Individual Insolvency – the Case for a Single Gateway

Prof Peter Walton*

Abstract

The history of bankruptcy law and procedure suggests that only where an independent and reliable public official has oversight of the process, can the public have confidence in it. It has long been recognised that bankruptcy, and formal means of avoiding bankruptcy, provide more stakeholder confidence where a public official is involved. As well as the interests of debtors and their creditors, there is an inherent public interest in ensuring individual insolvency mechanisms work fairly. The current bankruptcy and debt relief order procedures have the benefit of official oversight. There is no suggestion of any obvious systemic weaknesses. However, individual insolvency procedure is open to criticism in the area of individual voluntary arrangements (IVAs) where there is rarely any official involvement. This article suggests that the problems identified in the modern day IVA market might be resolved by considering the lessons learnt from nineteenth century bankruptcy law reform. A new single gateway for all individual insolvency cases, echoing the two-stage process introduced by the Bankruptcy Act 1883, is suggested where all individual insolvency processes would begin with an initial consideration of the case by a public official. This would ensure an objective assessment is made as to the best way forward for debtors and their creditors. It would encourage transparency and honest dealing.

Keywords

Bankruptcy, Bankruptcy History, Individual Insolvency Arrangements, Single Gateway

I. INTRODUCTION

The purpose of this article is to examine the current legislative framework governing individual insolvency in light of historical developments. It will concentrate on whether or not there is a case for adopting a single gateway for individual insolvency capable of improving upon the current system by balancing more equally the public interest, the interests of creditors and the interests of the debtor.

The discussion will begin with an historical outline of the battle, evident in bankruptcy legislation, between *officialism* and *voluntaryism* in the nineteenth century. The lessons learnt during this period culminated in the Bankruptcy Act 1883 whose provisions remained largely in place until the 1980s. The overhaul of individual insolvency following the recommendations of

* Professor of Insolvency Law, University of Wolverhampton. I am grateful to the comments and suggestions of the anonymous referees. Any remaining errors or poor exposition are entirely my own responsibility. ORCID ID: 0000-0001-5970-3585.

the Cork Committee[1] recommendations will be discussed as will certain subsequent amendments and additions. In light of these discussions, a case for a single gateway will be considered.

It is not proposed to examine in detail the current workings of all aspects of the individual insolvency legislative framework (under the Insolvency Act 1986 and associated legislation) in any detail. A number of aspects of the current system appear to work efficiently, or at least are not subject to consistent criticism. It has for centuries been possible for creditors to petition for the bankruptcy of their debtors and this possibility remains a frequently used option.[2] The court remains the appropriate organ for overseeing creditor petitions. The introduction of a system of voluntary bankruptcy[3] where a debtor applies outside court to an adjudicator for a bankruptcy order, does not appear to have not caused any major problems.[4] The deliberations and decisions of an adjudicator, a public official, do not appear to have been subject to any significant criticism. The bankruptcy system appears to work transparently with rights of appeal to court where stakeholders wish to challenge the decision of either the court (creditors' petitions) or the adjudicator (debtors' applications). Once a bankruptcy order is made, the Official Receiver (a public official) is appointed as the initial trustee in bankruptcy[5] (and may or may not later be replaced by a private sector insolvency practitioner[6]). The Official Receiver will usually carry out an investigation into the reasons for the bankruptcy.[7]

The system of Debt Relief Orders ("DROs")[8] has been a popular option for debtors of limited means with relatively low debt levels.[9] DROs are made by the Official Receiver acting in both an administrative and judicial capacity.

In cases where a debtor is found to have acted in a culpable manner, the legislation allows for the restrictions on the bankrupt (where there has been a bankruptcy order made) or debtor (where there is a DRO) to be extended for up to 15 years.[10] The public interest is seen to be protected in such cases.

There is no clamour for the bankruptcy or DRO regimes to be overturned or drastically changed. They appear to work in a transparent way where the various actors are seen to be accountable for their conduct.[11]

The most recent addition to individual insolvency legislation has been the Breathing Space Regulations.[12] Although perhaps too early to tell, it seems that the opportunity to take advantage of a short breathing space from creditor action is proving popular[13] and there is as yet no evidence of any systemic or other problems with the procedure.

