Red Tape Challenge –
Changes to insolvency law to reduce unnecessary regulation and simplify procedures

Consultation Closing Date: 10 October 2013

RESPONSE OF THE INSOLVENCY PRACTITIONERS ASSOCIATION

INTRODUCTION

There follows the response of the Insolvency Practitioners Association to the Insolvency Service consultation on proposals to reduce regulation and simplify insolvency procedures. The response has been prepared jointly by the Associations' Personal Insolvency and Corporate Consultation committees; Committees which comprise IPA members with particular interest and expertise in the fields of personal and corporate insolvency, respectively. Further information about the IPA may be found at the end of this document.

This response is not intended to reflect the views of every member of the Association, who are themselves at liberty to submit their own responses, but rather to reflect the broadly agreed views of the Association and its Committees.

OVERVIEW OF RESPONSE AND GENERAL REMARKS

The objects for which the IPA is established are, for the public benefit, to promote and maintain high standards of practice in "Insolvency Administration Offices"; ancillary to which, the Association is empowered to advise and make recommendations to any government department or other body regarding any changes in law or practice affecting insolvency practice.

Having considered the proposals, we are generally supportive of the proposed reduction in administrative and regulatory burdens placed upon practitioners, particularly where there seems to be little direct benefit from the existing provision, or a significant divergence between the apparent intention of the provision and the current practice. Proposals in respect of the simplification of the D-forms system are particularly welcomed.

However, in a number of instances, we would question whether what is proposed would have the level of impact suggested (e.g. removing the requirement to retain case records) and we are unclear how some of the proposals would act to achieve their apparent objectives (e.g. removing opportunities for creditors to participate in meetings when the stated intention is to promote creditor engagement). Further, given that the IPA opposed the introduction of Adjudicators to determine winding up and bankruptcy petitions when previously consulted upon in 2011, the resurrection of these proposals within this consultation is not welcomed.

We are also averse to being unduly prescriptive in detailed matters; such as the manner of distribution of funds (e.g. requiring distribution by bacs). Our practitioners are drawn from a wide variety of practice backgrounds and the valuable roles they perform within the local business communities they serve should be recognised, notwithstanding that they may not all have sophisticated internal systems. The cases with which they are dealing will also vary greatly in terms of size and complexity and bacs distributions may not be appropriate in all cases.

Part 1 Insolvency Practitioner Regulation

Q1. Do you agree that the requirement to maintain a separate case record should be removed?

No. We perceive a benefit in the centralised maintenance of these records at apparently little costs, as this information is retained anyway within the most commonly used case management systems. Extracting these summaries into a standardised report is a simple task that may act as a prompt to IPs to review files and attend to outstanding actions.

Q2. Do you believe that the present requirements result in duplicate information being maintained? If so, can you provide an estimate of the amount of time taken to maintain this duplicate information?

N/A.

Q.3 Do you agree that Regulations 15(1)(a) and 15(1)(b) should be repealed?

N/A.

Q.4 Would it be necessary to introduce a new provision outlining in general terms what is expected in terms of case records and retention?

N/A.

Q5. Do you agree that administrators and voluntary liquidators should be allowed to dispose of books and papers at any time with the approval of the Secretary of State?

Yes. However, this should only be possible once the IP is satisfied that they are no longer required in the proper performance of his functions.

Q6. Can you provide an estimate of the proportion of administrations and voluntary liquidations where it is necessary to retain books and papers until one year after dissolution and the associated costs?

Anecdotally, we are advised that office holders will vary rarely have cause to refer to books and papers (including electronic records), after dissolution of a company. The exception may be where there is a disqualification of other prosecution under way, in which case it would seem preferable to hand the records over the appropriate authorities. We are unable to quantify the costs of retaining records.

Q.7. Are you aware of instances where companies are being placed into compulsory liquidation because of the present requirements to retain books and papers in administration and voluntary liquidation?

No.

Q8. Do you agree that the requirement to obtain sanction to exercise certain powers within Schedules 4 and 5 of the Insolvency Act 1986 should be removed?

Yes. The current system does not appear to add much value to the decision making process and removal of this requirement brings these processes in line with others where the requirement does not apply (administrations and CVLs).

Q9. Do you agree that the requirement for liquidators and trustees in compulsory winding up and bankruptcy to obtain authorisation from the Secretary of State to operate a local bank account in place of banking with the Insolvency Services Account should be removed?

Yes.

Q10. Can you provide an estimate of the approximate cost of obtaining sanction in liquidation and bankruptcy?

