



# Strengthening the regulatory regime and fee structure for insolvency practitioners

## Consultation

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## Foreword



The recent economic downturn raised the profile of insolvency professionals and the regulatory regime under which they operate. An effective insolvency regime is essential to the workings of a modern economy; it helps recover money for creditors, directs resources to productive businesses through recovery procedures and provides a mechanism by which individuals can unburden themselves of unsustainable levels of debt. Fair and effective insolvency mechanisms thus help drive economic growth through encouraging lending and preserving economic value.

At the heart of our insolvency regime is the insolvency practitioner (IP) who, in addition to advising on business recovery and restructuring, will lead companies and individuals through the insolvency process. IPs carry out an important role often in very difficult circumstances. They are in a considerable position of trust over the affairs of insolvent companies and individuals, and their decisions and actions can have a significant financial impact on those affected.

The very nature of insolvency means that some people will not recover all that they are owed. What is important is that creditors have confidence that they will recover the maximum amount possible under the circumstances. It is understandable therefore that both the general conduct of IPs and the fees they charge should come under close scrutiny. Recent independent reports<sup>1</sup> have concluded that there is clear evidence of the difficulty unsecured creditors face in controlling IP fees, and that there is a need to strengthen the regulatory framework in this area.

This consultation document sets out measures to strengthen the regulatory regime by introducing clear regulatory objectives for the regime and a range of proportionate sanctions and powers to deal with a failure to comply with the regulatory objectives. It also includes proposals to amend the way in which an insolvency practitioner can charge fees for his or her services, which should ensure that there will be funds available to make a payment to creditors.

We want to ensure that our insolvency processes work fairly and effectively.

I look forward to hearing your views.

A handwritten signature in cursive script that reads "Jenny Willott".

**Jenny Willott MP**  
**Minister for Employment Relations and Consumer Affairs**

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<sup>1</sup> The Office of Fair Trading's 2010 report into the market for corporate insolvency practitioners ([http://www.offt.gov.uk/shared\\_offt/reports/Insolvency/oft1245](http://www.offt.gov.uk/shared_offt/reports/Insolvency/oft1245)) and Professor Elaine Kempson's 2013 report reviewing insolvency practitioner fees (<http://www.bis.gov.uk/insolvency/insolvency-profession/review-of-ip-fees>).

## Executive Summary

1. Everyone who is affected by insolvency, whether they be employees who are owed wages, consumers who have lost deposits, suppliers who have not been paid or the debtors themselves, should be able to have confidence that insolvency procedures operate fairly and that IPs deliver the best possible outcome in what are often difficult and challenging circumstances. Two independent reports commissioned by Government have identified both a failing in the regulatory system<sup>2</sup> and a clear market failure when unsecured creditors are in control of an IP's remuneration.<sup>3</sup>
2. This consultation paper, which builds on earlier consultations, therefore sets out proposals to:
  - Strengthen the regulatory framework through the introduction of clear regulatory objectives;
  - Give the oversight regulator more appropriate powers to deal with poor performance, misconduct and abuse;
  - Take a backstop power to introduce a single regulator for the insolvency profession; and
  - Change the way that IP fees are set to ensure better returns for unsecured creditors.
3. The overarching aims of the regulatory regime for IPs must be to ensure fair and consistent regulatory outcomes for the benefit of all those with an interest in insolvency cases because this in turn will enhance confidence in both the regulatory regime and the insolvency framework generally. We are aiming to improve the impact and effectiveness of the regulatory regime to respond to the widespread impression that the current regulatory regime is not fit for purpose. We have separately set out measures to reduce the costs of insolvency procedures (identified under the Red Tape Challenge)<sup>4</sup> and to improve the provisions on tackling misconduct in insolvencies<sup>5</sup>. These proposals should be read together with those other proposals.

### Strengthening the regulatory regime

4. The authorisation and regulation of the insolvency profession is mainly through a system of self-regulation by bodies, operating largely in the accountancy and legal professions, overseen by the Insolvency Service. Each of the authorising bodies (known as recognised professional bodies, or RPBs) has a set of rules and regulations to ensure that those individuals that they authorise to act as IPs are 'fit and proper' persons with the necessary experience, qualifications and insurance in place.
5. Currently, authorisation is undertaken by 8 different bodies (although as detailed in Part 1, the Secretary of State will stop authorising IPs directly) and both the Office of Fair Trading (OFT) and Professor Elaine Kempson suggest that the regulatory system would be more effective if fewer bodies were involved.

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<sup>2</sup> The Office of Fair Trading's 2010 report into the market for corporate insolvency practitioners ([http://www.offt.gov.uk/shared\\_offt/reports/Insolvency/oft1245](http://www.offt.gov.uk/shared_offt/reports/Insolvency/oft1245))

<sup>3</sup> Professor Elaine Kempson's 2013 report reviewing insolvency practitioner fees (<http://www.bis.gov.uk/insolvency/insolvency-profession/review-of-ip-fees>).

<sup>4</sup> <http://www.bis.gov.uk/insolvency/Consultations/RedTapeChallenge?cat=closedawaitingresponse>

<sup>5</sup> <https://www.gov.uk/government/consultations/company-ownership-transparency-and-trust-discussion-paper>

6. A number of important changes, outside of legislation, have already been made to the regulatory system and more are planned. These measures are part of a joint effort by the oversight regulator, the RPBs and the profession to enhance public confidence and transparency in insolvency regulation. The reforms that have been agreed so far are:
  - **Complaints Gateway** – set up by the Insolvency Service through which complaints about IPs are directed in the first instance.
  - **Common Sanctions** – regulators have also worked together to develop common sanctions (or penalties) for IPs against whom complaints are upheld. Cases are decided on their facts but the application of common sanctions guidance provides greater consistency in regulatory outcomes.
7. While these steps are a useful start, we will continue to work with the RPBs to ensure a more consistent approach to complaints handling and outcomes, including in relation to appeal procedures and publishing regulatory action. More generally, we are looking at ways of improving the visibility and effectiveness of our oversight role; this will include a new approach to our monitoring activities, more engagement with both the profession and stakeholders, and learning from the best regulatory practice in other sectors.
8. However, these reforms do not deal directly with the matters identified in the report by the OFT and by Professor Kempson:
  - The Insolvency Service (acting as oversight regulator) lacks proportionate powers with which to monitor RPBs and the IPs they authorise, and address poor performance.
  - The regulatory system suffers from a lack of clear regulatory objectives against which the Insolvency Service can hold the regulators to account.

#### Regulatory Objectives

9. The introduction of regulatory objectives will provide regulators with a clearer, enhanced framework within which to carry out their activities. This is particularly important for an industry where there are different regulators, each with its own distinctive approach. Regulatory objectives will enable consistency of approach, and will provide a reference point for discussions between IPs and RPBs, and between RPBs and the Insolvency Service as their regulator.
10. Full details of the proposed regulatory objectives are set out in paragraphs 45 to 54. In broad terms, they will be aimed at:
  - protecting and promoting the public interest;
  - delivering fair treatment for those affected by IPs' acts or omissions;
  - encouraging an independent and competitive IP profession, whose members deliver quality services with transparency and integrity; and who consider the interests of all creditors in a particular case,
  - promoting the maximisation of returns to creditors, and the promptness in making those returns; and
  - ensuring that fees charged by IPs should represent value for money.

The OFT's report of 2010 (and the 2011 Government consultation on IP regulation in response<sup>6</sup>) and Professor Kempson's report on IP Fees in 2013 (see footnotes 2 and 3) reflect that confidence in the regulatory system is currently lacking and that returns to unsecured creditors fall below expectations. The proposed regulatory objectives should help to ensure the best outcome for creditors in particular insolvency cases

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<sup>6</sup> <http://www.bis.gov.uk/insolvency/Consultations/IPConsultation?cat=closedwithresponse>

and more generally improve confidence among creditors, the insolvency profession and the wider public in the insolvency system.

#### Oversight Powers for the Insolvency Service

11. Currently, the only sanction available to the oversight regulator is to de-recognise a regulator, meaning that it could no longer authorise IPs. Given the costs and disruption this would cause, such a step would only be appropriate in extreme cases (and this power has never been used). The only reasonable course of action currently open to the oversight regulator is to seek to influence the behaviour and conduct of the regulators through persuasion, discussion and monitoring of the commitments RPBs have made in an agreement with the Secretary of State (through a Memorandum of Understanding).
12. The lack of appropriate and proportionate powers of sanction leaves the oversight regulator in a weak position and undermines the credibility of the regulatory regime. We propose to introduce a range of sanctions which may be imposed, and used in combination, where an RPB is not acting in accordance with the regulatory objectives.
13. The proposed sanctions (set out in more detail in paragraphs 55 to 83) are:-
  - to direct an RPB to take steps to counter any adverse impact of a failure to act compatibly with the objectives, mitigate its effect or prevent its occurrence or recurrence;
  - to impose a financial penalty on an RPB of an appropriate amount;
  - to publish a statement reprimanding the RPB for its failure to act in a way which is compatible with the regulatory objectives; and
  - to ask the court to sanction an IP directly, when it is appropriate to do so.
14. We are aware of concerns about the number of regulators that exist, given that there are well under 2,000 IPs, the dual role of the Insolvency Service (which both authorises some IPs directly and acts as oversight regulator) and the lack of a consistent approach to regulation. As a first step, the Secretary of State will stop authorising IPs directly. The Deregulation Bill currently before Parliament<sup>7</sup> provides for this. We also plan to seek to introduce a power in the law which would enable the introduction of a single regulator. This would be a reserve measure that could be used if the changes detailed in this consultation fail to achieve adequate change in the regulatory system. Introducing a single regulator would not be done without further detailed analysis and consultation as well as secondary legislation.