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[1] *Review Committee on Insolvency Law and Practice* (1982 Cmnd 8558) ("Cork Report").
[2] Insolvency Act 1986, s 264.
[3] Insolvency Act 1986, Chapter A1 of Part IX introduced by the Enterprise and Regulatory Reform Act 2013, s 71 and brought into force from 6 April 2016 (SI 2016/191).
[4] This is likely not to have been the case if creditors' petitions had also been removed from the court's bailiwick and made subject to an adjudicator's jurisdiction. See the eloquent arguments put forward against the introduction of the system of adjudication for creditors' petitions in S Baister and F Toube "All change is not growth, as all movement is not forward!" (2012) 25 *Insolvency Intelligence* 49.
[5] Insolvency Act 1986, s 291A.
[6] Insolvency Act 1986, s 298.
[7] Insolvency Act 1986, s 289.
[8] Insolvency Act 1986, Part 7A introduced by Part 5 of the Tribunals, Courts and Enforcement Act 2007 and brought into force in 2009 (SI 2009/382).
[9] It is often reported by debt charities that even the modest cost of applying for a DRO is sometimes beyond the means of the poorest debtors. As an example, statistics available on the Insolvency Service website show there were 5,735 DROs made in the third quarter of 2021.
[10] Insolvency Act 1986, Schs 4A and 4ZB respectively.
[11] There is a concern that the Official Receiver is not subject to the same regulatory rigour of insolvency practitioners and is not open to actions for breach of duty in the same way as those in the private sector (see e.g. *Mond v Hyde* [1999] QB 1097).
[12] Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 (SI 2020/1311).
[13] According to statistics available on the Insolvency Service website, between 4 May (when the scheme was launched) and 30 September 2021 there were 27,246 breathing space registrations (26,896 standard breathing space registrations 350 mental health crisis breathing space registrations).

The other main component of the current individual insolvency firmament is the Individual Voluntary Arrangement ("IVA"). There are concerns with IVAs about transparency, accountability and whether they are always used in appropriate cases.[14] The objective judgement of some insolvency practitioners who act as voluntary arrangement nominees is not always trusted by other stakeholders.[15] Although in theory subject to the supervision of the court, IVAs generally operate outside the control of a public official (whether that official is a judge or a government employee). In recent times, approximately 70% of all individual insolvency procedures have been IVAs.[16] A large proportion of these IVAs were supervised by a small number of volume providers,[17] a point which will be further considered below. If there are systemic concerns with IVAs, as they make up such a significant part of the individual insolvency regime, those concerns need to be addressed.

It is recognised that the problems with IVAs may be due to a combination of factors including the regulation of insolvency practitioners and how debt advice is provided to debtors in need. These other factors will not be considered here. The focus of this paper is to consider whether the history of *official* involvement in individual insolvency proceedings provides a lesson in how to approach the perceived problems with IVAs and inform a new approach in general to personal insolvency proceedings.

The article will consider whether a central gateway for all individual insolvency procedures (including IVAs) is needed where there is some *official* involvement or supervision to ensure transparency, accountability and appropriateness as far as the decision to enter into any formal individual insolvency proceeding is considered.

II. EARLY BANKRUPTCY LEGISLATION – *OFFICIAL* INVOLVEMENT

In the earliest forms of bankruptcy, commissioners were appointed by the Lord Chancellor to adjudicate on bankruptcies and an assignee in bankruptcy (the equivalent of the modern day trustee in bankruptcy) would be appointed from amongst the bankrupt's creditors.[18] The bankrupt's estate would be vested in the assignees who could enforce all the rights of the bankrupt.[19] Due to various fraudulent practices,[20] it became recognised that a representative of the creditors' group could not always be trusted to act honestly or competently.[21]