Anecdotally, our members suggest a minimum £500 of time costs will be incurred in preparing and submitting a sanction application, although this will vary from case to case.

Q11. Do you agree that the requirement to maintain time records where remuneration sought is not on a time cost basis should be removed?

Where the basis of remuneration has been agreed by the creditors other than on a time cost basis, there seems to be little purpose in retaining this information. However, such records need to be available until such time as the basis of remuneration has been fixed.

Q12. Can you provide an estimate of the proportion of cases where remuneration is sought on a non-time cost basis?

Not accurately, but believe that this could be estimated with reference to total numbers of cases of each type. Our experience suggests that volume MVLs are typically conducted on a fixed fee. IVAs are almost invariably conducted on a percentage of realisations (typically 15%). CVL cases where there are no assets to be realised will effectively be conducted for the fixed Statement of Affairs fee alone. In other forms of insolvency, time costs remuneration remains the norm. Whilst the utilisation of mixed bases of remuneration is growing in popularity, such arrangements are still relatively uncommon.

Q13. Can you provide an estimate of the average cost of maintaining time records in an individual case?

Time recording by category is required by virtue of SIP9. Practitioners report that maintenance of detailed narrative records of this nature is inherently time consuming, although rarely is this cost passed on to the estate.

Q14. Can you provide an estimate of the approximate proportion of cases where insolvency practitioners would dispense with maintaining time records if able to do so?

This would entirely dependent upon the nature of the practitioner's case portfolio, as noted above. This would be particularly advantageous for practitioners specialising in MVLs, low or no-asset CVLs or IVAs. Practitioners with a mixed case portfolio would probably need to continue to maintain these records.

Part 2 Changes to the law governing insolvency proceedings

A. Meetings of Creditors

Q15. Do you think that meetings always serve a purpose where held?

No. However, they do provide a valuable opportunity for creditor engagement (albeit, one seldom utilised). We would suggest that meetings should be held were the office holder considers there to be a purpose and benefit in doing so.

Q16. Do you agree that meetings of creditors should no longer be the default position of gauging creditor opinion?

Yes. Meeting should be at the behest of the office holder.

Q.17. Do you think some groups' interests will be unfairly harmed by such an approach with meetings of creditors? If so, do you think such harm could be avoided by incorporating statutory protections?

No.

Q.18. Are there decisions (other than those relating to the approval of voluntary arrangements or an office-holder's remuneration) that you think should only be considered at a meeting of creditors?

None other than decisions affecting the office-holder, such as removal from office.

Q.19. Do you think that 10% is a reasonable threshold for objecting creditors? If not, what do you think it should be?

Yes.

Q.20. Do you find final meetings to be poorly attended?

Yes.

Q.21. Do you agree that all final meetings should be abolished?

Yes. The new system of final reports in liquidations seems to be working well.

Q.22. Do you have any comments on any of the minor proposals on meetings of creditors included in Annex 4?

a)	No. If a meeting is to be held, creditors should be properly notified. This may be by electronic means.

b) Yes. We can see no reason why these meetings should be differentiated from other insolvency meetings.
c) No. This could cause confusion and create market distortions through use of blanket voting.
d) Yes.
e) No. We could envisage some AML problems.
f) Yes.
g) No. Proxies should be retained for evidential purposes, particularly where they are used to fix remuneration.
h) Yes.
i) Yes.
j) No view.
k) No view. [Noting that neither j) nor k) appear to reduce regulatory burdens.]
l) Yes.
m) Yes.
n) Yes.
o) Yes.
p) Yes.
q) No. Doing so could allow minority, un-connected creditors to have a disproportionate influence, particularly in the context of small close companies, where directors may have provide a significant proportion of the company's funding. We do not consider that a change of this nature in the voting rules constitutes a "minor" amendment.

B. Communication and creditor engagement

Q.23. Do you agree that creditors should be able to opt out of receiving correspondence sent by the insolvency office-holder?

No. We perceive little benefit given the increasing use of electronic communication. Given low levels of creditor engagement, they are unlikely to bother to exercise the opt out. However, an opt in system could have a real impact.

Q.24. Do you think that creditors should stop receiving documents automatically at the point they cease to have an economic interest in an insolvency? If so, should individual creditors be able to request that the insolvency office-holder continue to send them documents after this point?

No.

Not Applicable.

Q.25. Do you know how often the existing (post-2010) provisions regarding use of websites in insolvency proceedings are used? Do you think that this measure will increase their usage, and if so by how much?

No.

Yes.

Q.26. Do you agree with the proposal to remove the role of the court where the office-holder intends to place all documents on a website, with only one initial notice to creditors of this fact?

