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Dear Peter

Insolvency (Amendment) Bill: The Bar of Northern Ireland Evidence Session

Further to your letter dated 17 October 2025, seeking comments on issues raised by the Bar. Please see response below which has been cleared by Minister Archibald. This submission is not disclosable as it relates to the development of government policy.

The officials responsible for the Bill have considered the summary provided in your letter, of the issues which the Bar raised, and have also reviewed the Bar's comments during the evidence session. The officials have commented as follows:-

1. **The suggestion by the Bar that the arrangements for the assignment of post-insolvency causes of action should be different from those in England and Wales as there is a limited market for the sale of such assets in this jurisdiction.**

These comments are understood to relate to clause 3 of the Bill which inserts provision into the Insolvency (Northern Ireland) Order 1989 ("the 1989 Order") giving liquidators and administrators the right to assign any of six actions which they can take, or which they will be able to take, following amendments to be made by the Bill, against directors of companies which have been wound up by the High Court.

The actions are to require the directors to pay compensation, out of their own pockets, where they have engaged in specified forms of misconduct and this has caused loss to creditors.

Under the legislation as it stands, these actions can only be taken by liquidators. Following amendments to be made to the 1989 Order by clause 2 of the Bill, it will also become possible for them to be taken by administrators.

As the Bar pointed out in its presentation, it is best if such actions are taken by the liquidators or administrators themselves. This is because the liquidator or administrator, as an officer of the court, will be bound to act in the interests of all creditors, which will mean that he or she will be under an obligation to seek the maximum possible amount of compensation from the directors.

Also, if the action is successful, the creditors will stand to benefit from the entire proceeds of the claim, subject only to any deduction needed to help defray the costs and expenses of the liquidation or administration.

A successful outcome to any of the actions, by seeking compensation personally from errant directors, will send a powerful message that engaging in any of the types of conduct which can give rise to these actions has the potential to result in them suffering personal financial loss.
However beneficial it is for such actions to be taken, there is a factor which is likely to inhibit, or indeed prevent, liquidators and administrators taking them. It is that taking any of these actions is likely to result in very substantial legal and court costs.

If the action turns out to be unsuccessful, the liquidator or administrator may end up having to pay the director's costs for defending the proceedings as well as their own legal costs and the court costs. One of two things will then happen. If there are other assets in the case the creditors will lose out because the proceeds from the sale of these will have to be used to pay these costs. If the proceeds are insufficient to meet the costs in full the liquidator or administrator will have to pay them out of his or her own pocket.

This makes taking any of these actions a very risky prospect for liquidators, administrators and creditors and explains why such actions are very infrequently taken. And if they are not taken the creditors are denied any prospect of receiving the compensation which they would receive in the event of a successful action and any deterrent effect on directors will be non-existent.

Liquidators and administrators can ask the creditors to consent to the proceeds from the sale of other assets belonging to the company being used to fund the action or to put up additional funds for that purpose. However, it is very likely that the creditors will not agree to the asset proceeds being used in this way and will not be willing to fund the cost of an action, since they would likely see this as throwing good money after bad. It is inconceivable that legal aid would be available to fund actions of this type.

The upshot therefore is that, under the law as it stands, unless either there are sufficient funds from the sale of other assets, and the creditors are willing to put those funds at risk, or the creditors are willing to fund the cost of proceedings against the directors out of their own pockets, such actions cannot be taken and the value of having legislation in place to permit them to be taken is indeed diminished.

If no action is taken to address this problem, creditors will continue to be denied the possibility of receiving any payment whatsoever to recompense them for the losses they have suffered as a result of directors having engaged in the types of misconduct on which the actions are based. Directors will continue to escape personal liability for the harm which engaging in these types of misconduct causes to creditors and there will be no deterrent effect on directors generally.