The law was altered in 1831[22] to ensure that, in addition to an assignee being appointed by the creditors, an *official* assignee was also appointed. The bankrupt's estate vested in both the creditors' assignee and the *official* assignee. Although this suggests an equal partnership in the administration of the bankruptcy estate, in fact it was the *official* assignee who wielded the power and who effectively controlled the bankruptcy. *Official* assignees were selected by the

[14] See e.g. the FCA report: *A review of change and innovation in the unsecured credit market* (2 February 2021) at para 2.31.
[15] A similar concern has been recognised in the corporate equivalent of IVAs, the Company Voluntary Arrangement (see P Walton, C Umfreville and L Jacobs *Company Voluntary Arrangements: Evaluating Success and Failure* (May 2018) Report for R3 with support of IPA and ICAEW).
[16] The latest figures available on the Insolvency Service website for the third quarter of 2021 show over 70% of formal personal insolvencies were IVAs (19,085 IVAs, 5,735 DROs and 1,938 bankruptcies).
[17] See the Insolvency Practitioner Association's *Volume Provider Regulation (VPR) Scheme 2020 Benchmark Report* (March 2021).
[18] See e.g. the Statute of Elizabeth 13 Eliz c 7 dating from 1570. The commissioners appointed had partly administrative and partly judicial functions. As they were appointed by the Lord Chancellor, he retained a general right of supervision over bankruptcy matters. Discharge was introduced in 1705 partly due to the pressure brought by undischarged bankrupt Daniel Defoe (see M Quilter "Daniel Defoe: bankrupt and bankruptcy reformer" (2004) 25 *Journal of Legal History* 53).
[19] See e.g. the explanation in *Blackstone's Commentaries on the Laws of England in Four Books* (1848) Book 2 at pp 399 and 405.
[20] Assets were often disposed of at a gross undervalue and, according to the *Review Committee on Insolvency Law and Practice* (1982 Cmnd 8558) ("the Cork Report") at para 46: "the system was considered to be in a state of chaos and gave rise to general dissatisfaction."
[21] See e.g. the discussion and explanation of the Cork Report at para 46.
[22] An Act to establish a Court in Bankruptcy 1831 (1 & 2 Will IV c 56). Oversight of bankruptcy was taken away from Chancery and transferred to a newly formed Court of Review which acted as a court of appeal from the commissioners. This Court was abolished in 1847 (10 & 11 Vict c 102) with appellate jurisdiction being transferred back to Chancery to a Vice-Chancellor.

Lord Chancellor, not the creditors, and were responsible for the day-to-day management of bankrupt estates.[23] This introduction of *officialism* became problematic. Although a popular development when introduced, it fell into disrepute by the 1850s.[24] Initially paid based upon a percentage of assets realised, the remuneration of official assignees was seen to vary significantly with some being paid very large sums.[25] It would appear that a move to pay *official* assignees fixed salaries led to "a considerable amount of negligence and indifference in the collection and distribution"[26] of bankrupt estates. The courts were not capable of effectively supervising complex bankruptcies. Appointments were "notoriously obtained by jobbery. The result of that naturally was great carelessness and negligence… there was gross peculation."[27]

In 1869 there was a return to *voluntaryism* where the creditors had control over who could act as assignee. The Bankruptcy Act 1869[28] abolished the role of *official* assignee and returned to a trustee in bankruptcy appointed by the creditors.

The same old problems, and some new ones, were encountered.[29] Great delay and expense were experienced in the administration of bankrupt estates with "the nearly total irresponsibility of the trustees."[30]

III. OFFICIAL RECEIVER – *OFFICIALISM* WINS THE DAY

In 1883, a compromise solution was introduced whereby the office of Official Receiver was created to act in all bankruptcies. Joseph Chamberlain, then President of the Board of Trade, at the second reading in the House of Commons of what became the Bankruptcy Act 1883, explained in detail the new system.[31] Upon a creditor (or the debtor) proving the case for insolvency the court would make a receiving order. The Official Receiver would act as receiver of the debtor's estate upon the making of a receiving order. This preliminary stage might or might not ripen into bankruptcy. The debtor's creditors might agree to a scheme of arrangement or composition of debts but if this was not possible the next stage would be for the court to adjudicate the debtor bankrupt. A proposal for a scheme or composition needed to be initiated by the creditors who needed to pass two special resolutions (requiring a majority in number and three-quarters in value), one to entertain the proposal and a second to approve the proposal.[32] The second resolution could only be passed once the Official Receiver had completed the public examination of the debtor. Once approved by the creditors, the scheme or composition also needed to be sanctioned by the court.[33]