Yes. Providing that the initial direct communication makes it clear that this will be the case and where future information will be accessible.

Q.27. Do you agree that facilitating greater use of websites as described here could reduce unnecessary contact between the office-holder and the creditors? Or do you think that individual notice is always required?

Yes. Providing that communication is clear and information is readily accessible.

Q.28. Do creditors'/liquidation committees continue to play a worthwhile role where they are formed? Could more be done, through the committee structure or otherwise, to increase creditor engagement in insolvency procedures?

Yes. Practitioners' note their value when they are appointed. However, such committees are apparently rarely formed.

Q.29. Do you have any comments on any of the minor proposals on communication and creditor engagement included in Annex 5?

a) Yes.
b) Yes. On the assumption that the office holder is still furnished with the information about individual claimants in order to facilitate communication.
c) Yes. The information is provided elsewhere in the R&P account.
d) Yes – although it should still be sent to Companies House.
e) Yes. Although there is no practical benefit in doing so as the office holder will need to communicate with creditors re: fixing the basis of remuneration in any event.
f) No. The examination would cease to be a "public examination" and therefore, may have less gravitas.

C. Improving insolvency processes

Q.30 Do you agree that creditors should be able to extend administrations for 6 or 12 months, rather than only 6?

Yes.

Q.31 Do you think that creditors should be able to extend administrations beyond 12 months? If so, what should the maximum period of an extension be?

No. This would be inconsistent with the purpose of administration as a gateway process.

Q.32 Do you agree with the extension of wrongful and fraudulent trading provisions to administration?

Mixed views were expressed. Whilst we could perceive some benefit to doing so, it was questioned whether this would result in there being little difference between the administration and CVL processes. Additionally, practitioners were concerned whether the timescales involved in perusing

such an action would be consistent with the intended duration of administration.

As an alternative to such an extension, we would suggest that the existence of a claim could form the basis of a legitimate exit route to CVL from administration. Exit to CVL is currently limited to instances where there is to be a distribution to creditors (whereas the existence of a claim is more speculative). Anecdotally, we understand some practitioners have endeavoured to use CVL where such a claim exists, but they are probably technically incorrect in doing so. Were the CVL exit route to be specifically extended to instances where the administrator had identified a claim that might reasonably produce funds for distribution to the creditors, this would facilitate the pursuit of such claims within an appropriate process which is not limited in its duration.

Q.33 Could you estimate the financial benefit of this proposal? Are there cases you are aware of in the past, where the current law has hampered recovery action?

We are unable to quantify the financial benefit.

Q.34. Do you agree that low value dividends should not be distributed? If you do, is £5 or £10 an appropriate minimum dividend level? If not, what level would you suggest?

This is predominantly an issue for creditor groups, as these are ultimately their funds.

However, it should be born in mind that where an office holder is required to pay dividends, an administrative cost will necessarily be incurred which the office holder has a reasonable expectation of recovering. Any minimum should be related to the cost of processing, which will vary depending upon the nature of the case, the type of insolvency process, the number and composition of the creditors and the structure of the IP's practice.

It has been noted by a number of our corporate practitioners that issuing very small dividends to trade or consumer creditors in, for instance, a large retail failure, will often generate hostility and can be perceived by those creditors as "adding insult to injury". Conversely, in consumer credit IVA cases, very small dividends are routinely processed across large numbers of cases, with apparently little difficulty. There is, perhaps, an anomaly that large institutional creditors are typically better geared up to receive small dividends on an automated basis, than trade or consumer creditors, where a cheque will generally be issued (at a higher administrative cost) and unintended offense may be caused.

Q.35. Do you think that there are any circumstances where a payment of less than the minimum dividend level should be paid?

See comments above.

Q.36. Do you think that the minimum dividend level should reflect the **total** of all dividends that a creditor might receive in a case in respect of its debt (i.e. any interim dividends together with the final dividend)? Or should the minimum level be applied to each dividend payment for each distribution?

Yes.

Q.37. What savings do you think would be achieved in the costs of administering insolvencies were the insolvency office-holder not to make the payments of dividends less than £5 or £10 (or alternative limit if one suggested in your response to Q 34)?

This is difficult to estimate for the reasons stated above at Q.34.

Q.38. Do you think that funds not distributed should be used for insolvency investigation and enforcement purposes, or should they be paid to HM Treasury?

Paid to HM Treasury.

Q.39. Do you agree that a creditor's right to unclaimed dividends should lapse over time? If you do, do you think that 6 years after the payment is initially made is a suitable length of time to allow for a creditor to claim dividends owed to them? If not, what length of time do you suggest?

