. Initially, of course, the creditors have the opportunity to decline to approve the proposals put to them under section 23 or may only approve them subject to modifications.

C.24 But creditors have ongoing rights during the course of the administration procedure. They may establish a creditors' committee to represent them and the committee may require the administrator to attend before it and furnish it with such information regarding the carrying out of his functions as it may reasonably require. Creditors whose debts exceed 10 per cent of the overall indebtedness have the power to require the administrator to summon a meeting of the company's creditors. Creditors whose debts exceed 25% of the overall indebtedness may apply to the court for an order that the administrator's remuneration may be reduced on the grounds that it is excessive.

C.25 Finally, section 27 of the Act provides a creditor with the power to apply to the court if he considers that the company's affairs are being managed by the administrator in a manner which is unfairly prejudicial or that any act or omission of the administrator is or would be so prejudicial. On such an application, the court may make such order as it thinks fit, including regulating the future management by the administrator of the company's affairs.

THE ENTERPRISE BILL INSOLVENCY PROVISIONS

I. The Issue and Objective:

Issues

I.1 The Insolvency Act 1986 as amended by the Insolvency Act 2000 sets out the regime for dealing with the affairs of both insolvent companies and individuals.

I.2 At present, insolvency legislation subjects all bankrupts to substantially the same process and restrictions irrespective of the facts of their individual case or whether they are in any way culpable. Furthermore, the restrictions, prohibitions and disqualifications that currently automatically attach to all bankrupts on the making of the bankruptcy order act as a real barrier to enterprise by discouraging business start-ups and restarts.

I.3 Individual voluntary arrangements (IVA), which are intended as an alternative to bankruptcy, are subject to some criticism by both creditors and debtors due to the level of fees charged by insolvency practitioners and the poor returns to unsecured creditors. The numbers of IVAs commenced over the last 5 years are as follows:

1996	3,983
1997	4,211
1998	4,620
1999	7,086
2000	7,909

I.4 The promotion of collective insolvency procedures where all creditors are owed a duty of care and have an opportunity to influence the outcome.

Objectives

The Insolvency Aspects of the Enterprise Bill will:-

- (a) Provide for non-culpable bankrupts to be discharged from most of their debts and released from the restrictions that currently apply to bankrupts after a maximum of 12 months.
- (b) Reduce the stigma attached to bankruptcy by reducing the number of restrictions that are automatically imposed on undischarged bankrupts.
- (c) Provide for a new regime (Bankruptcy Restriction Orders) to protect both the public and business from those bankrupts whose conduct before and during bankruptcy has been found to be culpable.
- (d) Provide a power for the Official Receiver to act as nominee and supervisor of IVAs commenced after the making of a bankruptcy order.
- (e) Give the Official Receiver discretion to investigate the cause of failure of all bankrupts where he sees fit.
- (f) Streamline the procedure of administration, a collective court-based procedure to make it more efficient and accessible to ensure that companies do not fail unnecessarily. At the same time we will place a substantial restriction on the ability of secured lenders to appoint an administrative receiver.
- (g) To remove the Crown's preferential rights in insolvencies.

Note:

Under current legislation, the Crown is able to claim preferential status in relation to part of its debt. This is mainly in respect of debts owed in relation to VAT, Income Tax and National Insurance contributions. Full details of preferential debts are found in Schedule 6 to the Insolvency Act 1986. In insolvencies the order of payment out of the estate is set down in legislation.

In broad terms, the order of payment is:

- The costs and expenses of the insolvency.
- Preferential creditors.
- Secured creditors.
- Unsecured creditors.

2. Risk Assessment:**Bankruptcy**

2.1 The Government is committed to making the United Kingdom the best place to do business. In order to achieve this people from all walks of life need the opportunity to realise their creativity, innovative ability and entrepreneurial potential. If the proposals were not adopted then the existing provisions would continue to act as a barrier to achieving this goal.