Unlike the former system of *official* assignees, the Official Receiver was intended, in its origin in 1883, to be a public official under the direction of the (then) Board of Trade. After the bankruptcy adjudication, the creditors would be called upon to appoint a trustee. Any impartial

[23] See V Markham Lester *Victorian Bankruptcy* (1995, OUP) at pp 45-6 and 82.
[24] See the explanation by Joseph Chamberlain in the House of Commons in Hansard HC (1883) Third Series Vol 277 Col 825-826.
[25] See e.g. the *Royal Commission on the Fees, Funds and Establishments of the Court of Bankruptcy and the Operation of the Bankrupt Law Consolidation Act 1849* (1854) at p xxviii.
[26] *Report of the Select Committee on the Bankruptcy Act* 22 July 1864 at para 3.
[27] Joseph Chamberlain in the House of Commons in Hansard HC (1883) Third Series Vol 277 Col 826.
[28] 32 & 33 Vict c71.
[29] *A Report to the Lord Chancellor of a Committee appointed to consider the Working of the Bankruptcy Act 1869* (20 March 1877) explained how it had become common practice for proxy votes to be bought and sold to ensure appointment as trustee in bankruptcy and to ensure payment of costs and expenses and that (at p 2) "nearly all the evils which have led to so much dissatisfaction with the working of the 1869 Act can be traced to the direct or indirect effect of the proxy system."
[30] ET Baldwin *A concise treatise upon the law of Bankruptcy* (1879, Stevens and Haynes, London) at 5.
[31] Joseph Chamberlain in the House of Commons in Hansard HC (1883) Third Series Vol 277 Cols 775-923.
[32] A second creditors' meeting was not required for small bankruptcies (Bankruptcy Rules 1886, r 273).
[33] Bankruptcy Act 1883, s 18.

person who acted in good faith and was a suitable person could be appointed. The creditors might also, if they chose, appoint the Official Receiver to act as trustee in bankruptcy.[34]

Chamberlain made three main points in support of the introduction of the Official Receiver's role:

1 there should be in every case a public inquiry into the circumstances leading to the insolvency;
2 there must be a public official to conduct this inquiry; and
3 in order to ensure the official behaves responsibly they must be under the direction of a Department of State which is responsible to public opinion and Parliament.[35]

Chamberlain emphasised the collection and distribution of the assets of the bankrupt estate were primarily the duty of the creditors. Official interference was limited to the supervision which was necessary for the protection of a minority of creditors and to ensure honest dealing by all those involved.[36]

The introduction of the Official Receiver recognised that the administration of bankruptcy involves a public interest element and is not merely a matter for the debtor and their creditors.

IV. EFFECTIVENESS OF COMPOSITIONS OR SCHEMES UNDER THE BANKRUPTCY ACTS

The Bankruptcy Act 1890[37] made it easier for a scheme or composition to be proposed by a debtor (as the initiative no longer lay with the creditors to propose an arrangement) and under the Bankruptcy Rules 1890 the creditors needed to pass only one special resolution to approve a scheme or composition. The court's confirmation was still needed. No application for the court's sanction could be made until the Official Receiver had concluded the public examination of the debtor.[38]

These provisions were effectively replicated in the Bankruptcy Act 1914[39] but did not receive supportive commentary from the Cork Committee[40] who observed that very few schemes or compositions were approved due to the onerous conditions which they needed to satisfy.

