

**EXPLANATORY MEMORANDUM TO
THE DRAFT ENTERPRISE ACT 2002 (DISQUALIFICATION
FROM OFFICE: GENERAL) ORDER**

2006 No. 1722

1. This explanatory memorandum has been prepared by the Department of Trade and Industry and has been laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Description**

The purpose of this Instrument is—

2.1. in certain cases, to also disqualify from holding office, persons in respect of whom a bankruptcy restrictions order or undertaking has been obtained under the provisions of the Insolvency Act 1986; and

2.2 to remove in certain cases existing disqualifications from the holding of particular offices as a result of a person becoming bankrupt or entering into an arrangement with his creditors.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

None

4. **Legislative Background**

4.1 The Enterprise Act 2002 amended various bankruptcy provisions in the Insolvency Act 1986. Under the Insolvency Act 1986, bankrupts were generally discharged from bankruptcy three years after the making of a bankruptcy order, regardless of culpability. Section 256 of the Enterprise Act 2002 (which came into force on 1st April 2004) amended the Insolvency Act 1986 by providing for automatic discharge after one year in *most* cases.

4.2 However, the Enterprise Act 2002 also introduced bankruptcy restrictions orders (“BROs”) to deal with bankrupts whose conduct had been irresponsible, reckless or otherwise culpable. BROs are made by the court on the application of the Secretary of State, or the official receiver acting on a direction of the Secretary of State. BROs impose a number of insolvency based restrictions for a period of between 2 to 15 years.

4.3 Schedule 21 to the Enterprise Act set out the effect of BROs. Generally these extend certain restrictions that had previously been applied to undischarged bankrupts, to those who are the subject of a BRO. The restrictions include not being able to act as a receiver, or a manager of a company’s property on behalf of a debenture holder,

or a director of a company, or an insolvency practitioner, or, directly or indirectly to take part in or be concerned in the promotion, formation or management of a company.

4.4 However, the Enterprise Act 2002 also sought to remove some of the restrictions that automatically applied as a result of bankruptcy.

4.5 For example, section 266 of the Enterprise Act amended the position regarding disqualification from Parliament. Under the new provisions, a member will no longer be automatically disqualified on the making of a *bankruptcy order*. However, where particular culpability can be shown through the existence of a *BRO*, the member will be disqualified.

4.6 Similarly, section 267 of the Enterprise Act 2002 provides for the disqualification of bankrupts from serving as a member of a local authority, which will be replaced with one disqualifying those subject to a *BRO*.

4.7 In the same vein, section 268 of the Enterprise Act 2002 provides a wide power to the Secretary of State (or the National Assembly for Wales) to make orders to maintain, repeal, amend or abolish restrictions on bankrupts from being elected or appointed to an office or position, holding an office or position, or from becoming or remaining a member of a body or group. Amendments may include reducing the class of bankrupts to whom a disqualification applies, applying the restrictions to those persons who are subject to *BROs* as well as to bankrupts, or providing that the disqualification be subject to the discretion of a specified person, body or group. It is under this power that the Enterprise Act 2002 (Disqualification from Office: General) Order 2006 (“the draft Order”) is to be made.

5. Extent

5.1 The section under which this instrument is made extends to England and Wales, Scotland and Northern Ireland.

5.2 The draft Order has the same extent enabling it to make provision revoking, repealing, amending or modifying disqualification provisions made by, or under, Acts of Parliament of varying extent.

6. European Convention on Human Rights

The Parliamentary Under Secretary of State for Employment Relations and Consumer Affairs has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

“In my view the provisions of the Enterprise Act 2002 (Disqualification from Office: General) Order 2006 are compatible with the Convention rights.”

7. Policy background

7.1 The White Paper ‘Productivity and Enterprise – Insolvency A Second Chance’, which preceded the Enterprise Act 2002, noted ‘*the fear of failure can act as a powerful disincentive to potential entrepreneurs and the actual cost of failure can deter many whose failure was honest from trying again.*’ To encourage entrepreneurs, the Enterprise Act sought to balance the needs of bankrupts and creditors. To counterbalance the liberalisation of the bankruptcy regime for the majority of bankrupts, the new BRO regime deals with the minority whose conduct has been culpable. The Enterprise Act also provided an opportunity to review the wide range of automatic and mandatory (non-insolvency) restrictions which apply to bankrupts, since such restrictions can also add to the ‘fear of failure’. The Enterprise Act 2002 (Disqualification from Office: General) Order 2006 reflects an updating of those restrictions. In most instances, the restriction is removed or replaced with a restriction that applies only to those subject to a BRO.

7.2 With a view to furthering the policy to reduce fear of failure referred to above, every government department was invited to review existing bankruptcy disqualifications in legislation under their policy control.

7.3 As a result of the review, some departments wanted the bankruptcy disqualification removed entirely. This approach was adopted in cases where the legislation was little used, for example, paragraph 1 of Schedule 1 to the Metropolis Water Act of 1902, concerning appointments to the Water Board set up under that Act. Since Schedule 1 to the Order deals with repeals and revocations, it can be assumed that a similar approach was taken in respect of the other provisions in that Schedule.

7.4 Generally, where the bankruptcy disqualification concerned a position or office bearing duties of a fiduciary nature it was decided to retain the bankruptcy disqualification whilst extending the disqualification to those subject to a BRO. Because a BRO takes effect after a bankrupt is discharged from bankruptcy, to do nothing would have meant that a person whose conduct had been found to be culpable, would be free to take up, or remain in office as soon as discharged from bankruptcy. This approach was adopted in relation to trustees of a charity and trustees of pension funds. Since Schedule 2 to the draft Order deals with amendments or modifications, it can be seen that a similar approach was taken in respect of the provisions in paragraphs 7, 9 and 12 of that Schedule.

7.5 Some departments took that view that where no fiduciary duty attached to the post or office, the bankruptcy disqualification should be replaced with disqualification upon the making of a BRO. This approach was adopted in respect of the matters dealt with in paragraphs 1, 2, 6, 8,10,11 and 13 to 19 of Schedule 2 to the draft Order. It was also adopted for the provisions referred to in the Greater London Authority Act 1999, reflecting the fact that the Greater London Authority wished to be subject to the same disqualification provisions as those adopted for members of Parliament.

8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

8.2 There are no identifiable costs to the public or the Exchequer.

9. Contact

Andy Woodhead at the Insolvency Service: Tel: 0207 291 6738 or e-mail: Andy.Woodhead@insolvency.gsi.gov.uk can answer any queries regarding the instrument.