2.2 The Official Receiver has a statutory duty to investigate the cause of failure in most bankruptcy cases (approximately 21,000 a year). The majority of cases lead to no further action against the bankrupt and little administrative activity beyond the first few months. Most bankrupts are discharged three years after the bankruptcy order. Thus, in addition to the continuing cost of The Insolvency Service administering these cases, most bankrupts are denied the opportunity of prompt rehabilitation in relation to their financial affairs.

2.3 The only sanctions currently available to address misconduct or dishonesty by bankrupts are criminal ones. The high evidential requirements of the current criminal sanctions mean that very few bankrupts have action taken against them (about 3% of cases in the last year). The civil BRO regime, with its lower standard of proof (i.e. the balance of probabilities rather than beyond reasonable doubt, will allow for greater protection of the public and business. That protection will not be present if the proposals are not brought into force. The BRO regime will require additional resource from the courts by way of court time, but this should be balanced against a reduction in case numbers taken through the criminal system.

Company

2.4 There may be concerns that companies, particularly SMEs, will find that the cost of borrowing from secured lenders will increase as a result of the restrictions on administrative receivership. However, it is intended that the enhanced administration procedure will be seen by such lenders as a procedure which is as flexible and cost effective as administrative receivership. The reforms should help to ensure the proper alignment of, and the maximisation of value in insolvent companies. This should lead to increased returns to creditors and the preservation of value in the economy.

2.5 There might be increased pressure on the court system if the numbers of administration orders under the existing procedure were to increase substantially. However

it is intended that this impact should be minimised by the streamlining of the administration procedure;

2.6 In abolishing Crown preference, the benefits might, without additional protection, accrue to floating charge holders rather than unsecured creditors. However it is intended to provide for a percentage of funds to be ring fenced to avoid this outcome. The level of that percentage is yet to be established.

3. (i) Identify options:

Bankruptcy

3.1 Option 1 – Continue to rely on the provisions of the Insolvency Act 1986.

3.2 Option 2 – Accept the need to reduce the stigma of bankruptcy in the long term but seek to do this by way of education rather than legislative change.

3.3 Option 3 – Legislate to reduce the stigma of bankruptcy by removing unnecessary restrictions, allowing for an earlier discharge for the majority of bankrupts whilst at the same time providing a more punitive regime for culpable bankrupts.

Company

3.4 Option 1: Rely on the existing legislation. The current insolvency regime in the UK is prescribed principally by the Insolvency Act 1986 and Insolvency Rules 1986. This option would leave the current system unchanged and would be the cheapest, short-term, option. However the paper “Productivity in the UK” published on 18 June indicated the Government’s intention to bring forward proposals to ensure that collective procedures have clear primacy in corporate insolvency. This would give all interested parties the opportunity to influence the outcome. The objectives outlined above are all based on this intention and keeping the status quo would not be working towards them. It should also be borne in mind that there are likely to be long-term costs in failing to provide more effective mechanisms for rescuing viable businesses. There would be no particular benefit to businesses in adopting this approach.

3.5 Option 2: Introduce a voluntary code of practice for charge holders. A code of practice would aim to encourage creditors with the ability to appoint an administrative receiver, to allow a company to put together a rescue proposal, before enforcing their security. The advantage of this non-statutory approach would be its relatively low costs and ease of introduction. The difficulty is that such a code would only succeed if all secured creditors adopted it. In practice, this is very unlikely, particularly with the growth in number and importance of secured creditors such as factors and discounters and asset financiers. Self regulation is unlikely to operate effectively in a fragmented market.

3.6 Option 3: Introduce new legislation to realise the objectives of this part of the Bill. This option is likely to be the most effective means of achieving the objectives and in addition, the abolition of Crown preference could only be achieved by statutory means.

3. (ii) Issues of Equity or Fairness

Bankruptcy

3.7 Option 1: This would mean that the majority of bankrupts remain undischarged for three years and subject to the large number of outdated restrictions. Creditors (especially unsecured creditors) would not receive the likely increased returns that the changes will bring.

3.8 Option 2: This raises similar issues of fairness to option 1. Is it fair and practical to aim to reduce the stigma of bankruptcy through educating society in general, when there is a need to act in the short term?