V. DEEDS OF ARRANGEMENT

Debtors have always attempted to make individual arrangements with their creditors outside the structure of bankruptcy legislation. There is a long history of various frauds committed by debtors against their creditors by trusting their assets to unscrupulous individuals, as well as inducing creditors to support proposals with little or inadequate information. Although the Deeds of Arrangement Acts 1887 and 1914 brought publicity and some improvements on creditor protection to such arrangements, they remained a cause for suspicion. The Blagden

[34] Joseph Chamberlain at HC (1883) Third Series Vol 277 Cols 830-831:"No doubt, in a great majority of cases, the creditors would prefer to choose a trustee whom they knew … But in small estates it might often be desirable to appoint the Official Receiver."
[35] HC (1883) Third Series Vol 277 Col 827.
[36] HC (1883) Third Series Vol 277 Col 827.
[37] Bankruptcy Act 1890, s3 repealed s 18 of the Bankruptcy Act 1883.
[38] Bankruptcy Act 1890, s 3(6). The Report of the Committee on Bankruptcy Law and Deeds of Arrangement Law Amendment (1957 Cmnd. 221) ("the Blagden Committee") recommended at para 26 that the court should have a discretion to dispense with the public examination of the debtor.
[39] Bankruptcy Act 1914, s 16.
[40] Cork Report at paras 128-129 and at para 367 the introduction of the IVA was recommended.

Committee[41] found that as the Deed was registered with the Board of Trade, that fact in itself provided some illusory comfort and protection for the creditors so that they themselves did not act to look after their own interests. The Cork Committee discussed a number of the weaknesses of Deeds of Arrangement noting that only 44 were entered into in 1979.[42] In recommending the introduction of the IVA, the Cork Committee also recommended the repeal of the Deeds of Arrangement Act 1914.[43]

VI. THE IVA

The procedure under the Insolvency Act 1986 for an IVA requires the assistance of a private sector insolvency practitioner who will act as nominee and usually also supervisor once the IVA is approved. The nominee will often be heavily involved in drafting the IVA proposal and if necessary, in liaising and consulting with significant creditors.[44]

An IVA may begin in one of two ways. An interim order may or may not be sought. If an interim order is sought,[45] this must be acquired before the nominee reports to the court as to whether or not the debtor's creditors should consider the proposal. If the nominee's report is positive they will proceed to seek a decision of the creditors as to whether they approve the proposal.[46] If no interim order is sought, the procedure begins with the nominee's consideration of the proposal. The nominee will report on the proposal to the court, and if the report is positive will proceed to seek the decision of the creditors on the debtor's proposal.[47] If no interim order is sought, the court will not usually be active in any consideration of the IVA proposal (unless a creditor other stakeholder brings an action attacking the IVA after it has been approved by the creditors).

Although when introduced in 1986, all IVAs had to begin by an application to court for an interim order, that requirement was abolished by the Insolvency Act 2000.[48] One consequence of the interim order procedure is that the proposal is considered by an *official* – the court. There are examples of the court refusing an interim order where the terms of the proposed IVA were not seen as sensible[49] or fair to creditors.[50] Today, the vast majority of IVAs do not involve an application for an interim order and so there is no *official* consideration of the IVA proposal. The approval or rejection of the IVA is left entirely to the creditors.

The decision whether or not to approve the proposal is made by a creditors' decision procedure, that is, subject to a number of safeguards, a resolution of at least 75% in value of the unsecured creditors. Once approved by the requisite majority of creditors, it becomes binding upon all the unsecured creditors including those who did not vote or voted against the proposal. It is usual for the insolvency practitioner who acted as nominee to continue as supervisor of the IVA.

The original intention of IVAs was that they would appeal to three types of debtor: company directors, members of professions and traders who had chosen not to trade with the benefit of limited liability.[51] In recent times, IVAs have become increasingly common for consumer debtors.

