

Draft Deregulation Bill
Written evidence from R3, the insolvency trade body

Introduction

1. R3 represents 97% of UK Insolvency Practitioners (IPs) - the only professionals authorised to take insolvency cases. From senior partners at the 'Big Four' accountancy firms to practitioners who run their own micro-businesses, our members have extensive experience of both corporate and personal insolvency.
2. R3's interest in the call for evidence stems from the insolvency measures contained within the draft Bill. The majority of our points will, therefore, relate to Clause 9 and Schedule 5.
3. R3 supports the majority of the insolvency proposals in the draft Bill. As such, our response focuses on areas of key importance to the profession – the proposed changes to the licensing regime for IPs (Clause 9), authorisation of IPs by the Secretary of State (Schedule 5, part 6) and basic bank accounts for undischarged bankrupts (Schedule 5, part 5). R3's overarching view on the remaining insolvency provisions is briefly laid out in the response, but more detailed commentary is provided in Annex A.

Executive Summary

4. R3 believes the majority of the insolvency proposals contained within the draft Bill are sensible and will make the conduct of insolvency processes more efficient and streamlined. This in turn should have a beneficial impact for creditors, including the business community and HMRC.
5. R3's principal concern with the draft Bill relates to Clause 9 and the proposed changes to the authorisation of Insolvency Practitioners. Firstly, R3 has serious concerns that allowing practitioners to be partially authorised for either corporate or personal insolvency could reduce standards across the profession and may thus affect the quality of advice given to debtors. Secondly, we are concerned that this provision may have a disproportionate impact on R3's members who work in small firms, many of whom are micro-businesses. Thirdly we question whether the measure will prove to be deregulatory.
6. In addition, we do not believe that Clause 9 supports the intention of the Bill - to reduce the burden of regulation on businesses. Whilst we appreciate that partial licences may be attractive to some of the large firms, R3 has serious doubts over whether the proposed partial licences will be utilised widely and as such, the proposal adds unnecessary layers of complexity to the current authorisation regime. In our view, the current regime works well and ensures Insolvency Practitioners are highly qualified.
7. Evidence from R3's membership shows that just 27% and 5% of members specialise in either corporate or personal insolvency respectively. In addition, part 390B of the draft Bill, which determines that a person who is partially authorised may not act in relation to partnerships, will rule out many IPs, that undertake such work, from obtaining a partial licence.

8. In addition, Clause 390B of the draft Bill, which provides an exemption relating to membership of a partnership, should not apply in Scotland, with regard to the personal specialist authorisation. In England and Wales an insolvent partnership can be dealt with through “corporate” insolvency procedures, e.g. liquidation, whereas in Scotland an insolvent partnership is dealt with through a “personal” insolvency procedure i.e. sequestrated (bankrupted). In Scotland it is possible to sequester either the individual partners of a partnership or the partnership without dealing with the other party (ie the partnership or partners, respectively) The explanatory notes of the draft Bill explain that the policy behind the exemption in Clause 390B is because knowledge of both company and individual law is required, however, this is not the case in Scotland where the affairs of insolvent partnerships and partners are both dealt with under individual insolvency law.

Key areas

Clause 9 – partial licensing

9. Under the current system of authorisation, Insolvency Practitioners are granted an insolvency licence, which allows them to act as an IP in relation to both corporate and personal insolvency cases. This licence is contingent upon passing the Joint Insolvency Exam (JIE) and gaining a significant amount of practical insolvency experience (approximately 600 hours for most licensing bodies). The JIE incorporates both personal and corporate insolvency papers and students must pass each paper to become qualified.
10. Clause 9 of the draft Bill introduces a new ‘partial authorisation’ level, which allows IPs to be granted licences to act either only in relation to companies, or only in relation to individuals. R3 has serious concerns about the implications of Clause 9 and feels strongly that the provision is unnecessary and will add further complexity to the current regime.
11. The explanatory notes of the draft Bill advise that these changes will ‘increase accessibility to the profession and improve competition.’ However, R3 believes that the proposed partial licences will not be widely taken up by practitioners for two principal reasons.
12. Firstly, a survey of R3’s membership demonstrates that just 5% of IPs work in firms that deal with personal insolvency only and 27% in firms that deal with corporate insolvency only. It is clear that an overwhelming majority of the profession practice in both corporate and personal insolvency and therefore would not be suitable for a partial licence.
13. Secondly, section 390B of the draft Bill prevents partial licence holders from acting in relation to partnerships. Whilst large firms may have a limited practising scope and only deal with insolvent companies, they will often act in relation to partnerships, which means they will not take up partial licensing exclusively as this would fetter their ability to act in the full range of cases they wish to cover. As such, it seems reasonably likely that firms such as these will require at least some of their employees to have full authorisation, despite the firm’s focus on corporate insolvency.