#### A new approach to IP remuneration

15. In 2010 the OFT found that in just over a third of insolvency cases where unsecured creditors receive a pay-out, fees were estimated to be 9% higher in like-for-like cases than where secured creditors 'control' an IP's fees. In July 2013 Professor Kempson published her report which supported the OFT findings that there is little effective oversight by unsecured creditors of the work undertaken by IPs, and that costs are higher as a result. Despite discussions with the profession and the regulators, little has changed to address this market failure.
16. Currently, by far the most common way for IPs to set their remuneration is on a 'time-cost basis'. Disquiet about the fees of IPs therefore often focuses on the headline hourly rates their firms charge and the lack of control on the number of hours

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<sup>7</sup> <https://www.gov.uk/government/publications/draft-deregulation-bill>

charged. As highlighted by Professor Kempson<sup>8</sup>, in circumstances where large secured creditors have no incentive to control IP fees, this can result in inefficient working, leading to over charging on cases. She goes on to offer a number of potential options for reform, but recognises that there is no single solution to address the weak position of unsecured creditors.

17. The Insolvency Service will review the current information provided to creditors and will seek to publish better guidance to help creditors assess whether fees proposed are reasonable and how they may challenge fees if they have concerns, for example, by raising it with the RPB that authorises the IP. We will be working with the RPBs to ensure that there are effective systems in place for the RPBs to handle fee disputes between creditors and an IP instead of leaving the creditor to apply to court to challenge. This will be a key feature of the new regulatory objective ensuring that the remuneration of IPs represents value for money.
18. Based on Professor Kempson's report however, we believe more needs to be done to ensure that creditors and others can have confidence that the fees charged by IPs properly reflect the value of the work they carry out. The consultation sets out proposals to simplify the IP fee charging structure and, to make clear in the new regulatory objectives that regulators have a role to play in ensuring that fees taken in an insolvency case represent value for money.
19. Full details of the current set up for an IP's remuneration and the proposed changes can be found in paragraphs 88-129. We are proposing to remove the option for an IP to propose time and rate as a basis for remuneration except in cases in which there is tight control over the work being done (generally, by either a creditors' committee or secured creditors). This will ensure that a creditor can have an expectation that fees charged will be based on the value of the work done by the IP, and will more closely align the interests of IPs and unsecured creditors. It should remove the possibility that work is done to realise assets where all the money is taken by the IP as fees leaving nothing for creditors.

## Scotland

20. Schedule 5 to the Scotland Act 1998 sets out "reserved" matters which are outwith the legislative competence of the Scottish Parliament. The Schedule largely reserves business associations as well as aspects of insolvency and winding up, although there are specific exceptions to these general reservations. The effect of the reservations and exceptions contained within the Schedule is that parts of insolvency law and practice are reserved to the UK Parliament, whilst other parts are within the legislative competence of the Scottish Parliament. Broadly speaking, the law relating to administration and company voluntary arrangements is reserved to the UK Parliament, as is the regulation of insolvency practitioners and enforcement matters such as director disqualification. Receivership and all personal procedures are within the legislative competence of the Scottish Parliament. Responsibility for the law relating to winding up is divided between the two Parliaments.
21. Since devolution, the practice of the UK Government has been to legislate for Scotland in line with England and Wales in those areas that are reserved to it, unless underlying Scottish law or practice differs.

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<sup>8</sup> Chapter 5 (<http://www.bis.gov.uk/insolvency/insolvency-profession/review-of-ip-fees>)

22. The regulation of insolvency practitioners is reserved to the UK Government and the proposals in this consultation document which relate to strengthening the regulatory regime for insolvency practitioners would apply in Scotland.
23. However, the procedure by which insolvency practitioners agree their remuneration is determined in England and Wales by the Insolvency Rules 1986 and in Scotland by the Insolvency (Scotland) Rules 1986. The two regimes for setting remuneration are currently different and we do not propose to bring them together. The issues highlighted by the OFT and Professor Kempson do not apply to the same extent in Scotland, where the Court Reporter system is used as a check and balance. The proposals regarding remuneration in this consultation document would only cover the rules applying to England and Wales and therefore would not extend to Scotland.

## **Wales**

24. Insolvency in Wales is reserved to the UK Parliament and therefore all of the proposals in this consultation document would apply to Welsh insolvencies.

## **Northern Ireland**

25. Insolvency is fully devolved to the Northern Ireland Assembly and therefore none of the proposals in this consultation document would apply in Northern Ireland.



## How to respond

26. When responding please state whether you are doing so as an individual or whether you are representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.
27. This consultation was published on Monday 17 February 2014 and will close on Friday 28 March 2014. We encourage responses as early as possible to assist us in accelerating the process of considering replies. Contributors may wish to respond just to those questions that are of relevance to them.
28. A response can be submitted by email to [Policy.Unit@insolvency.gsi.gov.uk](mailto:Policy.Unit@insolvency.gsi.gov.uk), using the attached response sheet if you wish. Responses to questions on the fee structure can also be submitted online at [www.surveymonkey.com/s/RVC65FW](http://www.surveymonkey.com/s/RVC65FW).
29. This consultation may be of interest to:
  - Business and consumer groups
  - Creditors
  - Directors
  - Insolvency practitioners
  - Regulators of insolvency practitioners
  - The legal profession

## Additional copies

30. This consultation can be found at: [www.gov.uk/government/consultations](http://www.gov.uk/government/consultations). You may make additional copies without seeking permission. Under Cabinet Office guidelines consultations are digital by default.

## Confidentiality and data protection

31. Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you would like information, including personal data that you provide, to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidentiality.
32. In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic disclaimer generated by your IT system, will not, of itself, be binding on The Insolvency Service.

## Help with queries

33. Questions about the policy issues raised in the document can be addressed to Sam Roberts at The Insolvency Service, email [sam.roberts@insolvency.gsi.gov.uk](mailto:sam.roberts@insolvency.gsi.gov.uk), Telephone 020 7291 6822.

## What happens next?

34. The Government will consider the responses received in deciding whether to implement the proposals and will publish the way forward on [www.gov.uk/government/consultations](http://www.gov.uk/government/consultations)

# Part 1 – Regulation of insolvency practitioners

## Background

### Regulation of insolvency practitioners

35. IPs act as office-holders in insolvency procedures which include administration, administrative receivership, liquidation, bankruptcy and voluntary arrangements. To be qualified to act as an IP, the Insolvency Act 1986 requires a person to be authorised as a member of a professional body which has been recognised for this purpose by the Secretary of State<sup>9</sup>. There are presently seven of these 'Recognised Professional Bodies' (RPBs). In addition, the Secretary of State is currently able to authorise IPs directly however, the Government has brought forward legislation in the Deregulation Bill, to withdraw the Secretary of State from this role.<sup>10</sup> As at 1 January 2014 there are 1,677 authorised IPs, of whom 1,355 take appointments in insolvency procedures.
36. Once authorised, IPs are regulated through a system of self-regulation by the RPBs together with the Secretary of State. The eight current regulators are:-
- Institute of Chartered Accountants England and Wales (ICAEW)
  - Insolvency Practitioners Association (IPA)
  - Association of Chartered Certified Accountants (ACCA)
  - Institute of Chartered Accountants in Scotland (ICAS)
  - Institute of Chartered Accountants in Ireland (CAI)
  - Law Society Scotland (LSS)
  - Law Society (LS)
  - Secretary of State for Business Innovation and Skills
37. The Insolvency Act 1986 requires the regulators to ensure that the IPs they authorise are fit and proper individuals to act as IPs who have the necessary practical experience and qualifications.<sup>11</sup> There is then a Memorandum of Understanding in place between the RPBs and the Secretary of State which includes the qualification requirements for IPs and an agreement to ensure that IPs follow common professional and ethical standards<sup>12</sup>. To support this the Insolvency Service, on behalf of the Secretary of State, has worked with the profession to establish the Insolvency Code of Ethics<sup>13</sup> and Statements of Insolvency Practice (SIPs)<sup>14</sup> with which IPs must comply.
38. The regulators have a broadly similar set of rules and regulations in place to ensure they meet their obligations in relation to authorising individuals to act as IPs. The regulators carry out monitoring visits to assess the conduct and performance of the IPs they have authorised to ascertain whether they continue to be 'fit and proper' and are adhering to insolvency legislation and the agreed professional and ethical standards. Ultimately regulators can withdraw an

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<sup>9</sup> Insolvency Act 1986, section 390

<sup>10</sup> Deregulation Bill Schedule 5, Part 6 <https://www.gov.uk/government/publications/draft-deregulation-bill>

<sup>11</sup> Insolvency Act 1986, sections 391 and 393

<sup>12</sup> <http://www.bis.gov.uk/insolvency/insolvency-profession/Professional%20conduct/memos-of-understanding/mou-consistency-in-authorisation-of-IPs>

<sup>13</sup> <http://www.bis.gov.uk/insolvency/insolvency-profession/Professional%20conduct/code-of-ethics>

<sup>14</sup> <http://www.bis.gov.uk/insolvency/insolvency-profession/Regulation/statements-of-insolvency-practice>

authorisation if an IP fails to meet these requirements. The regulators also deal with complaints about their IPs and during 2013 there were 748 new complaints.