By giving liquidators and administrators the power to assign claims to third parties, clause 3 of the Bill provides a potential solution. It is not a perfect solution, but it is better than the alternative, which is to do nothing. The way in which assignment is intended to function is that the liquidator or administrator would sell the right to take the claim against the directors to a specialist company which would then take over and prosecute the claim. The company would make a payment to the liquidator or trustee, to acquire the right to take the action. The payment would add to the total funds available to make a distribution to the creditors, after payment of the costs and expenses of the liquidation or administration.

The attraction of this solution, from the standpoint of the liquidator or administrator, is that they are no longer at risk of being out of pocket and perhaps being very substantially out of pocket, if they had taken the action themselves and lost.

The advantage for the creditors is that they receive a payment, which would not otherwise have been made, which will have been received into the common pot out of which a distribution will be made to them. That payment will be sure and certain, and will be available within a short time period. Whereas, if the action had been taken by the office-holder, it could have lasted for years and even then, the creditors could have ended up receiving nothing, and quite likely would have suffered a substantial loss, had the action turned out to be unsuccessful.

If the claim is sold, and the company which has purchased it loses in court, this will not affect the payment which the company made to the liquidator or administrator to acquire the claim and that money will still therefore still be available for the benefit of the creditors.

There is an alternative to an outright sale of an action by the liquidator or administrator. It is for the claim to be sold to the specialist company for a nominal sum, with the liquidator or administrator having the right to a share in the proceeds in the event of the claim turning out to be successful. This retains the creditors' ability to benefit from the proceeds of the claim, if it is successful, while at the same time ensuring that neither they nor the liquidator or administrator are exposed to any financial risk.

The Bar has made the point that a market for the sale of the claims in question does not exist in the North of Ireland. That may be true, but it is also something which cannot change unless and until legislation is put in place to permit the sale of such claims to take place. It is not beyond the bounds of possibility that GB companies engaged in that type of activity will expand their operations to this jurisdiction once the legislation to make the sale by liquidators and administrators of the five categories of action legal in this jurisdiction has been passed.

2. **The suggestion that insolvency practitioners should have the right to call meetings of creditors if they feel that there is a need to do so.**

There are provisions in the 1989 Order as it stands, which give office holders in insolvency proceedings the right to call the creditors to a meeting. Article 143(2) applies in the case of companies being wound up by the High Court to give the liquidator the right to summon a general meeting of the creditors or contributories for the purpose of ascertaining their wishes. In addition, Article 287(8) as it stands, gives trustees in bankruptcy the right, if they think fit, to at any time summon a general meeting of the bankrupt's creditors.

It would be at odds with the general policy that decisions by creditors should be made in ways which do not involve a physical meeting, if these rights to consult with creditors were to continue to be exercisable at physical meetings.

It would mean that if a liquidator or trustee wanted to ascertain the creditors' wishes about any matter, they would have to ask the creditors to attend and vote at a meeting held at one particular geographical location. This would give rise to the same disadvantages for the creditors as a physical meeting held for any other purpose. They would incur the cost in time and money and would suffer the inconvenience of having to travel to wherever the meeting was being held. If they had to take time off work to travel to and from that location it could result in them losing pay. Going to the meeting might not be feasible at all if the person lacked transport, lived a long way away, or was resident outside this jurisdiction.

Just because engagement with creditors takes place at the instigation of the office holder, rather than at the instigation of the creditors, or in pursuance of a statutory requirement, does not in our view amount to any reason why the method of engagement should be any different.

It is in keeping with the general policy that persons entitled to take part in making decisions should not have to attend a physical meeting that Articles 143(2) and 287(8) are amended by the Bill so that the rights accorded by these two provisions to liquidators acting in compulsory winding up and trustees in bankruptcy will become the right to seek decisions from creditors instead of a right to call the creditors to a meeting.
The same proviso that a specified number or percentage of the creditors will have the right to insist on a physical meeting will apply as in other cases where a decision is being sought.

Article 208ZE inserted into the 1989 Order by clause 7 of the Bill and Article 345A inserted by clause 8, provide that a physical meeting has to be held if ten or more creditors request it in writing. And if the number of creditors making the request is less that ten, a physical meeting still has to be held if those who do make the request number at least 10% of the total number of creditors or hold a minimum of 10% of the total debt owed to creditors.