Until 2016[52] s 273 of the Insolvency Act 1986 permitted an adjudicator to require a debtor who had applied for their own bankruptcy to consult an insolvency practitioner in order

[41] Blagden Committee Report at para 234.
[42] Cork Report at para 358.
[43] Cork Report at para 366. The Deeds of Arrangement Act 1914 was eventually repealed by the Deregulation Act 2015, Sch 6, para 1.
[44] See *Paymex Ltd v HMRC* [2012] BPIR 178 for a discussion of the role of the nominee.
[45] Insolvency Act 1986, s 253.
[46] Insolvency Act 986, ss 256 and 257.
[47] Insolvency Act 1986, ss 256A and 257.
[48] Insolvency Act 2000, s 3 and Sch 3.
[49] *Davidson v Stanley* [2004] EWHC 2595 (Ch); [2005] BPIR 279
[50] *Re Julie O'Sullivan* [2001] BPIR 534
[51] Cork Report at para 365.
[52] Enterprise and Regulatory Reform Act 2013, Sch 19, para 9 (effective 6 April 2016).

to consider an IVA instead of bankruptcy if their debts were no more than £40,000 with assets of the value of at least £4,000. This power provided for an official to intervene where the best interests of the creditors and the debtor might be better served outside of a bankruptcy.

The Cork Committee emphasised the "heavy responsibilities"[53] placed upon the insolvency practitioner who acts as nominee and (usually) supervisor of an IVA. It is worth remembering that in practice most IVAs are also drafted by the same insolvency practitioner who then is required to report objectively on its viability. There is no indication in the Cork Report that the Committee members envisaged that the nominee would act as creator as well as independent assessor of an IVA proposal[54] even though this is commonly the case in practice. Neither is there any indication that the Cork Committee envisaged a single insolvency practitioner acting in relation to thousands of IVAs at any one time as appears to be the case with volume IVA providers (as discussed in the next section). It is arguable that in each case where the nominee carries out all of these roles there is at least a risk of a conflict of interest. It appears that the system as it currently operates does not guarantee that a debtor or their creditors necessarily benefit from the much-needed "professional competence, independence and integrity" of the nominee identified by Cork.[55]

VII. VOLUME IVA PROVIDERS IN THE 21ST CENTURY

During the surge in numbers of IVAs this century, a certain amount of disquiet arose within the ranks of the principal creditors, the banks and other credit card providers. This was largely driven by concerns about the practices of volume providers in dealing with consumer debtors. There were allegations that some IVA providers were mis-selling IVAs and marketing them as a 'one size fits all' type of debt arrangement. Quite commonly, it was alleged, debtors were wrongly advised to enter into IVAs, usually to last five years, under which the debtors were promised a reduction of up to 90% of their outstanding debt. There were claims of inaccurate advertising of IVAs and misleading information on the fees of nominees/supervisors.[56] Cases of misleading advertising have not gone away. As recently as 2021, the Advertising Standards Association found online advertising by two IVA providers (or lead generators) to be, amongst other things, misleading.[57]

In order to address these issues the British Bankers' Association, providers of IVAs and the Insolvency Service did produce in 2007 a protocol, including standard terms and conditions, to be used for "straightforward consumer-based IVAs".[58] This protocol is designed to ensure consistency of approach by the nominee/supervisor and the main institutional lenders. It is also intended to ensure that IVAs are only used in appropriate circumstances. The protocol is a voluntary code and is in addition to the requirements of the Act.[59]

The disquiet surrounding volume providers of IVAs has not gone away.[60] Apart from continuing cases of misleading advertising, there are general concerns about volume providers. In 2014, the Insolvency Service issued Guidelines for the monitoring of volume IVAs which has