39. The seven RPBs each have similar powers of sanction over their IPs which include issuing a fine and restricting or withdrawing a member's authorisation to act as an IP. During 2013 sanctions were issued by RPBs in 28 cases where there had been complaints. The Secretary of State has only one sanction available which is the power to withdraw an IP's authorisation where misconduct of a serious nature is discovered. There were no such withdrawals by the Secretary of State in 2013.

### **Regulation of the regulators**

40. The RPBs are recognised and regulated by the Secretary of State (acting through the Insolvency Service). The Secretary of State may recognise a body as an RPB if it regulates the practice of a profession and maintains and enforces rules (effectively the code of ethics and SIPs) to ensure that those it authorises to act as IPs are fit and proper persons with appropriate qualifications and experience. The Secretary of State may withdraw recognition from a body if it appears that the body no longer meets those conditions.<sup>15</sup>
41. To fulfil this oversight role, the Insolvency Service carries out regular monitoring visits to the RPBs, and the regulators are required to submit returns which include details of complaints they have dealt with during the period. The Insolvency Service also investigates complaints against the RPBs (there were 6 in 2013), although at present its role is largely restricted to ensuring that the RPB has correctly followed its own procedures when handling complaints. The Memorandum of Understanding between the RPBs and the Secretary of State sets out principles which RPBs have agreed to follow in relation to the granting of authorisations, ethics and professional standards, the handling of complaints, retention of records, and the disclosure of regulatory information. The Insolvency Service monitors the RPBs for adherence to these principles.
42. The Secretary of State currently has only one sanction against an RPB which is not regulating effectively and that is to withdraw its recognition as an RPB. The application of this sanction would be disproportionate in all but the most serious circumstances and has never been used.

### **Reform objectives**

43. The Government stated in December 2011 that its vision is to have an insolvency regulatory regime that is transparent, consistent, accessible, independent and accountable.<sup>16</sup> This followed the Office of Fair Trading's report in 2010 into the market for corporate insolvency practitioners and the subsequent Government consultation which concluded that more could be done to improve the effectiveness of, and confidence in, the insolvency regulatory regime particularly for unsecured creditors.
44. The Office of Fair Trading's report in particular identified that the Secretary of State is frustrated in his ability to effectively regulate the RPBs by factors including a lack of appropriate and proportionate powers of monitoring and sanction, and a lack of clear regulatory objectives against which he can hold the RPBs to account.

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<sup>15</sup> Section 391 Insolvency Act 1986

<sup>16</sup><http://www.bis.gov.uk/insolvency/Consultations/IPConsultation?cat=closedwithresponse>

## Proposed reforms

45. There is stakeholder support, particularly from creditors but also in some parts of the IP profession, for having a single independent regulator for IPs in place of the current system of RPBs. This would represent a very significant change to the regulatory regime. The reforms that we are proposing are intended to achieve the objectives in a more evolutionary way by strengthening controls. However, we also intend to seek a reserve power to enable the Secretary of State to appoint a single regulator for the insolvency profession should it become appropriate to do so in the future (see paragraphs 84 to 87). This would not be done without further analysis and consultation.
46. Our aim is to bring the regulation of IPs up to the level of the best regulatory models for other professions. The regulatory system for IPs is based on a typical model for professionals – one of practitioner-led self regulation within a statutory framework above which sits an oversight regulator. There are two examples which set a precedent for the reforms that we intend to introduce into the IP regulatory system. These are the regulatory system for the legal profession which is contained in the Legal Services Act 2007<sup>17</sup> and regulations made under it; and the regulation of statutory auditors within the framework of the Companies Act 2006.<sup>18 19</sup> Both frameworks have been significantly strengthened in recent years.

### **Introduction of regulatory objectives**

47. We propose to amend Part 13 of the Insolvency Act 1986 to introduce clear **regulatory objectives** for the RPBs, and the Secretary of State as oversight regulator, to help direct their activities when authorising and regulating IPs. These objectives will then underpin a more focused, efficient and consistent regulatory regime.
48. The regulatory objectives should include broad aims that might be expected in any professional regulatory system; for example, the insolvency profession should act with integrity, fairness and transparency. There should also be specific insolvency-related objectives aimed at improving confidence in the regime. In order to have confidence in the insolvency regime, creditors and the wider public need to see that there are effective mechanisms in place to ensure that IPs realise the assets of an insolvent and distribute the proceeds effectively and promptly and with due regard to the interests of all creditors.
49. The Office of Fair Trading's report of 2010 identified a lack of transparency and consistency in the present regulatory system which affected unsecured creditors, particularly in regard to the complaints mechanism. The report found that creditors often did not know how to complain or had no confidence that a complaint would be treated fairly. The regulatory objectives should therefore promote a transparent, consistent, proportionate system of IP regulation which delivers fair outcomes.

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<sup>17</sup> <http://www.legislation.gov.uk/ukpga/2007/29/contents>

<sup>18</sup> <http://www.legislation.gov.uk/ukpga/2006/46/part/42>

<sup>19</sup> It is noteworthy that most of the RPBs fall to be regulated either under LSA 07 or CA 06 in their role as regulators of legal practitioners or as regulators of statutory auditors

50. It is proposed that the regulatory objectives are framed as follows:

1. Protecting and promoting the public interest
2. Having a system of regulating persons acting as IPs that:
  - (i) delivers fair treatment for persons affected by their actions and omissions,
  - (ii) reflects the regulatory principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principle considered to represent best regulatory practice, and
  - (iii) delivers consistent outcomes
3. Encouraging an independent and competitive IP profession whose members:
  - (i) deliver quality services transparently and with integrity, and
  - (ii) consider the interests of all creditors in any particular case
4. Promoting the maximisation of the value of returns to creditors and also promptness in making those returns
5. Ensuring that the fees charged by IPs represent value for money\*

\* further explanation regarding this objective can be found in Part 2, paragraphs 97 to 102.

### **RPBs to act in compliance with the regulatory objectives**

51. We propose to further amend Part 13 of the Insolvency Act 1986 to provide that an RPB must, in its authorisation and regulation of IPs, act in a way which is compatible with the regulatory objectives. In addition the Secretary of State would be required to have regard to the regulatory objectives when carrying out his regulatory functions. Meeting the regulatory objectives will be at the heart of the new regulatory regime.

### **Regulatory objectives to be used in recognising RPBs**

52. We intend to incorporate the regulatory objectives into the conditions that must be met for a body to be recognised by the Secretary of State as an RPB, so that there is consistency in applying the objectives throughout the new regulatory system. Currently a body may be recognised as an RPB if it appears to the Secretary of State that:-

- a) the body regulates the practice of a profession; and
- b) the body maintains and enforces rules for securing that its insolvency specialist members are fit and proper persons to act as IPs and meet acceptable requirements as to education and practical training.

It is proposed that a further requirement is added so the Secretary of State must also be satisfied that:-

- c) the body's rules and practices for or in connection with authorising persons to act as IPs, or regulating persons acting as IPs, are designed to ensure that the regulatory objectives are met.

53. The current legislation does not set out the mechanism for a body to make application to the Secretary of State for recognition as an RPB. Whilst there has been no change in the identity of the RPBs since the current regulatory regime began in 1986, the legislation allows new bodies to be recognised and an application process is implied. We propose to take this opportunity to clarify in Part 13 of the Insolvency Act 1986 how such an application would be made. We intend to follow as a precedent the application process for the recognition of a supervisory body for auditors in Schedule 10, Part 1 of the Companies Act 2006<sup>20</sup>. An application would be made in the manner directed by the Secretary of State and accompanied by such information as he may require to determine the application. We propose that every application should be accompanied by a copy of the applicant's rules, policies and practices and any written guidance relevant to its insolvency specialist members. The Secretary of State would be able to refuse an application for recognition if he considers that recognition of the body is unnecessary having regard to the existence of one or more other bodies which meet the conditions and are already recognised.