Finally, the change will only be to rule out the use of physical meetings as the normal method of engagement with creditors. It will still be possible for office holders to convene meetings to take place remotely, with office-holders engaging in discussions with creditors and asking them to take decisions using electronic means such as video calls, video conferences and tele-conferences.

3. **The suggestion that insolvency practitioners should not be given the right to use a procedure to be known as deemed consent to seek creditor approval for decisions.**

With the use of physical meetings having been largely discontinued, it is essential that office-holders in insolvency proceedings are equipped with suitable alternatives which they can use to seek decisions from creditors. Deemed consent is one such alternative. It is a wholly new and innovative procedure, although it has been in use in England and Wales since April 2017.

Article 208ZE, inserted into the 1989 Order by clause 7 of the Bill, creates the option to use deemed consent procedure in the corporate insolvency proceedings and Article 345B, inserted by clause 8, creates the option to do so in the case of individual insolvency proceedings.

The intention is that deemed consent will exist as an alternative to the other decision-making methods brought into being by the Bill, these being qualifying decision procedures in the case of corporate insolvency proceedings and creditors' decision procedures in the case of individual insolvency proceedings.

It is our view that being able to make decisions using a deemed consent procedure will offer significant advantages for both insolvency office-holders and creditors. It is a relatively simple and straightforward procedure and requires no action by creditors unless they disagree with the proposed decision. Its use will benefit creditors by reducing the cost of administering cases.

The office holder writes to the creditor or contributory informing them of the matter to be decided, and the decision which the office-holder is proposing should be made. If less than 10% of the creditors, by value, object by a specified date the decision is treated as having been made. Therefore, the silence of at least 90% of the creditors, by value, is sufficient to ensure that the decision is made. The fact that the decision is made will reflect that 90% of the creditors, by value, are either content with the decision, or are indifferent to it, and that 10% at most are opposed to it.

In contrast, under a qualifying or creditors' decision procedure, a majority, by value, of those voting, is required.
If more than 10% of the creditors by value object, the decision will be treated as not having been made and if the office-holder wants to put it to the creditors or contributories again at any time in the future he or she will have to do so using a qualifying decision or creditors' procedure.

A deemed consent procedure would be especially suitable for use where the decision to be made does not involve consideration of any alternatives, only a straightforward yes or no. An example would be where the creditors are being asked to agree to a decision to extend an administration by the maximum twelve months, which will be permitted under an amendment to be made by clause 88 of the Bill.

The Bar did not explain why it thinks that the fact that an office-holder considers a decision to be controversial would incline them to use a deemed consent procedure rather than a qualifying decision or creditors' decision procedure.

The view seems to be that an office-holder, seeking validation of a decision which he thinks may face challenge, would be better using a qualifying decision or creditors' decision procedure or else apply to the High Court for directions.

We cannot see that a decision made using a qualifying decision or creditors' decision procedure would be any less likely to be challenged than one made using a deemed consent procedure.

It is open to any person aggrieved by an act or decision of a liquidator to apply to the High Court under Article 143(5) of the 1989 Order to have the decision modified or reversed and that would be so even if the decision had been approved by the creditors using either a qualifying decision procedure or a deemed consent procedure.

Similarly, it is open to a bankrupt, any of their creditors or any other person who is dissatisfied by any action, omission or decision of the trustee of a bankrupt's estate to apply to the High Court to have any action or decision modified or reversed.

Again, we cannot see that having had a decision approved by the creditors using either a creditors' decision procedure or a deemed consent procedure would do anything to prevent this happening.

The fact that the Bill will insert provision into the 1989 Order to enable decisions to be taken by creditors, using a decision procedure, will not do anything to interfere with the rights which a liquidator and trustees have, under respectively Articles 143(3) and 276(2) of the 1989 Order, to apply to the High Court for directions.

They will remain free to do so should they consider that this will afford them greater protection against a decision being challenged than approval by creditors using a deemed consent procedure would.