[53] Cork Report at para 364.
[54] Cork Report at paras 366 – 383
[55] Cork Report at para 364.
[56] See e.g. the press release by the Office of Fair Trading dated 17 January 2007 headed 'OFT warns IVA providers over misleading adverts'.
[57] See https://www.asa.org.uk/rulings/fidelitas-group-ltd-a20-1072188-fidelitas-group-ltd.html and https://www.asa.org.uk/rulings/fidelitas-group-ltd-a20-1072188-fidelitas-group-ltd.html.
[58] The protocol was the result of the 'IVA Forum' and has been updated on a number of occasions by the IVA Standing Committee. The latest version (at the time of writing) which is available on the Insolvency Service website, was revised in 2021. An alternative set of precedent standard terms for IVAs is available from the Association of Business Recovery Professionals (R3).
[59] At the same time that the protocol was being developed, the Insolvency Service was also working towards a new type of IVA designed specifically for consumer debtors. This Simple Individual Voluntary Arrangement was, as its name suggests, a simplified version of the IVA. Due mainly to the effectiveness of the protocol, the Insolvency Service announced in 2008 that it had withdrawn its plans. For an explanation of what the simplified IVA would have entailed and an analysis of the decision to withdraw it see P Walton 'New ways to avoid bankruptcy: a jigsaw puzzle with a piece missing?' (2009) 5 *Corporate Rescue and Insolvency* 190.
[60] Proposed amendments to Statement of Insolvency Practice 3.1 whose consultation ended in early November 2021 would introduce tighter regulation of reliance on lead generators and debt packagers.

subsequently been updated (most recently in 2019). The Guidelines define a volume provider as a firm that controls greater than 2% of the total. The volume providers appear all to be regulated by the recognised professional body the Insolvency Practitioners Association ("IPA") which introduced its own Volume Provider Regulation ("VPR") Scheme in 2019 which is a system of continuous monitoring.

The IPA's *Volume Provider Regulation Scheme 2020 Benchmark Report* from March 2021 provides an interesting assessment of this market and the actions of the IPA in regulating it. The entry level for supervising 2% of the IVA market is currently around 5,000 IVAs. According to the 2020 Benchmark Report, the VPR Scheme covers 68% of all IVAs, the figures provided being 202,823 out of a total 297,311 active cases. There are only seven[61] volume provider firms[62] in the Scheme who appear to employ 18 insolvency practitioners to supervise over 200,000 IVAs with the assistance of 840 staff. The 2020 Benchmark Report suggests that a majority of debtors are making payments of £100 or less a month and a sample of IVAs considered by the IPA suggests that approximately 25% of debtors in that sample were in receipt of some form of benefit.

In 2021, the Financial Conduct Authority's Woolard Review[63] looked at, amongst other things, the IVA market and expressed a number of concerns:[64]

> "… the often high and front-loaded fees for these solutions were driving poor outcomes and practices for both consumers and creditors. The message from these respondents, including both consumer advocates and creditors, was clear: the IVA market is broken."[65]

The IPA's 2020 Benchmark Report states that the main problems around fees identified by the Woolard Review are historical and have been resolved by a new fixed fee model.[66]

The IPA still expresses concerns about how the volume market operates and states:

> "The IPA's view is that the IVA market has outgrown legislation, which was designed for a different era, and did not anticipate the commercial developments which now dominate the market."[67]

There is clearly a number of ongoing issues in relation to IVAs which have not thus far been satisfactorily resolved. It might be a question of regulation and the current Insolvency Service consultation on the future of the regulation of the insolvency profession may address specifically these issues.[68] Is it a failure of regulation or is it time to reconsider fundamentally how IVAs should operate and how they should fit within the overall individual insolvency framework?

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[61] In 2020, one volume provider ceased to take new appointments with its IVAs transferred to another provider who then joined the scheme and subsequently rebranded. Another member ceased to trade with its IVAs transferred to a connected party who entered into a service agreement with a Mauritius company connected to another member.

[62] For an example of where a volume provider itself became insolvent and the consequent problems caused to debtors whose assets the provider failed to hold separately as trust monies under the terms of their respective IVAs see *Varden Nuttall Ltd v Nuttall* [2018] EWHC 3868 (Ch), [2019] BPIR 738.

[63] *A review of change and innovation in the unsecured credit market* (2 February 2021).

[64] For example at para 2.31: "High levels of commission - sometime over £1,000 per referral - have driven potentially harmful business models in the regulated debt advice sector"

[65] Woolard Review at para 2.31.

[66] The problem of high referral fees is likely to be addressed by a new Statement of Insolvency Practice 3.1 whose consultation period ended in November 2021.