54. We are not proposing to require the existing seven RPBs to reapply for recognition under this new regime. We consider that this would be unnecessary and burdensome given that the existing RPBs will be required in any event to act in a way which is compatible with the regulatory objectives or face sanctions.

**Q1 Are the proposed regulatory objectives and the requirements for RPBs to reflect them appropriate for the insolvency regulatory regime?**

### **Secretary of State's increased powers to sanction RPBs**

55. One of the principal aims of the reforms is to strengthen the system by which the Secretary of State, as oversight regulator, can monitor and control the work of the RPBs having regard to clear regulatory objectives. It is proposed that the Secretary of State should have a range of sanctions available so that proportionate action can be taken where the Secretary of State is satisfied that an RPB is not adequately fulfilling its regulatory functions.

### **Revocation of recognition**

56. The revocation of recognition is, and will remain, the most powerful sanction available to the Secretary of State to address the performance of an RPB.

57. Currently the Secretary of State may revoke the recognition of an RPB where it appears that the body no longer ensures that its authorised IPs are fit and proper persons to act or that they meet acceptable requirements of education, practical training and experience. We propose to extend this to enable the Secretary of State to revoke an RPB's recognition if he is satisfied that an act or omission of

<sup>20</sup> <http://www.legislation.gov.uk/ukpga/2006/46/schedule/10>

the RPB has had, or is likely to have, an adverse impact on one or more of the regulatory objectives and in all the circumstances it is appropriate to revoke the recognition.

58. It is envisaged that this sanction would be used in an extreme case where an RPB has consistently and systematically failed to address poor performance by its authorised IPs. The intention is that the sanction would be invoked only after the Insolvency Service's attempts to change the RPB's behaviour through the use of other available sanctions have failed. However we do not wish to rule out the possibility of revoking recognition where a single act or omission has had an extremely serious impact on one or more regulatory objectives.
59. The current legislation is silent as to the procedure for ordering that the recognition of an RPB be revoked. We intend to introduce a revocation procedure in legislation which is consistent with procedures for the new sanctions being introduced.
60. If the Secretary of State is proposing to revoke a body's recognition, he must give notice of his intention to the RPB specifying the reasons for proposing to do so and a period of time (not less than 28 days) within which written representations may be made. The Secretary of State must publish the notice on the same day it is given to the RPB. After considering any representations from the RPB or any other affected persons the Secretary of State must make his decision. Notice of his decision will be given to the RPB and published. Where the Secretary of State's decision is to revoke recognition, the notice must specify the reasons for the decision and state when it is to take effect. The revocation order may make provision for IP members of the body to be treated as authorised for a period of time to allow them to make new arrangements with another RPB. An RPB wishing to challenge the Secretary of State's decision would do so by judicial review<sup>21</sup>.
61. We recognise that publishing notice of the Secretary of State's proposed action to revoke recognition may be of concern to RPBs due to the potential damage to their reputation. Given that revocation would only be considered in the most serious of circumstances, and only after other avenues of redress had failed, we consider that publication is warranted to allow the IPs who are authorised by the RPB the opportunity to make representations to the Secretary of State and to give them time to explore alternative authorisation. There are precedents for this in the regulatory regimes for both legal services<sup>22</sup> and statutory auditors<sup>23</sup> which require publication of a notice of intention to de-recognise a regulatory body. We do not intend to require the Insolvency Service on behalf of the Secretary of State to publish its proposals to impose sanctions other than revocation.

**Q2 Do you have any comments on the proposed procedure for revoking the recognition of an RPB?**

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<sup>21</sup> Judicial review is a type of court proceeding in which a judge reviews the lawfulness of a decision or action made by a public body.

<sup>22</sup> Legal Services Act 2007 Schedule 9 - <http://www.legislation.gov.uk/ukpga/2007/29/schedule/9>

<sup>23</sup> Companies Act 2006 Schedule 10 - <http://www.legislation.gov.uk/ukpga/2006/46/schedule/10>



## **New powers of sanction for Secretary of State**

62. We are proposing to introduce a range of proportionate powers of sanction which the Secretary of State (acting through the Insolvency Service) may impose where he is satisfied that an RPB has not acted in a way which is compatible with the regulatory objectives. We envisage that the different sanctions may be used alone or in combination with one another according to the circumstances of the case. The powers are :-

- (a) a power to direct an RPB to take such steps as the Secretary of State considers will counter any adverse impact of a failure to act compatibly with the objectives, mitigate its effect or prevent its occurrence or recurrence;
- (b) a power for the Secretary of State to impose a financial penalty of an appropriate amount;
- (c) a power to publish a statement reprimanding the RPB for the failure to act in a way which is compatible with the regulatory objectives.

63. In practice, the Insolvency Service (on behalf of the Secretary of State) will not commence proceedings to impose a sanction without first entering into discussions with an RPB to try to resolve matters by agreement. Therefore, it is envisaged that the sanctioning powers will be exercised rarely.

64. These powers of sanction are very similar to those exercisable by the Legal Services Board under the Legal Services Act 2007<sup>24</sup> in relation to approved regulators and the Financial Reporting Council under the Companies Act 2006<sup>25</sup> in relation to recognised supervisory bodies. Consistent with those regimes, and to ensure that the powers are exercised in a fair and measured way, we propose that for each sanction :-

- The Secretary of State will be required to notify an RPB of his intention to impose a sanction and to provide details of the proposed action and the reasons for it.
- The RPB will then have a period of time from being given such notice within which to make written representations.
- The Secretary of State will make a final decision.
- Where a sanction is imposed the Secretary of State will publish notice of it.

### **Power for Secretary of State to direct an RPB**

65. We propose that the Secretary of State should have a power to direct an RPB to take action or refrain from taking a specific action. This would be invoked where the Secretary of State is satisfied that an RPB in discharging its regulatory functions has acted in a way which has had, or is likely to have, an adverse impact on one or more of the regulatory objectives. The Secretary of State may, if in all the circumstances it is appropriate to do so, direct the RPB to take such steps as he considers will counter the adverse impact, mitigate its effect or prevent its occurrence or reoccurrence.

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<sup>24</sup>Legal Services Act 2007 Part 4 - <http://www.legislation.gov.uk/ukpga/2007/29/part/4>

<sup>25</sup>Companies Act 2006 Part 42 sections 1225-1225G  
<http://www.legislation.gov.uk/ukpga/2006/46/part/42/chapter/2/crossheading/enforcement>

66. We propose that the scope of a direction by the Secretary of State should be limited to acts which the RPB has power to take under its own byelaws, although a direction may require an RPB to change its byelaws.
67. Under our proposals the Insolvency Service would be able to direct an RPB to change its rules and practices in relation to disciplinary proceedings. It would also be able to direct an RPB to commence an investigation into individual IPs where it had received intelligence relating to alleged misconduct.
68. It is proposed that the period within which an RPB must submit written representations would be at least 14 days from when notice of intention to issue a direction is given. The Secretary of State will give notice of his final decision whether or not to issue the direction to the RPB. If he decides to issue a direction the notice would state the reasons for his decision and the date when the direction takes effect. An RPB wishing to challenge the Secretary of State's decision would be able to do so by way of judicial review.
69. We propose that the legislation should give the Secretary of State the ability to do what is necessary to monitor compliance with the direction. If the RPB fails to comply, it is proposed that the Secretary of State can apply to the court to enforce compliance.

**Q3 Do you have any comments on the proposed scope and procedures for the Secretary of State to issue a direction to an RPB?**

**Power for Secretary of State to impose a financial penalty on an RPB**

70. In its report into the market for corporate insolvency practitioners, the Office of Fair Trading recommended that sanctions against an RPB should include fines of a sufficient size to deter future transgression. The power to impose a fine is also a feature of the regulatory regime for legal services and for statutory auditors. We propose that the Secretary of State would be able to impose a financial penalty on an RPB where satisfied that the RPB has failed to comply with a requirement imposed:-

- (a) by a direction given to the RPB by the Secretary of State; or
- (b) by a provision of the Insolvency Act 1986 or its subordinate legislation (this would include an RPB's obligation to act in a way which is compatible with the regulatory objectives)

and that it is appropriate to impose a penalty.

71. The procedure for imposing a financial penalty would be similar to the other sanctions and follow the precedents for legal services (sections 37 to 39 of the Legal Services Act 2007) and statutory auditors (sections 1225D to G of the Companies Act 2006). Once notice of the intention to impose a penalty is given to the RPB, the RPB will have at least 21 days to submit written representations. Notice of the Secretary of State's final decision, which may include a decision to amend the penalty amount, must then be given to the RPB. Where a penalty is imposed, the notice must state the reasons for the penalty, the amount and the date by which it must be paid. We propose that a period of at least 3 months be allowed for payment.