14. Given the reasons outlined above, R3 does not believe the proposed measure is deregulatory. It is likely that the partial licences will be utilised by only a small number of members of the profession and, as a result, this will not improve competition within the sector.
15. The current system of authorisation works well and ensures IPs are highly qualified and well equipped to deal with the complex situations they are often faced with. IPs have a significant level of responsibility and must make decisions which have a considerable impact on a variety of stakeholders, including suppliers, employees, as well as the wider economy. To provide proper advice to individuals and corporate entities, R3 believes it is necessary to have knowledge of insolvency legislation in its entirety. By way of example, an IP advising a company might need to provide advice on the directors' personal debts. Insolvency is already a narrow specialism and reducing it further could impact on the quality of advice provided to individuals and companies.
16. For the insolvency regime to work properly, it is necessary that creditors and the wider public have confidence in the industry. The level of knowledge and extensive experience required to become a qualified IP plays a significant role in ensuring that the profession is held in high regard. If the current standard of qualification is reduced, there could be a wider impact on the reputation of the industry as a whole.
17. R3 is also concerned that Clause 9 may have a disproportionate impact on R3's members who work in smaller firms. The explanatory notes outline that the partial licensing regime will 'reduce the cost of training and ongoing regulation for Insolvency Practitioners who specialise'. However, given an estimated 75% of small firms undertake both corporate and personal insolvency procedures for commercial reasons, it is likely that very few small firms will be able to take advantage of these benefits, as it would reduce the scope of work they could undertake.
18. Whilst we do not believe that partial licences will be taken up widely, as mentioned above, it is more likely to be the very large firms who are able to adopt partial licensing (as their business models are more likely to have a limited practising scope). As such, there is a risk that partial licences will create an unlevel playing field across the industry, making it relatively more costly for smaller IPs to compete in an already difficult market.
19. R3 is of the view that the proposed partial licences, contained within Clause 9 of the draft Bill, are not deregulatory. They are unlikely to increase competition within the sector and risk adding complexity to a licensing regime that currently works well. In addition, R3 has serious concerns that the proposed changes will have a disproportionate impact on smaller IPs and may reduce overall standards. The changes would therefore appear to make the current regime unnecessarily complex, with little tangible benefit. For the reasons outlined above, we would caution the Government against introducing these measures.

Schedule 5, part 6 – repeal of provision for authorisation of nominees and supervisors in relation to voluntary arrangements

20. Under the current system, individuals can be authorised to act solely as nominees or supervisors in voluntary arrangements. The Government considers that this will no longer be necessary if the partial authorisation regime in Clause 9 is introduced.
21. This provision is contingent upon the introduction of partial licences, which, as outlined above, R3 considers should not be introduced. As such, if Government decide not to implement Clause 9 then the authorisation for nominees and supervisors in relation to voluntary arrangements should not be repealed.