3.9 Option 3: Section 307 of the Insolvency Act 1986 gives the trustee in bankruptcy power to claim property that vests in the bankrupt after the bankruptcy order (“after acquired property”). By reducing the period of bankruptcy the after-acquired property provisions will apply for a substantially shorter period thus potentially reducing the assets available to creditors. In practice, trustees do not often use the current powers.

3.10 Reducing the restrictions placed on bankrupts could result in those whose conduct is on the margins of acceptability not having their conduct addressed.

3.11 Whether culpable and non-culpable bankrupts are treated the same or differently is unlikely to have much effect on returns to creditors.

Company

3.12 Option 1: Is it fair to keep the status quo, as this is likely to result in some companies which might otherwise be viable not being saved with a negative effect on the economy.

3.13 Option 2: Is it fair and practical to introduce a code of practice and could any lapses from the code be addressed.

3.14 Option 3: There will be less money available to the Crown from their preferential claims but a compensatory amount made available through taxation applied to firms continuing to trade, which might otherwise have failed.

3.15 The current regime contains aspects, which are perceived to be unfair and inequitable, particularly the treatment of unsecured creditors. Options 1 and 2 will not, or only partially, address this as they are in favour of retaining the status quo or relying on a voluntary code which is without a statutory means of addressing departures from its terms. Option 3 will put a more equitable system in place to ensure that those who stand most to lose when a company fails are given an opportunity to influence the outcome. In addition the increased prospects of a business surviving should ensure that the Crown recoups any loss through the abolition of preferential status by increased tax received from continued trading.

4. (i) Identify the Benefits

Bankruptcy

4.1 Option 1 – There will no additional costs placed on businesses.

4.2 Option 2 – The benefits of an economy strengthened by increased entrepreneurial activity might be achieved in the long term. Entrepreneurs may have increased awareness of the pitfalls of business and the stigma of bankruptcy may gradually be reduced through a programme of education. This option would not require legislative change.

4.3 Option 3 – The early discharge provisions will mean the prompt rehabilitation of non-culpable bankrupts. The removal of the automatic application of the various restrictions, disqualifications and prohibitions that currently attach to bankrupts will reduce the stigma attached to bankruptcy and increase both business start-ups and restarts by encouraging responsible risk takers back into business and thereby contributing to the economy. Rogues

will have greater restrictions placed on them so protecting the public and business community. Where such restrictions are agreed through undertakings there will be a reduction in both administrative and court costs.

4.4 The provisions for Official Receivers to act as nominees and supervisors of IVAs, linked to increased contributions by bankrupts through Income Payment Orders, will generate greater dividends for creditors and allow greater number of bankrupts to have their bankruptcy annulled.

Company:

4.5 Option 1 – There will be no additional costs placed on businesses.

4.6 Option 2 – There will be some benefit in that a Code of Practice might aid business recovery but the code is unlikely to be mandatory therefore, there may be no reduction in the number of administrative receiverships and no increase in administrations.

4.7 Option 3 – Amendments will improve the administration procedure and will help to maximise economic value by aligning incentives properly. This should make it less likely that viable businesses will go to the wall. The abolition of Crown preference is likely to increase dividends to creditors.

4. (ii) Quantifying and Valuing the Benefits

Bankruptcy

4.8 Option 1 – No additional monetary benefit to the public or business.

4.9 Option 2 – It is difficult to quantify the cost of educating the wider community. This might, for example, involve the production and distribution of leaflets. It would also be difficult to assess the most effective method of distribution. Financial budgeting and education could be introduced into school syllabus but at the expense of other subjects.

4.10 Option 3 – Creditors will benefit from the removal of the Crown's preferential rights in both bankruptcies and IVAs.

4.11 Administration costs will be reduced in all bankruptcies through the early discharge provisions. The Insolvency Service currently deals with about 21,000 bankruptcies a year. The vast majority of these require little input after the Official Receiver has completed his enquiries.