72. Appeal by the RPB following the issue of a penalty decision notice would be to the Court (this is not a judicial review process). The relevant court would be the High Court, or the Court of Session in Scotland. The appeal process again follows precedents from the Legal Services Act 2007 and the Companies Act 2006. There would be a number of statutory grounds for appeal including:-

- the requirement in respect of which the penalty was imposed had been complied with
- the amount of the penalty is unreasonable
- the time allowed for payment of the penalty is unreasonable.

Following a successful appeal, the court may quash the penalty, substitute a penalty of a lesser amount or substitute a later time limit for paying the penalty.

73. Both the Legal Services Act 2007 and the Companies Act 2006 contain provisions for the recovery of a penalty as a civil debt which we intend to follow. This includes charging interest on any unpaid penalty at the rate specified in section 17 of the Judgments Act 1838 (unless the court specifies a different rate) and payment only becoming due once any appeal has been determined or withdrawn<sup>26</sup>.

74. We do not propose setting a maximum level for a financial penalty; rather we propose to provide that a penalty may be imposed of an amount commensurate to the breach and likely to deter future misconduct.

**Q4 Do you have any comments on the proposed scope and procedures for the Secretary of State to impose a financial penalty on an RPB?**

**Power for Secretary of State to reprimand an RPB**

75. We propose that the Secretary of State should be given a power to publish a statement which reprimands an RPB where he is satisfied that an RPB in discharging its regulatory functions has acted in a way which has or is likely to have an adverse impact on one or more of the regulatory objectives. It is envisaged that a reprimand will be given either where a more serious sanction seems unwarranted or in combination with another sanction where an RPB is guilty of a particularly serious breach of the regulatory objectives.

76. The procedures will closely mirror those in sections 35 and 36 of the Legal Services Act 2007 as regard the Legal Services Board's power to issue a statement censoring an approved regulator. We propose that the RPB should be given not less than 28 days to make written representations to the Secretary of State. If the Secretary of State decides to vary the wording of the proposed statement he must issue further notice to the RPB and allow another period of at least 21 days for representations.

77. It would be open to an RPB to challenge the Secretary of State's decision to issue a public reprimand by way of judicial review.

**Q5 Do you have any comments on the proposed scope and procedures for the Secretary of State to publicly reprimand an RPB?**

<sup>26</sup> Legal Services Act 2007 section 40 and Companies Act 2006 section 1225G

## Q6 Do you agree with the proposed arrangements for RPBs making representations?

### Power for the Secretary of State to directly sanction an IP in the public interest

78. In addition to the new powers for the Secretary of State to sanction an RPB, we also intend to enable the Secretary of State acting through the Insolvency Service to apply to the court directly to sanction an IP who is authorised by an RPB. It is proposed that this power will only be used where it is considered to be in the public interest to do so, because an act or an omission by an IP or a series of acts or omissions have undermined or are likely to undermine public confidence in the insolvency regime.

79. We are concerned that in rare cases where an act or omission of an IP has particularly serious consequences for the reputation of the profession and the insolvency regime, the Secretary of State is currently unable to take any direct action. There have been examples that we consider would fall into this category where RPBs following their own procedures have been slow, or felt they were unable to bring disciplinary proceedings against an IP that they authorise. We consider it appropriate for the Secretary of State to have the power to take such action in serious cases where there is evidence of an IP's misconduct, for example through a statutory investigation. Such action would be similar to that available to other regulators like the Financial Reporting Council and would supplement the powers of the RPBs enabling swifter and more effective regulatory action to be taken against an IP where such action is absolutely necessary. The Secretary of State would deal with cases of potential misconduct which raise important issues affecting the public interest but prime responsibility for dealing with poor behaviour by IPs would remain with the RPBs. We believe that this power, combined with our other proposals, will address the perception that the current disciplinary procedures for IPs are not always effective in delivering fair, effective and prompt outcomes for those affected.

80. The proposal is that the Insolvency Service, acting on behalf of the Secretary of State, will investigate where it appears that an IP has failed to comply with the body of legislation and rules which govern his or her practice and conduct to such an extent that it may be in the public interest to take action. We envisage that evidence of misconduct may come to light by complaints or through other administrative or investigative activity by the Insolvency Service or others.

81. The intended procedure is as follows:

- If, having considered the evidence, the Secretary of State is satisfied that it is in the public interest to take direct action, he will give notice to the IP and the authorising RPB of his intention to apply to the court for a sanction against the IP. The sanction may be one or more of the following:
  - A financial penalty in the form of an order to repay to an insolvency estate some or all of the IP's fees;
  - A non-financial penalty, for example a warning, a severe reprimand, suspension or revocation of authorisation as an IP.
- The IP will be able to enter into an undertaking to accept the proposed sanction.
- If an undertaking is not agreed, the Secretary of State will apply to the court for an order to impose the sanction.

- Where the court orders a suspension or revocation of an IP's authorising licence, it will order the RPB to take that action.
- An IP or RPB who wishes to appeal the decision of the court could be able to apply to a higher court.

**Q7 Do you have any comments on the proposed procedure for the Secretary of State to be able to apply to Court to impose a sanction directly on an IP in exceptional circumstances?**

**Power for the Secretary of State to require information**

82. In order to determine if it is appropriate to exercise any of the sanctions outlined above, the Secretary of State (acting through the Insolvency Service) will clearly need to be able to investigate the conduct of an RPB or IP. To enable the Insolvency Service to investigate we propose that the Secretary of State be given a power in the Insolvency Act 1986 to require information from an RPB, an IP and other specified persons.

83. There are precedents for fact finding powers in other regulatory systems. We are proposing to follow the power in the Companies Act 2006 (section 1224) in relation to the regulation of statutory auditors. The intended procedure is as follows:

- The Secretary of State may, by notice in writing, require a specified person to give him such information as he may reasonably require for the performance of his functions as oversight regulator.
- The persons who may be required to provide such information would include :
  - an RPB
  - a person who is or has been authorised to act as an IP
  - the employer or former employer of an IP
  - a person who is, or was, in the employment of an IP or an IP's firm or other body of which the IP was a member, partner or employee
  - A person who acts or has acted on behalf of an IP.
- The Secretary of State may require the information to be given within a reasonable time and may require it to be verified in a specified manner.
- If a person fails to provide the required information, the Secretary of State may apply to the court to enforce the requirement.

**Q8 Do you have any comments about the proposed procedure for the Secretary of State to require information and the people from whom information may be required?**

**Reserve power to replace RPBs with a single insolvency regulator**

84. The Government is aware of stakeholder concerns about the number of regulatory bodies that exist for a relatively small insolvency profession, and the resulting potential for inconsistency. Responses to the Government consultation on IP regulation in 2011 showed strong stakeholder support for having a single regulator for IPs. More recently, Professor Kempson's report, following her review

of IPs fees, concluded that there was a case for reducing the number of RPBs and ultimately for having a single regulator.

85. We can see the merits of having a single regulator. However, moving to such a system would involve significant change, time and cost. Our preferred option is to work with the RPBs to strengthen the current regime with the introduction of regulatory objectives and more proportionate powers of sanction for the oversight regulator as detailed above. We do not rule out moving to a single regulator structure in the future, particularly if our proposals to strengthen the regime do not succeed in improving public confidence in the regime. We are therefore proposing to introduce a power to allow the Secretary of State to appoint a single body to authorise and regulate IPs.

86. We propose that this power would enable the Secretary of State to designate a single body as the regulator for IPs as a replacement for the existing RPBs. The provision will need to set out in some detail what the body is able to do and we propose that these functions will include the following:

- Authorising persons to act as IPs;
- Establishing the criteria for determining whether a person is a fit and proper person to act as an IP and the qualifications and practical training and experience which a person must have in order to demonstrate that they are suitably qualified to act as an IP;
- Setting professional and/or technical standards to be applied in insolvency practice and pre-insolvency work;
- Monitoring and enforcing compliance with those standards;
- Investigating the conduct of IPs;
- Establishing fair and reasonable rules and practices to exercise discipline over authorised IPs;
- Investigating complaints against IPs.

87. As our proposal is to take this as a reserve power with no immediate intention to create a single regulator, an impact assessment has not been prepared. Should a time arise when the Government decides to exercise this power, secondary legislation will be required and a full assessment of the costs and benefits will be carried out, as well as further consultation.