Schedule 5, part 6 – direct authorisation of Insolvency Practitioners by the Secretary of State

22. Schedule 5, part 6 removes the power of the Secretary of State to authorise individuals to act as Insolvency Practitioners. R3 welcomes this change, which it has advocated for a number of years and believes will improve consistency and transparency across the regulatory regime.
23. The regulatory regime for Insolvency Practitioners is complex. In addition to the seven Recognised Professional Bodies (RPBs), the Secretary of State also has the power to authorise practitioners. In contrast to the RPBs, the Secretary of State does not have the power to establish a disciplinary regime, which would enable it to impose a range of sanctions for regulatory breaches. The only power available to the Secretary of State is to withdraw a practitioner's authorisation, which is extremely draconian and therefore rarely used. This means that for a range of conduct breaches, which are not serious enough to warrant withdrawal of authorisation, the Secretary of State effectively has no regulatory powers.
24. The proposal to remove Secretary of State authorisation, alongside recent changes to the regulatory framework for IPs, will ensure that all practitioners are regulated to the same standard and there is consistency and commonality across the regime. The Secretary of State also acts as an oversight regulator for the RPBs. This provision therefore removes the conflict of interest with the Secretary of State's role as both a regulator of RPBs and a direct regulator of Insolvency Practitioners.

Schedule 5, part 5 - Basic bank accounts for undischarged bankrupts

25. R3 supports the move in Schedule 5, part 5 to facilitate banks providing bank accounts to undischarged bankrupts. R3 has been calling for banks to provide basic accounts for undischarged bankrupts for some time. R3 is keenly aware of the banks' concerns regarding after-acquired property and has highlighted previously that these issues should be dealt with through legislation, rather than guidance. R3 considers that the proposed changes strike a fair balance between providing adequate protection for the banks and ensuring Insolvency Practitioners can still make recoveries for creditors.

Additional insolvency provisions – Schedule 5

26. R3 supports the vast majority of the insolvency proposals contained within Schedule 5 of the draft Bill. The changes are likely to improve efficiency and remove unnecessary burdens, both on the insolvency profession and Government. This in turn should help to save costs, which will benefit creditors more generally. Please see Annex A for detailed views on these proposed changes.

Answers to specific questions

- 1. The draft Bill covers a broad range of specific activities and a large amount of legislative provision is amended by it. Could the same result have been achieved using existing secondary legislative procedures?**

R3 do not believe these changes could have been achieved using existing secondary legislative procedures.

- 3. Are the changes proposed in the draft Bill evidence based and have any risks associated with the changes been taken adequately into account?**

R3 do not consider that the move in Clause 9, to introduce a partial licensing regime for Insolvency Practitioners (IPs), is evidenced based. Indeed, we have seen no evidence that these changes will fulfil the Government's aim to increase competition within the sector.

R3 do not believe the proposed partial licences will be widely taken up by practitioners as an overwhelming majority of the profession practise in both corporate and personal insolvency and as such would not be suitable for a partial licence.

In addition, the Bill prevents partial licence holders from acting in relation to partnerships. Whilst some large firms may have a limited practising scope and only deal with insolvent companies, they will often act in relation to partnerships, which means they will not take up partial licensing exclusively as this would fetter their ability to act in the full range of cases they wish to cover. As such, it is reasonably likely that firms such as these will require their employees to have full authorisation, despite the firm's focus on corporate insolvency.

R3 also believes that the move to introduce a partial licensing regime has several risks, which have not been fully considered by Government.

To provide proper advice to individuals and corporate entities, R3 believes it is necessary to have knowledge of insolvency legislation in its entirety. Insolvency is already a narrow specialism and reducing it further could impact on the quality of advice provided to individuals or companies.

If the standard of qualification for IPs is reduced there could be a wider impact on the reputation of the industry as a whole. For the insolvency regime to work properly, creditors and the wider public must have confidence in the profession. The level of knowledge and extensive experience required to become a qualified IP plays a significant role in ensuring that the profession is held in high regard.

R3 is also concerned that Clause 9 may have a disproportionate impact on R3's members who work in smaller firms. The explanatory notes outline that the partial licensing regime will 'reduce the cost of training and ongoing regulation for Insolvency Practitioners who specialise'. However, given an estimated 75% of small firms undertake both corporate and personal insolvency procedures for commercial reasons, it is likely that very few small firms will be able to take advantage of these benefits, as it would reduce the scope of work they could undertake.