Yes.

Yes.

Q.40. Do you agree that the insertion of a crystallisation trigger where an administrator wishes to distribute funds to unsecured creditors in a Scottish administration is required?

Yes. It would be helpful.

Q.41. Where do you think that a crystallisation trigger, attaching the charge to the company's assets, should be placed?

Upon the filing of the notice of the Administrator's appointment.

Q.42. How widespread is this problem in Scottish administrations? How much do you estimate is 'wasted' from an administrator having to initiate an 'unnecessary' liquidation in an average case (where this issue applies) as a result of the current statutory framework?

We are aware of two cases where this has happened. We estimate the additional costs at £10,000 per case.

Q.43. Do you agree with the proposal to enable debtors to consent to a winding-up order / bankruptcy order where a petition has been served by a creditor?

Whilst we do not envisage a problem in principle, there would need to be an appropriate process by which a company could signify consent.

Q44. Do you think there will be any circumstances where, despite consent being received by the court from the debtor that they do not object to an insolvency order being made, that a hearing will still be necessary?

Yes, if there was any suggestion that consent had not been validly given (e.g. capacity in the case of an individual / authority in the case of a corporate). Similarly, the debtor ought always to be able to request a hearing, even after giving consent, given the gravity of the consequences of a bankruptcy or winding up order.

Q45. Do you agree that a winding-up petition presented by the company itself need not follow the same procedure as a petition filed by another party?

Yes. Provided that those parties with a right to object to the order being made are provided with an opportunity to do so.

Q46. Can you think of any drawbacks with having a streamlined process in these cases? Are there any parts of the winding-up petition procedure that you would like to see retained in this streamlined process?

There exists a risk of abuse of process; for instance winding up orders being obtained in instances of board or shareholder disputes, or to circumvent existing legal proceedings.

Notice will need to be given to any existing petitioner, receiver or supervisor. Potentially, also majority shareholders and/or litigants in pre-existing legal proceedings.

Q47. Do you agree with there being a role for an Adjudicator in this streamlined process?

We opposed the appointment of Adjudicators to determine such applications when previously consulted upon, and remain opposed to such involvement given the gravity of the order and the potential conflict of interests presented by the Insolvency Service determining these applications and then administering the cases which result from them.

Q48. Do you agree that the official receiver's duty to investigate the cause of failure of a company in liquidation should be discretionary, as it is in bankruptcy?

No. The cause of failure should be investigated in all cases. Failure to do so can only undermine creditor confidence and reduce the deterrent effect of the prospect of such an investigation on levels of conduct in corporate governance.

Q49. Do you agree that the position of receiver and manager in a bankruptcy should be scrapped and instead the official receiver will become trustee upon the making of the order?

Yes.

Q50. Do you agree that FTVAs should be abolished?

Yes.

Q51. Do you have any comments on any of the minor proposals that seek to improve insolvency processes included in Annex 6? Please indicate which of the minor proposals is being referred to in any reply on this question.

a) Yes.
b) Yes. Although we understand that this issue has been determined in case law *(Kaupthing Singer & Friedlander Ltd (in administration)*.
c) No. This is not always possible and would place a significant burden on smaller practices.
d) Yes.
e) Yes.
f) Yes. See above re: wrongful trading.
g) Yes. Provided that Companies House maintained a record that the order had been made.

Part 3 Changes to reporting on the conduct of directors by insolvency office-holders

Q52. Do you agree with the proposal that a return be required in respect of all cases? If not, please explain why.

Yes.

Q53. Do you agree with the proposal that where liquidation follows administration office holders should not be required to submit a further report? If yes, please estimate the average time saved per case based on the current form(s).

Yes. Unless the office holder has further information, in which case there ought to be an option to submit a further report. Unable to quantify cost savings.

Q54. Do you agree with the proposal that the requirement to submit a statutory form is changed to require the IP to complete the return in a format specified by the Secretary of State?

Yes.

Q.55. If you are an IP, what problems do you encounter with the current reporting process?

The current system places the onus upon practitioners to form an opinion as to the director's unfitness. They may be understandably reluctant to do so until there is a sufficient body of evidence available to them, particularly given that D-returns may now be accessed by the subject using a Subject Access Request.

The proposed change is to be welcomed and will facilitate the early and frank reporting by IPs of behaviour which *may* indicate misconduct.

Q.56. If you are an IP how long per case (on average) does it take you to complete and submit the;

current D1;

N/A.

current D2 form?