**Q9 Do you agree with the proposal to provide a reserve power for the Secretary of State to designate a single insolvency regulator?**

**Q10 Do you have any comments on the proposed functions and powers of a single regulator?**

## PART 2 – Insolvency Practitioner Fee regime

### Background

#### Fees and remuneration of Insolvency Practitioners

88. Each year IPs realise approximately £5bn worth of assets from corporate insolvency processes, and in doing so charge about £1bn in fees, distributing some £4bn to creditors<sup>27</sup>. In 2010 the OFT found that in just over a third of insolvency cases where unsecured creditors receive a pay-out, fees were estimated to be 9% higher in like-for-like cases than where secured creditors 'control' an IPs fees. Despite discussions with the profession and the regulators little has changed to address this market failure and the impact this has on the position of unsecured creditors in insolvency situations.
89. To address these concerns the Government announced in December 2012 a review, led by Professor Elaine Kempson into IP fees, to make recommendations for change to ensure that creditors are being charged fairly, as well as to increase confidence in the insolvency regime. The review was intended to build on the work conducted by the OFT.
90. In July 2013 Professor Kempson published her report<sup>28</sup> which supported the OFT findings that the current system of controls on IP remuneration work as intended where a secured creditor (often a bank) plays an active part in an insolvency. In this situation the market works competitively as banks are repeat customers and IPs want to join and remain on Bank panels. On the other hand Professor Kempson found evidence that where control lies in the hands of unsecured creditors collectively, the current control mechanisms do not work as intended and this is particularly the case for small unsecured creditors with limited or no prior experience of insolvency. In such circumstances there is little competition for jobs, no 'identifiable' client (as the IP is working to a number of unsecured creditors, most of which have no involvement) and creditors are required to work together, in circumstances where they do not know, or find it difficult, to contact each other. This results in little effective oversight by unsecured creditors of the work undertaken by IPs which can result in higher costs. The decisions IPs make in any insolvency procedure, where they have wide powers, can have a substantial impact on the funds available to creditors.

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<sup>27</sup> Paragraph 1.5 'Market for Corporate Insolvency Practitioners – a market study' - [http://www.of.gov.uk/shared\\_of/reports/Insolvency/oft1245](http://www.of.gov.uk/shared_of/reports/Insolvency/oft1245)

<sup>28</sup> <http://www.bis.gov.uk/insolvency/insolvency-profession/review-of-ip-fees>

91. At present an IP's remuneration can be set a) on a time-cost basis, b) as a percentage of realisations or c) as a fixed fee. However IPs take their remuneration on the basis of time and rate in the majority of cases, which requires creditors to have considerable knowledge and understanding of the insolvency process in order to question the amount of time spent, as well as the grade of staff used to carry out a particular piece of work. Professor Kempson highlights four main areas of concern amongst stakeholders, those being the actual hourly charge out rates and what they include, inefficient working and staff management, time recording and cost-ineffective working<sup>29</sup>. Despite these concerns, and because the only effective method of complaining about an IP's fees is via the court (which can be costly), few challenges are made to the level of fees charged by IPs.
92. Evidence from Professor Kempson's review shows that in circumstances where controls do work, fees can be considerably lower and suggests that the OFT estimate of 9% difference is probably conservative. Professor Kempson does not interpret that this over-charging is deliberate where controls are minimal or absent, instead she asserts that this is largely related to inefficiencies rather than a deliberate attempt to inflate fees. IPs have a legitimate expectation that they will be paid for the work they do and as Professor Kempson highlights the great majority of IPs are honest and generally do a good job, sometimes under very difficult circumstances.
93. However given the clear evidence of harm suffered by unsecured creditors, the Government feels strongly that reforms are required in order to address the market failure.

### **Professor Kempson review of IP fees - Recommendations**

94. The Kempson review offers a wide range of options for reform but recognises there is no single solution to address the weak position of unsecured creditors. Although a number of solutions are proposed to educate and inform creditors, these alone would be insufficient as they require creditors to work together and be motivated to spend time (and money) overseeing the work of an IP. This motivation is often lacking as creditors feel they have already lost enough through the insolvency itself and do not wish to spend more time and resource for little return.
95. The full recommendations can be found in Chapter 6 of the report but broadly can be categorised into three main areas;
- Transparency measures and increasing creditor engagement: These concern the availability of sufficient and clear information for creditors and the timing of this information - both generally and specific to a particular case, to encourage greater engagement by unsecured creditors. This includes an estimate at the start of the case of the likely fees that will be charged as well as a cap on this amount. The report also highlights the role Crown creditors can play in exercising greater oversight, and the possibility of creating creditor protection associations to represent creditors collectively.
  - Simplifying the fee structure: The report recommends giving consideration to changing the presumed basis for remuneration (which is time and rate in

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<sup>29</sup> Paragraph 5.2 Review of Insolvency Practitioner fees- Elaine Kempson – July 2013



almost all administration, winding up and bankruptcy cases) and proposes two options: having percentage of realisations as the presumed basis for charging fees in all cases or using different bases for different aspects of a case. For example fixed fees could be charged for statutory work where the costs are known and a percentage of realisations where the work involves asset realisation.

- Enhanced monitoring and oversight of fees: The report highlights that the existing codes of practice and the associated regime for compliance monitoring is inadequate when it comes to remuneration and there is a need for greater oversight over fees, in particular by ensuring the regulators exercise a greater degree of compliance monitoring of fees. The report concludes that ultimately there is a strong case for a single regulator in this sector.

## **Proposed reforms**

96. The following paragraphs set out a package of measures which aim to address the three main strands identified by the report, namely enhanced monitoring and oversight of fees, increasing creditor engagement, and simplification of the fee charging structure.

### **1. Enhanced monitoring by the regulators – providing value for money**

97. Professor Kempson's review highlights the important role of enhanced monitoring by the RPBs both for the reputation of the profession and to ensure that work is properly undertaken and levels of remuneration are appropriate. The report highlights that the existing codes of practice and associated regime for compliance monitoring is inadequate when it comes to remuneration (chapter 6). Independent oversight to ensure that time charged is for work that is necessarily and properly performed is largely absent. The only recourse open to creditors is the court which is costly and slow and requires a skilled understanding of the case. The report highlights that the starting point for reforms in this area should be on providing greater oversight, therefore reducing the number of complaints and challenges relating to fees.

98. As set out in Part 1, we are consulting on a number of proposals to reform the landscape of IP regulation, by bringing in regulatory objectives and strengthening the Secretary of State's powers of oversight. The regulators do not currently play a role in, or monitor, the level of IP fees, unless, for example, they have been charged without authority. **We believe the regulators could do more in this respect and are therefore consulting on including within the regulatory objectives (as set out at paragraph 47-50), an objective with the aim of ensuring that fees charged by IPs represent value for money. By this we mean that IPs remuneration properly reflects the nature and complexity of the work done in any given case.**

99. The purpose of the regulatory objectives as a whole is not to introduce additional regulatory burdens but rather to direct and focus regulatory activity to produce better and more consistent outcomes and to tackle misconduct in the small minority of cases where regulatory action is required. Adding this objective will ensure that RPBs can direct and focus their regulatory activity onto the level of fees charged for the work done as well as the process in which fees are taken.

100. We recognise that giving the RPBs a regulatory role in monitoring fees will increase their costs when dealing with complaints around the quantum of fees and have therefore included the estimated cost of doing this within the impact assessment – see pages 11-12. This cost is offset by the benefit to creditors in having an accessible system in which to raise complaints about fees, as well as strengthening confidence in the profession which will benefit the industry as a whole.

**Q11 Do you agree with the assessment of the costs associated with fee complaints being reviewed by RPBs?**

101. The objective will aim to ensure that fees charged by IPs represent value for money and are ‘fair’ and valid for the work undertaken, by requiring the RPBs to provide a check and balance against the level of fees charged. This will ensure that IPs do not abuse their market position and build confidence in the profession. The regulators will be expected to take a full role in assessing the fairness of an IP’s fees, including the way in which they are set, the manner in which they are drawn and that they represent value for money for the work done. This would be done via the usual monitoring visits and complaint handling processes. Any appeal against an RPB finding would follow the same process that exists for other complaints.

102. Rather than create a new body and system for adjudicating on fee complaints, which would add extra complexity to the complaints process, it is our preferred option to work within the framework that we currently have. We would like the idea of ‘value for money’ to be part of the overall regulatory framework and believe the regulators are best placed to deal with issues surrounding the level of fees as they have the relevant experience, and access to panels with the relevant experience, to adjudicate on fees.

**Q12 Do you agree that by adding IP fees representing value for money to the regulatory framework, greater compliance monitoring, oversight and complaint handling of fees can be delivered by the regulators?**

## **2. Increasing creditor engagement**

103. Unsecured creditors feel they are not in a position to negotiate down fees or question the amount of work done on a case as they do not have the experience or knowledge to do so, and often do not know they can.