4.12 The public and businesses will be protected from those culpable bankrupts who are the subject of BROs.

4.13 Most IVA proposals are prepared by insolvency practitioners and presented to creditors in return for a "nominee's fee". If the IVA is accepted it will be administered by a supervisor who will charge fees over the term of the IVA. The Insolvency Service has researched IVAs either completed or abandoned in the period 1 August 2000 to 31 October 2000. The number of cases in the sample was about 900. The nominees' fees ranged from about £150 to £9,000 with an average of about £1,500 a case. Supervisors' fees varied according to the length and complexity of the case.

4.14 Creditors will get a higher return from the anticipated increased number of post-bankruptcy IVAs as debtors will have to pay a drastically reduced up-front fee (currently

about £1,500) to have proposals drawn up. The Official Receiver will already have access to most of the required information and will be able to draw up proposals at minimum cost. The level of the up-front fee currently acts as a real deterrent to entering a post-bankruptcy IVA. About 2,300 bankrupts a year pay surplus income to their estate via an “income-payments order”. If half of those were to go down the IVA route instead approaching £1,725,000 (£1,500 x 1,150), less Official Receiver’s costs, could be applied to meeting creditors’ claims rather than the up-front fee for an IVA.

Company

4.15 Assuming that the abolition of administrative receiverships resulted in an increased number of administrations, it is unlikely that any material change in fee levels for insolvency practitioners would result. However from a wider perspective the benefits will be seen in the form of increased survival rates and recovery rates for creditors through the streamlined administration procedure. The combination of the introduction of a more efficient administration procedure and abolition of Crown preference which will free up to £100m per annum for other creditors and would also be expected to provide greater numbers of rescues.

4.16 As far as direct benefits are concerned, Option 1 one will be neutral, as it does not advocate change. Options 2 and 3 will potentially result in the benefits referred to above in terms of survival rates and improved returns to creditors, with some uncertainties as to the practical effect of a voluntary code outline under option 2.

5. (i) Compliance Costs for Business, Charities and Voluntary Organisations

Bankruptcy

5.1 Options 1 and 2 are unlikely to place any further burden on businesses, charities or voluntary organisations. However, there are about 1,850 licensed insolvency practitioners (with about 1,000 active covering about 450 firms). There are also some solicitors who are involved in company director disqualification. It is likely that solicitors will be involved in some BRO proceedings.

5.2 Option 3 imposes no additional costs for business in general. However, there will be a need for insolvency practitioners to familiarise themselves and their staff with the revised bankruptcy regime and to set up systems to cope with it. It is anticipated that the training cost will largely be absorbed into existing regular staff training programs and continuing professional education but that the cost of setting up new systems might be between £500 and £5,000 depending on the size of the firm.

5.3 Option 3 has potential to reduce the burden on organisations, including charities, as rather than hearing appeals by bankrupts against automatic disqualification, they could rely on the making of a BRO to determine an individual’s suitability to act. This would lead to considerable savings in administrative time and costs.

5.4 Option 3 may have an impact on voluntary organisations in the debt advice sector (e.g. Citizens’ Advice Bureau, Paylink, National Debtline and Consumer Credit Counselling Service) as they will need to be familiar with the new provisions but those costs might be able to be assimilated into existing staff training programs. The proposals might also lead to an increase in the number of applications for advice.

5.5 Option 3 will place a burden on the court system, as they will have to deal with the new regime for making Bankruptcy Restriction Orders (BRO). However the Bill will provide an option for a bankrupt to agree to a BRO without involving the court. It is presently envisaged that approximately 10% of bankruptcy cases will result in a BRO and that at least half will not involve a court hearing i.e. approximately 2,100 per year of which about a thousand will need a court hearing.

Company

5.6 There would be neither costs nor benefits under option 1, as no change would take place.

5.7 There would be familiarisation and training costs for both options 2 and 3, these being higher for a substantial change in the law. These costs would fall mainly on insolvency practitioners, those providing financial/legal advice to companies and financial institutions.

5.8 Option 2 would require financial institutions to agree a code of practice and put this in writing and publicise the final version.