Finally, it would be both invidious and anomalous to deny to insolvency practitioners the use of a method for use, when seeking approval of decisions they have made, when that method is available to their counterparts in other jurisdictions.

4. **The suggestion that there should be an amendment to the Bill to clarify that the provision which result in the Official Receiver becoming trustee, forthwith on the making of a Bankruptcy Order, does not prevent the Court being able to itself appoint an insolvency practitioner as trustee on the making of a Bankruptcy Order in exceptional circumstances.**

Article 246A, to be inserted into the 1989 Order by clause 92 of the Bill, expressly provides that except where an insolvency practitioner's report has been submitted to the High Court under Article 248, or a supervisor of a voluntary arrangement is in place, the Official Receiver automatically becomes trustee on the making of a bankruptcy order.

Article 116(2), already present in the 1989 Order, expressly states that the Official Receiver by virtue of his office automatically becomes liquidator on the making of a winding up order by the High Court.

Neither provision is more emphatic about the Official Receivers appointment being automatic than the other. Therefore, if the Court is able to use its general powers of administration and superintendence to itself appoint an insolvency practitioner to act in one case, there should be nothing to prevent it doing so in the other.

To legislate to expressly give the Court the power to appoint an insolvency practitioner as trustee, would run counter to the policy under Article 246A, that it is the Official Receiver who is to become trustee on the making of a bankruptcy order and that the Official Receiver can then apply to the Department, under Article 269, to have an insolvency practitioner appointed in his stead.

To do so would run the risk of creating twin track systems for the appointment of trustees. The system which it is intended should operate, will be that the Department will continue to maintain a rota of insolvency practitioners from which appointments as liquidators and trustees are made on an orderly basis. As cases come up, in which a liquidator or trustee needs to be appointed, the next person on the list is appointed.

As well as having the potential to interfere with the orderly appointment of insolvency practitioners from the Department's rota, giving the court power to itself appoint trustees would also create the danger that the Court could decide, in the future, to itself make all such appointments.

The Bar has alluded to the power being limited so that it could only be used in exceptional circumstances. This gives rise to the problem of how exceptional circumstances would be defined. What one person might consider to be exceptional circumstances might not be considered exceptional circumstances by another.

In conclusion, I hope that the information provided above sets out the Department's views and opinions on the issues raised by the Bar's evidence presented to the Committee. We will, of course, be happy to provide any further information or clarification if required.

Yours sincerely

[redacted]

Departmental Assembly Liaison Officer

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Our Ref: **EC2025: 515**

17 October 2025

Dear DALO,

Insolvency (Amendment) Bill
The Bar of Northern Ireland Evidence Session

At its meeting of 15 October 2025, the Committee received oral and written evidence from the Bar of Northern Ireland in respect of the Insolvency (Amendment) Bill.

The Committee agreed to write to the Department seeking its commentary and related assurances on the following:

- the suggestion that in NI different arrangements for the assignment of post insolvency causes of actions are required compared to England and Wales. It was argued that as there is a limited market for the sale of such assets and the current NI process requires the office holder to act in the interest of the court, creditors or the insolvent person where there is a surplus, then a change in NI to the England and Wales practice for the assignment of causes of action will mean that such assignments may not be in the interests of creditors etc.;
- the suggestion that insolvency practitioners should have the discretion to call a creditor meeting even where the default position is that there would be no meetings of creditors unless creditors request it;
- and further to the above, the suggestion that in respect of deemed consent to hold a creditor meeting, this should be replaced with the insolvency practitioner having qualified discretion to call meetings – this being of particular importance where controversial decisions may be required; and
- the suggestion that the provisions relating to the immediate appointment of the Official Receiver should be amended to indicate that this will not override the court's power to appoint another insolvency practitioner in exceptional cases.

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A written response at your earliest convenience would be greatly appreciated. The Committee would also greatly appreciate any related background policy information that the Department can provide.

If you require further information or clarification in respect of the above, please do not hesitate to contact me.

Yours sincerely,

Peter McCallion

Peter McCallion
Clerk to the Committee for the Economy

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