104. We recognise that crown creditors, who often represent a large proportion of unsecured debt in insolvency cases have a role to play in overseeing and negotiating competitive rates in cases where a potential dividend is due to unsecured creditors. **We are working with Government creditors to ensure a joined up proactive stance is taken to exert influence over fees charged by IPs and to strengthen this role.**

105. In addition we propose to assist unsecured creditors by ensuring that in future they are provided with better information about fees, both in respect of individual cases and by way of background/contextual information on fees generally. This includes;

- **Working with the profession in order to update and consolidate Statement of Insolvency Practice 9** in order to focus information requirements about fees on what creditors really need in order to assess the reasonableness of fees requested/taken.
- **Produce an information sheet**, similar to that produced by the Australian regulator (Australian Securities and Investments Commission<sup>30</sup>), providing basic information on the role creditors can play in approving and questioning the fees charged by IPs.
- **Internet based information on how to appoint an IP and get involved in negotiating fees, including the best way to obtain competitive quotes.**
- Scope out the feasibility of **publicising comparative fee data by asset size, and possibly by sector, to allow creditors to make a more informed choice.** This would give them a basis on which to question the percentage proposed by the IP. This data would also be useful to assess the effectiveness of the changes to the fee structure that we are proposing. It would also be of assistance to RPBs in their new role of assessing the fairness of IP fees. However the work involved is likely to be labour intensive and costly so we would welcome comments as to how beneficial this information is likely to be to unsecured creditors.

**Q13 Do you believe that publishing information on approving fees, how to appoint an IP, obtain quotes and negotiate fees and comparative fee data by asset size, will assist unsecured creditors to negotiate competitive fee rates?**

### 3. Simplification of fee structure

106. Those that are impacted by insolvency should be able to have confidence that insolvency procedures operate fairly and that IPs deliver the best possible outcome in what are often difficult and challenging circumstances. IPs on the other hand are entitled to receive a fair fee for the work they do. This balance is a difficult one to strike, the very nature of insolvency means that someone is going to lose out and it is the unsecured creditors who usually suffer.
107. A further proposal, which addresses Professor Kempson's recommendation to simplify the fee charging structure to assist unsecured creditors by reducing the necessary oversight, is to **restrict the use of time and rate as a basis for remuneration to cases where there is tight control over the work being done (generally, by either a creditors' committee or secured creditors).** This will ensure that a creditor can have an expectation that fees charged will be based on the value of the work done by the IP, and will more closely align the interests of IPs and unsecured creditors.
108. Over the last few years, culminating in the Insolvency (Amendment) Rules 2010, we have sought to improve the position for unsecured creditors by, for example, lowering the threshold of creditor value required to challenge remuneration from 25% to 10%, or otherwise as the court allows and allowing

<sup>30</sup>[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Approving\\_fees\\_guide\\_for\\_creditors.pdf/\\$file/Approving\\_fees\\_guide\\_for\\_creditors.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Approving_fees_guide_for_creditors.pdf/$file/Approving_fees_guide_for_creditors.pdf)

creditors (5% or more as court allows) the right to requisition further information on receipt of a report. The 2010 amendments also enabled an IP to have more than one basis for remuneration; however, anecdotally, it seems that this option is seldom used.

109. The requirement to set the basis of remuneration, for all insolvency procedures, is set out in the Insolvency Rules 1986. It is common for an IP to seek approval of the basis of his or her remuneration at the first meeting of creditors, but in all cases the basis must be set within 18 months of the appointment. In bankruptcy and compulsory liquidation cases, if the IP fails to get approval by this date, the statutory scale will apply (this is explained in more detail in paragraph 116).

110. At present an IP's remuneration can be set a) on a time-cost basis, b) as a percentage of realisations or c) since 2010, as a fixed fee. It is the IP who proposes which basis they wish to take their remuneration under and the creditors vote on his/her proposal. Professor Kempson found that in the great majority of cases remuneration was taken on a time-cost basis.

111. The Kempson review suggests that consideration be given to the way in which fees are determined in order to simplify the oversight required by unsecured creditors. To do this it is suggested that a radical change to the basis of remuneration is needed by moving to percentage of realisations as the presumed method for setting remuneration. Alternatively, other methods of charging could be allowed, but only for specific aspects of casework, for example using fixed fees for statutory duties and time and rate only for investigation work.

112. It is not intended that the changes proposed below should apply to the fees charged by the Official Receiver which are already set out by regulations. Nor should they apply in the case of an Individual Voluntary Arrangement (IVA) or a Company Voluntary Arrangement (CVA), where IP fees are closely controlled by creditors. They should not apply in the case of Members' Voluntary Liquidation (MVL), where the company is solvent and all creditors are paid in full. In these cases the current Rules will apply.

**Proposal: To restrict time and rate to cases where tight controls exist over fees charged**

113. Having considered the options, we feel that prescribing different methods of charging for different aspects of a case will add even more complexity and will be difficult to define. This proposal is therefore to amend the Insolvency Rules to **require office-holders to take their remuneration either as a percentage of realisations or as a fixed fee in all insolvency cases** with the exception of:

- Cases in which a creditors' committee is established, as these committees oversee the remuneration of the office-holder;
- Cases where secured creditors will not be paid in full and so remain in control of fees. The market works well in this instance so we do not want to interfere with the ability for secured creditors to successfully negotiate down fees. If however it later becomes apparent that secured creditor(s) will be paid in full, at this point office-holders would be required to seek approval from unsecured creditors for the basis and percentage (if relevant) for their remuneration going forward. The basis would need to be either percentage of realisations or fixed fee; or
- IVAs, CVAs, and MVLs.

114. In these excepted cases, the current provisions on setting and agreeing remuneration will apply. That is time and rate, along with percentage of realisations and fixed fee, would be open to office-holders as a basis on which to take their remuneration.

**Q14 Do you think that any further exceptions should apply? For example, if one or two unconnected unsecured creditors make up a simple majority by value?**

115. In all other cases the basis for remuneration will need to be set as either a percentage of realisations or fixed fee and approval of a majority in value of creditors voting, will be required.

116. Where the office-holder seeks to take their remuneration as a percentage of realisations, he or she will be required to get **positive approval from a simple majority (in value) of creditors voting** (that is more than 50%) for the percentage, or a range of different percentages for different assets, that they seek to take. This is the same threshold as is required currently –deemed consent would not be sufficient. Where approval is sought after it becomes apparent that secured creditors will be paid in full, approval is required from a simple majority in value of **unsecured creditors**. The **fall-back position**, for all insolvency procedures where agreement is not reached, would be that the statutory scale, which currently applies to compulsory liquidations and bankruptcies, will apply. This is currently set out in schedule 6 to the Insolvency Rules 1986 (schedule 8 of the draft new rules) and allows an IP to take their remuneration as:

- 20% on the first £5k
- 15% on the next £5k
- 10% on the next £90k and
- 5% on everything above.

An IP can also claim payment for distributing funds to creditors as:

- 10% on the first £5k
- 7.5% on the next £5k
- 5% on the next £90k and
- 2.5% on everything above.

117. We believe that the advantages of this as a basis for remuneration are that:

- It gives creditors tighter control over the amount an IP can charge;
- It ensures that there are funds available for distribution and not all realisations are swallowed up in fees and remuneration;
- It allows creditors to use the statutory scale as a comparison on which to question the percentage the IP is proposing;
- From the outset of a case, creditors will have more idea of the final outcome because they will be able to reasonably assess the IP's remuneration; and
- It encourages the creation of creditor committees.

118. We would retain the option for an IP to take his or her remuneration as a fixed amount. This method provides creditors with certainty at the beginning of the case as to the costs and how much is likely to be available for distribution. This provides transparency and creditors know in advance what they are being charged.

119. These measures should align IP fees and unsecured creditors' interests more closely. Moreover, the measures we are taking to strengthen the regulatory regime generally, especially the introduction of regulatory objectives, will also ensure that the professional bodies will have arrangements in place to tackle excessive fees.
120. Where the IP seeks to take his or her remuneration as a fixed amount, they will be required to seek approval for this basis and the fixed amount as they are required to do so currently. Where the office-holder cannot obtain the agreement of creditors, the fall-back position will again be statutory scale.
121. Office-holders will be able to apply to court where they feel the amount fixed is insufficient or basis fixed inappropriate, but must first show why they consider the amount available under statutory scale is inappropriate or insufficient.
122. The Rules already permit an office-holder to request a review of fees from the creditors where there is a material and substantial change in circumstances and we intend to retain this right.
123. The draft Insolvency Rules amendments required to deliver this policy are set out in Annex A. It is proposed that these changes should come into force as part of the new Insolvency Rules. The proposed amendments will be incorporated into new Rule 17 which relates to remuneration.

**Q15 Do you have any comments on the proposal set out in Annex A to restrict time and rate as a basis of remuneration to cases where there is a creditors committee or where secured creditors will not be paid in full?**

**Q16 What impact do you think the proposed changes to the fee structure will have on IP fees and returns to unsecured creditors?**

**Q17 Do you agree that the proposed changes to basis for remuneration should not apply to company voluntary arrangements, members' voluntary liquidation or individual voluntary arrangements?**

124. Where the basis is set as a percentage of realisations, an alternative approach might be to reverse the default position so that a prescribed scale (not necessarily the current statutory scale) automatically applies. If the office-holder wished to seek further funds from those available through the prescribed scale, then they would need to seek approval from creditors for an increased percentage with an explanation as to why the prescribed scale is not appropriate/sufficient.
125. The prescribed scale would need to be set so that it made it commercially viable for IPs to take cases – this could be done by reference to a median of cases. There would be exceptions, where for example assets are costly to realise, and in such cases the IP could apply to creditors for an alternative percentage(s), but this would be the exception rather than the rule.
126. Such a scale could be determined through discussion and evidence provided by the profession and creditor organisations, but could for example be set as a sliding scale.