N/A.

Q.57. If you are an IP what impact do you think a single, pre-populated form would have on the time/cost involved in submitting a return?

N/A.

Q58. Do you support the proposals to require mandatory electronic submission of returns?

Yes.

Q59. How would you expect to submit the new returns?

- using a secure online form, which allowed you to cut and paste or type information

Yes – this would be the most readily accessible format for practitioners. Noting however, that any online submission system should provide a facility for the IP to print a copy of the submission.

- via a secure web service* which could potentially integrate with your own case management system (*you would need to invest in developing an interface)

This may be an appropriate longer term goal.

Q60. Do you think that enabling electronic reporting will lead to savings in terms of the cost of completing and submitting returns? We would welcome comments on the costs and benefits you think will accompany electronic submission.

Yes. However, practitioners comment that the extent of review/investigation work is unlikely to change and so the cost of preparation and review of the content for online submission will be broadly similar.

Q61. If you are an IP, would you want the ability to follow the progress of returns?
If yes would you prefer to do this in online 'account' environment or separately?

Practitioners report that this would be useful, but not essential.

Q62. If you are an IP would you require individual logins for staff submitting returns, or would a single password for your firm suffice?

Large practices have indicated that they would wish to have individual logins for staff. It has been commented that otherwise, there would have to be a change the firm password every time someone left if a single password were used.

Q63. Do you support the proposal to remove the requirement for IPs to express an opinion as to director misconduct? Please explain why.

Yes. For the reasons stated above at Q.55

Q64. Do you think that not being required to evidence an opinion would result in IPs reporting more instances where behaviour which may indicate misconduct? If so, can you provide an estimate of the proportion of cases?

Yes. Whilst this would seem likely, we are unable to estimate a proportion.

Q65. Do you agree with the proposal that IPs be required to submit information to us within 3 months of the date of the insolvency event? If not, when is the appropriate deadline?

No - given that the current 6 month time limit is proving challenging in a significant proportion of cases, we would suggest retaining the 6 month time limit, with an expectation of compliance.

Q66. Do you think that if required to submit earlier returns, IPs would be more likely to report more instances of behaviour which may indicate misconduct? If you are an IP, can you provide an estimate of the proportion of cases?

Possibly not, as it may be too early to have to fully investigated, particularly in larger or more complex cases, or where there are a number of directors involved. The initial stages of an appointment will often be occupied with protecting and realising assets and collecting the information from records, creditors and other sources that may indicate misconduct.

Q67. If you are an IP we would welcome comments on the estimated savings associated with completing a single return and comments as to other costs or benefits which may not been identified.

N/A.

Q68. We have outlined what actions we would take to publicise changes to reporting procedures and to make completion of the forms straight- forward. Is there anything else you would consider useful in terms of IP familiarisation with the new approach?

No. The suggested approach seems appropriate and thorough.

ABOUT THE IPA

The Insolvency Practitioners Association (IPA) is a membership body recognised by the Secretary of State for Business, Innovation & Skills (BIS) for the purposes of authorising Insolvency Practitioners (IPs) under the Insolvency Act 1986. It is the only recognised professional body to be solely involved in insolvency and for over fifty years, the IPA is proud to have been at the forefront of development and reform within the industry.

As of 01 January 2013, the IPA had approximately 2,000 members, of whom 554 are currently licensed insolvency practitioners (IPs). In addition to its recognition under the Insolvency Act for the purpose of licensing IPs, the IPA is also a Competent Authority approved by the Official Receiver for the purpose of authorising intermediaries to assist with debtors' applications for Debt Relief Orders.

The IPA currently license approximately one third of all UK insolvency appointment takers, who are subject to a robust regulatory regime, applied by the IPA's dedicated regulation teams carrying out complaints handling, monitoring and inspection functions. Additionally, the IPA conducts inspection visits of those appointment-takers licensed by the Law Society (Solicitors Regulation Authority), one of the other recognised professional bodies under the Insolvency Act. The IPA also undertakes monitoring visit work for the Debt Resolution Forum, a membership body which sets standards for its members when involved in providing non-statutory debt solutions to insolvent individuals (such as Debt Management Plans).

The IPA has a longstanding and continuing commitment to improving standards in all areas of insolvency (and related) work. It was the first of the recognised bodies to introduce insolvency-specific ethics guidance for IPs, and the IPA continues to be a leading voice on insolvency matters such as the development of professional standards, widening access to insolvency knowledge and understanding, and encouraging those involved in insolvency case administration and insolvency-related work to acquire and maintain appropriate levels of competence and skills.

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