Whilst we do not believe that partial licences will be taken up widely, it is more likely to be the very large firms who are able to adopt partial licences (as their business models are more likely to have a limited practising scope). As such, there is a risk that partial licences will create an unlevel playing field across the industry, making it relatively more costly for smaller IPs to compete in an already difficult market.

R3 do not believe that the suggested partial licensing regime is deregulatory. There is no evidence to suggest that this change will increase competition within the sector and instead it risks reducing the quality of advice available to individuals and companies and may have a disproportionate impact on R3's members who work in small firms.

4. Does the draft Bill achieve its purpose of reducing the regulatory burden on business, organisations and individuals effectively and fairly?

R3 fully supports the insolvency provisions contained within Schedule 5 of the draft Bill and believe they will reduce the regulatory burden on businesses and individuals.

However, as discussed in our response, R3 has serious concerns about Clause 9, which proposes changes to the authorisation of Insolvency Practitioners. These changes are unlikely to increase competition within the sector and risk adding complexity to a licensing regime that currently works well. In addition, R3 believes that the proposed changes will have a disproportionate impact on smaller IPs and may reduce overall standards. The changes would therefore appear to make the current regime unnecessarily complex, with little tangible benefit. For the reasons outlined above, we would caution the Government against introducing these measures.

5. Will the draft Bill generally benefit businesses by offsetting other regulatory burdens? Are there indirect impacts on other businesses from reducing regulation in specific sectors?

The changes contained within Schedule 5 should generally benefit businesses. The proposals will make the conduct of insolvency processes more efficient, which in turn should see an improved return to creditors, many of whom are businesses.

However, as mentioned above, the proposed changes to Clause 9 may have a disproportionate impact on smaller insolvency firms, many of whom are micro-businesses. The changes may also risk reducing the quality of advice given to struggling businesses.

8. Have the measures set out in the draft Bill been subject to adequate cost-benefit analysis on the basis of consultation with those affected?

R3 is not aware of a cost-benefit analysis or wider impact assessment for the changes proposed in Clause 9 of the draft Bill, but as stated above, we do not believe the changes are deregulatory.

Power to disapply legislation

10. Is a new “power to disapply legislation no longer of practical use” necessary or are there existing procedures which could be used to achieve the same effect?”(Clause 51)?

Existing procedures, such as the Deregulation Bill, can be used to achieve the same effect as the proposed ‘power to disapply legislation no longer of practical use’. However, deregulatory bills, such as these, are introduced infrequently and the process is fairly cumbersome.

As the proposed power will seemingly undermine Parliamentary authority, we view this issue as a matter for Parliament.

11. Is the meaning of the phrase “no longer of practical use” clear? In this context, what is meant by “practical”? Should it be defined and, if so, how? Will removing any of the provision proposed in Schedule 16 of the draft Bill have implications for any other areas of regulation?

R3 believes that the meaning of the phrase ‘no longer of practical use’ is fairly clear and suggests that the wording remains broad to ensure that the power can be utilised effectively.

16. What are the risks associated with the proposed new power to disapply legislation that is “no longer of practical use”?

This power would effectively repeal legislation by executive dictat rather than parliamentary scrutiny, which risks undermining parliamentary authority.

The power also overcomes the need for public consultation. Insolvency encompasses a broad range of legislation and is often affected by changes, which at first glance appear to be unrelated. Understandably therefore, legislative changes which adversely impact on insolvency can sometimes be overlooked by legislators. If the need for public consultation is removed there is a real risk that potentially detrimental changes may slip through unnoticed. It is therefore vital that the consultation procedure is robust.

R3, the insolvency trade body

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ANNEX A: detailed comments on the insolvency provisions contained within Schedule 5 of the draft Bill

ANNEX A

Schedule 5, part 1 – Deeds of Arrangement

This section of the draft Bill repeals the Deeds of Arrangement Act 1914. R3 supports this change, which repeals legislation relating to an insolvency solution no longer used.