[67] IPA's Volume Provider Regulation (VPR) Scheme 2020 Benchmark Report (March 2021) at para 1.12.

[68] *The future of insolvency regulation* (21 December 2021).

VIII. A SINGLE GATEWAY

The problems outlined above are not new problems nor are they peculiar to the twenty-first century. Similar concerns were expressed throughout the nineteenth century. The Bankruptcy Act 1883 introduced a system which permitted effective debt compromises to be agreed by debtors but also ensured official, objective initial assessment of such compromises.[69] The 1883 Act provided for a single gateway into individual debt relief via the receiving order procedure. It provided for an official to take action in order to ensure independence, fairness, transparency and to act in the best interests of creditors.

The system for individual debt relief needs to be simple and accessible. A new single gateway for all individual insolvency cases may be the answer. It is proposed that the Individual Debtor Gateway ("the InDeG") would provide a two-stage process. Whenever there is a voluntary proposal for either bankruptcy, a DRO or an IVA, that proposal will first need to be considered by a public official in the InDeG. Even where a creditor's petition is successful in court, the debtor enters the InDeG. On entering the InDeG the debtor would have the benefit of a moratorium – similar to an interim order or breathing space. The public official at the InDeG will initially consider the most appropriate next step. The official will consider whether any proposed IVA is appropriate – whether a *prima facie* case has been made out. If the proposal passes this test it proceeds to a creditors' decision and the IVA would proceed as usual under the supervision of an insolvency practitioner. The official may decide that a different route is to be followed, for example, that a DRO is a better option for the debtor than a proposed IVA.

If the InDeG does not support the application, it may ask for more information, suggest amendments or refer the matter to an independent party (such as a debt adviser or an insolvency practitioner to consider an IVA[70]) with appeal to the court. Debt arrangements outside of this regime would of course still be possible but any proposed debt composition would be required to go through the InDeG.[71]

The Official Receiver will retain their current roles as office holder and investigator but the InDeG would take on its judicial role in respect of making DROs. Wisdom from 1883 and from a more recent time may be considered in how best to bring a helpful and sensible use of *officialism* into today's processes. It is clear from the experiences of DROs and voluntary bankruptcy that not all decisions need to be made or sanctioned by a court. A public official, with suitable experience and training is capable of carrying out the assessment and sifting tasks suggested as one of the roles here of the InDeG.

IX. CONCLUSION

History teaches a number of lessons. A strong individual insolvency regime requires in every appropriate case, some form of inquiry into or consideration of the circumstances leading to insolvency. Creditors have the right to control the collection and distribution of the insolvent estate but a public official is needed to ensure honest dealing generally. The system must be robust but also cost effective and efficient. A (simplified and updated) version of the procedure introduced by the Bankruptcy Act 1883 might work well today which would, amongst other things, deal with the problems created by the current volume IVA providers.

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[69] See e.g. form 82 in the Appendix to the Bankruptcy Rules 1886.

[70] A power previously available to a bankruptcy adjudicator under the repealed s 273 of the Insolvency Act 1986.

[71] One of the concerns raised about the aborted Debt Management Scheme under Tribunals, Courts and Enforcement Act 2007 was that Debt Management Plans under the Scheme would have been capable of allowing some composition of debts. For a consideration of the 2007 Act provisions generally see P Walton 'New ways to avoid bankruptcy: a jigsaw puzzle with a piece missing?' (2009) 5 *Corporate Rescue and Insolvency* 190.

Although it may seem to be an overreaction to problems identified in one part only of the individual insolvency framework, the IVA is by far the most popular of the individual insolvency procedures and the volume providers deal with the lion's share of IVAs. Although there may be answers available specific to the IVA-centric problems considered, it seems a good time to consider looking at individual insolvency in the round. It is arguable that ensuring some independent, official oversight of all individual insolvency procedures would inspire confidence and help to ensure fairness, accountability and transparency. The InDeG would act as an independent assessor for the protection of the debtor, minority creditors and ensure honest dealing by all those involved.