5.9 Overall it is anticipated that these costs will be largely absorbed into existing regular staff training programs and continuing professional education. For businesses in general it is not likely that even the changes contained in option 3 would be substantial in cost terms as they do not involve additional regulation and will only be of relevance for those subject to insolvency proceedings. Furthermore, for secured lenders and IPs there are likely to be reduced compliance costs through the relaxation of the requirement on section 2.2 reports.

5. (ii) Compliance costs for a typical business

Bankruptcy

5.10 Options 1, 2, and 3 impose no burdens on a typical business, the compliance costs for insolvency practitioners has been dealt with above.

Company

5.11 **Option 1** places no burden on any business sector.

5.12 **Option 2** places a burden on banks/chargeholders to draw up (and adhere) to a code of conduct.

5.13 **Option 3** imposes no additional costs for business in general but there will be a need for insolvency practitioners to familiarise themselves with the revised corporate (and the previously mentioned bankruptcy) regime. It is anticipated that this cost will largely be absorbed into existing regular staff training programs and continuing professional education.

5. (iii) Policy costs

Bankruptcy

5.14 There should be no need for further staff resources (InsS), as the new procedures will very likely utilise redeployed staff.

5. (iv) Total compliance costs

5.15 Having regard to the number of active insolvency practitioner firms (about 450), and if we take the mid-point of the estimated non-recurring cost of between £500 and £5,000 to put in place the systems, the total compliance cost is likely to be about £1,237,500 (450 x £2,750)

6. Consultation with small business: “The Litmus Test”

Bankruptcy

6.1 Small firms of insolvency practitioners and solicitors and individual bankrupts are being consulted in order to identify any costs and benefits of implementing the proposals. In total 15 firms or individuals have been contacted and asked to return a questionnaire.

Company

6.2 Small firms of insolvency practitioners and solicitors, financial institutions and directors of limited companies that have entered either administration or administrative receivership are being consulted in order to identify any costs and benefits of implementing the proposals. In total 25 firms or individuals have been contacted and asked to return a questionnaire.

7. Identify any other costs

7.1 None presently identified other than the cost to Government of preparing the legislation.

8. Results of consultation

8.1 There have been extensive previous consultations.

Bankruptcy

8.2 The Insolvency Service published the consultation document “Bankruptcy – A Fresh Start” in April 2000. A copy of this document can be found on The Insolvency Service website at www.insolvency.gov.uk/introduction/freshstart/foreword.htm.

Company

8.3 The Insolvency Service published the consultation document “A Review of Company Rescue and Business Reconstruction Mechanisms” in November 1999 and a report on that consultation was published in February 2001. Copies of those documents can be found on The Insolvency Service website at www.insolvency.gov.uk/introduction/condoc/reviewof.htm and www.insolvency.gov.uk/introduction/condoc/condocreport.htm respectively.

9. Summary and recommendation

9.1 Option 3 in both bankruptcy and companies are recommended as the most effective means of ensuring the survival of viable businesses and of improving the returns made to creditors. The overall costs of these options are unlikely, for the reasons set out above, to be material as the regulatory burden on businesses generally will be minimal and on the professional, financial and voluntary sectors, restricted to training, system and familiarisation costs.

10. Enforcement, Sanctions, Monitoring and Review

10.1 The bankruptcy proposals will repeal two offences in the Insolvency Act 1986 (section 361 – failure to keep proper accounts of business and section 362 – gambling). Conduct that would currently be dealt with under these provisions will be dealt with under the BRO regime. The effectiveness of the new legislation will be monitored after the new legislation has been in operation for a period of three years.

10.2 It will be a criminal offence to breach a BRO and will be subject to penalties of a fine and/or imprisonment.

10.3 There are no new offences created by the company proposals and the effectiveness of the new procedures will be monitored after the legislation has been in operation for three years.

Declaration

I have read the Regulatory Impact Assessment and I am satisfied that the balance between cost and benefit is the right one in the circumstances.

Signed _____

Parliamentary Under Secretary of State
for Competition, Consumers and Markets

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