In 1986, the Insolvency Act introduced Individual Voluntary Arrangements (IVAs), as an alternative to bankruptcy. IVAs have effectively replaced deeds of arrangements, making the Deeds of Arrangement Act 1914 obsolete.

Schedule 5, part 2 – administration

The appointment of administrators

R3 supports the provision to enable a company or directors to appoint an administrator despite the presentation of a winding-up petition, if the petition was presented during an interim moratorium.

Administration is a key business rescue tool and this move, which aims to facilitate administration, is likely to bolster the rescue culture and save businesses and jobs.

Notice of intention to appoint an administrator

The draft Bill removes the current requirement to give notice of intention to appoint an administrator to persons who are not themselves entitled to appoint an administrative receiver or administrator in certain circumstances.

R3 fully supports this move as following alternative and wider judicial interpretation it re-establishes what appears to have been the original sensible, intention of the legislation of informing only those parties who have the power to appoint an administrator themselves of the directors' intention to appoint.

The release of an administrator

In insolvency, it will often be the case that there are insufficient assets in the 'pot' to make a return to unsecured creditors and as such, the unsecured creditors will have no financial interest in the administration.

Despite this, current legislation implies that when an administrator wishes to obtain his release as office-holder, a normal resolution of all of the creditors is required, in addition to a resolution of all of the secured creditors. This situation gives rise to unnecessary creditors' meetings, arranged with the sole purpose of giving the administrator their release.

The proposed changes in Schedule 5, part 2, will clarify the situation and make clear that where unsecured creditors have no interest in the administration, by virtue of the fact they will not receive a dividend, they are not involved in the administrator's release, which can instead be resolved by the secured creditors. This will avoid the need for unnecessary creditors' meetings, thereby reducing the costs of the process.

Schedule 5, part 3 – winding-up companies

Payment to the Bank of England

R3 supports the proposal to remove the court's power to order payment into the Bank of England of money due to a company. This power is no longer necessary and dates back to the Companies Act 1862, when the insolvency profession was largely unregulated.

The release of the liquidator when a winding-up order is rescinded

Schedule 5, part 3 inserts a new subsection, which provides that when a winding-up order is rescinded, the liquidator has his or her release with effect from the time the court may determine.

R3 considers this to be a useful provision, which will allow the liquidator's release to be addressed at the same time the court rescinds a winding-up order. This will avoid the need for the liquidator to make a subsequent, separate application to court.

Schedule 5, part 4 – disqualification of unfit directors

R3 supports the move in Schedule 5, part 4 to enable the Secretary of State or official receiver to directly request information that they consider relevant to a person's conduct as a director. Currently, the Secretary of State/official receiver may only request information from the office holder, which imposes an administrative burden on the IP. The proposed changes should reduce this burden and assist the Government with the disqualification of unfit directors.

Schedule 5, part 5 – bankruptcy

Appointment of an interim receiver

The proposed amendment to permit the court to appoint the official receiver or any Insolvency Practitioners as an interim receiver in all circumstances is to be welcomed.

Currently, only the official receiver can be appointed by the court to act as interim receiver. As both the official receiver and Insolvency Practitioners can act as trustees of a bankrupt's estate, it stands to reason that both parties should be able to act as interim receivers.

Statement of affairs in creditor petition cases

R3 supports the move in Schedule 5, part 5 to remove the requirement for a bankrupt to submit a statement of affairs in creditor petition cases, unless requested to do so by the official receiver. This will ensure consistency across insolvency legislation and put creditor petition bankruptcy on the same footing as companies wound up by the court, where the directors only submit a statement of affairs if required to do so by the official receiver.

It is our understanding that in the majority of cases, bankrupt individuals do not submit a statement of affairs. Individuals are often unaware of their duty to provide this information, as they have already submitted a Personal Insolvency Questionnaire, which contains the same information. As the official receiver already has the relevant information, these changes should remove the unnecessary burden on bankrupt individuals to provide this information twice.

Schedule 5, part 7 – preferential debts of companies and individuals

R3 supports the repeal of one element of priority given to employees' wages in certain insolvency proceedings, as the type of employee contract it relates to no longer exists.