127. This would remove the need for creditors to take an active role in proceedings, which we have seen is often lacking in cases, and instead creditors could focus their attention on cases where the IP is seeking permission to draw a higher percentage than that set by the scale.

**Q18 Where the basis is set as a percentage of realisations, do you favour setting a prescribed scale for the amount available to be taken as fees, as the default position with the option of seeking approval from creditors for a variation of that amount?**

**Q19 Is the current statutory scale commercially viable? If not what might a commercial scale, appropriate for the majority of cases, look like and how do you suggest such a scale should be set?**

128. We appreciate that a balance needs to be struck between incentivising IPs to undertake work to identify and realise assets and investigate misconduct and ensuring that fees charged represent value for money for creditors. We have therefore considered whether it would be useful **to allow time and rate in specified circumstances**, for example for investigations into the conduct of directors or individuals, or investigations to uncover realisable assets. However, while we recognise that this would allow IPs to recover costs for more time-consuming and unpredictable work, there is potential for over-charging for these aspects of a case. It would also be very difficult to define what should be covered by investigation work especially in relation to uncovering assets. Allowing time and rate in these circumstances would not remove the uncertainty that currently exists in requiring creditors to approve an hourly rate, without any indication of how long a job will take or what work will be done for that time.

129. Where there is strong support amongst unsecured creditors for such investigation work to be undertaken, and where those creditors would be willing to agree a time and rate basis for the work, the IP has the option of putting together a creditors committee, which will allow an exception to be made.

**Q20 Do you think there are further circumstances in which time and rate should be able to be charged?**

## **Comments or complaints on the conduct of this consultation**

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

John Conway,  
BIS Consultation Co-ordinator,  
1 Victoria Street,  
London  
SW1H 0ET

Telephone John on 020 7215 6402  
or e-mail to: [john.conway@bis.gsi.gov.uk](mailto:john.conway@bis.gsi.gov.uk)

**However if you wish to comment on the specific policy proposals you should contact the responsible policy team (see paragraph 33).**



# Annex A: Draft legislative provisions to implement changes to fee structure

## CHAPTER 3

### Remuneration in administration, winding up and bankruptcy

#### Application of Chapter

**17.13.**—(1) This Chapter applies to the remuneration of—

- (a) administrators,
- (b) liquidators in creditors voluntary windings up or windings up by the court except where the liquidator in a winding up by the court is the official receiver,
- (c) liquidators in members' voluntary windings up where expressly specified (but not otherwise), and
- (d) trustees in bankruptcy except where the trustee is the official receiver.

(2) The rules which by virtue of paragraph (1)(c) apply in members' voluntary windings up are 17.14, 17.15(5) to (8) and (11), 17.17(1), (6) and (7), 17.20, 17.21, 17.22(1)(c), (2), (3), (5) and (7) to (10) and 17.23.

(3) This Chapter does not apply to the remuneration of provisional liquidators or interim receivers.

#### Remuneration: principles

**17.14.**—(1) An administrator, liquidator (including in a members' voluntary winding up) or trustee in bankruptcy is entitled to receive remuneration for services as office-holder.

(2) The basis of remuneration must be fixed in accordance with paragraph (4) where—

- (a) there is no creditors' committee; and
- (b) there is likely to be property to enable a distribution to be made to unsecured creditors other than by virtue of the application of section 176A(2)(a) (prescribed part).

(3) The basis of remuneration must be fixed in accordance with paragraph (5)—

- (a) where there is a creditors' committee;
- (b) where there is insufficient property to enable a distribution to be made to unsecured creditors other than by virtue of the application of section 176A(2)(a); or
- (c) in a members' voluntary winding up.

(4) Where paragraph (2) applies the basis of remuneration must be fixed—

- (a) as a percentage of the value of—
  - (i) the property with which the administrator has to deal, or
  - (ii) the assets which are realised, distributed or both realised and distributed by the liquidator or trustee; or
- (b) as a set amount.

(5) Where paragraph (3) applies the basis of remuneration must be fixed—

- (a) as a percentage of the value of—
  - (i) the property with which the administrator has to deal, or
  - (ii) the assets which are realised, distributed or both realised and distributed by the liquidator or trustee;
- (b) as a set amount; or
- (c) by reference to the time properly given by the office-holder and the office-holder's staff in attending to matters arising in the administration, winding up or bankruptcy or any combination of them; and different bases may be fixed in respect of different things done by the office-holder.

(6) Where the basis of remuneration is fixed as in paragraph (4)(a) or 5(a), different percentages may be fixed in respect of different things done by the office-holder.

(7) The matters to be determined in fixing the basis of remuneration are—

- (a) which of the bases set out in paragraphs (4) or (5) are to be fixed and (where appropriate) in what combination;

- (b) the percentage or percentages (if any) to be fixed under paragraphs (4)(a) or (5)(a);
  - (c) the amount (if any) to be set under paragraph (4)(b) or 5(b).
- (8) In arriving at that determination, regard must be had to the following matters—
- (a) the complexity (or otherwise) of the case;
  - (b) any respects in which, in connection with the company's or bankrupt's affairs, there falls on the office-holder, any responsibility of an exceptional kind or degree;
  - (c) the effectiveness with which the office-holder appears to be carrying out, or to have carried out, the office-holder's duties as such; and
  - (d) the value and nature of the property with which the office-holder has to deal.
- (9) If the office-holder is a solicitor and employs the firm, or any partner in it, to act on behalf of the company, profit costs must not be paid unless expressly authorised in the determination.

### **Remuneration: procedure for initial determination**

**17.15.**—(1) It is for the creditors' committee, subject to paragraph (5), to determine the basis of remuneration (except in a members' voluntary winding up).

(2) If there is no committee or the committee does not make the requisite determination, and—

- (a) in an administration, the case does not fall within paragraph (4); or
  - (b) in a creditors' voluntary winding up or a winding up by the court, subject to paragraph (5);
- the basis and (where appropriate) the percentage of remuneration must be fixed by a resolution of creditors.

(3) In an administration a resolution passed under this rule is invalid if those voting against it include more than half in value of the creditors to whom notice of the meeting was sent and who are not, in the chairman's belief, persons connected with the company.

(4) If the administrator has made a statement under paragraph 52(1)(b) of Schedule B1 and there is no creditors' committee, or the committee does not make the requisite determination, the basis of the administrator's remuneration may be fixed by the approval of—

- (a) each secured creditor of the company; or
- (b) if the administrator has made or intends to make a distribution to preferential creditors—
  - (i) each secured creditor of the company; and
  - (ii) preferential creditors whose debts amount to more than 50% of the preferential debts of the company, disregarding debts of any creditor who does not respond to an invitation to give or withhold approval.

(5) Where—

- (a) a company which is in administration moves into winding up under paragraph 83 of Schedule B1 and the administrator becomes the liquidator, or
- (b) a winding-up order is made immediately upon the appointment of an administrator ceasing to have effect and the court under section 140(1) appoints as liquidator the person whose appointment as administrator has ceased to have effect,

the basis of remuneration fixed under this rule for the administrator is treated as having been fixed for the liquidator, and paragraphs (1) and (2) do not apply.

(6) In a members' voluntary winding up, it is for the company in general meeting to determine the basis of remuneration.

(7) If not fixed as above, the basis of the liquidator's remuneration in a members' voluntary winding up must, on application by the liquidator be fixed by the court.

(8) An application under paragraph (7) may not be made by the liquidator without having first sought fixing of the basis in accordance with paragraph (6) (as the case may be), and in any event may not be made more than 18 months after the date of appointment.

(9) In a members' voluntary winding up, the liquidator must deliver at least 14 days' notice of an application under paragraph (6) to the company's contributories, or such one or more of them as the court may direct; and the contributories may nominate one or more of their number to appear, or be represented, and to be heard on the application.

(10) If, in a winding up or bankruptcy, the basis of remuneration is not fixed as above after the office-holder has requested the creditors to fix the basis and (where appropriate) the percentage in accordance with

paragraph (2) or in any event within 18 months after the date of the office-holder's appointment, office-holder is entitled to such sum as is arrived at (subject to paragraph (11) by—

- (a) applying the realisation scale set out in Schedule 8 to the moneys received by the office-holder from the realisation of the assets of the company or bankrupt (including any Value Added Tax on the realisation but after deducting any sums paid to secured creditors in respect of their securities and any sums spent out of money received in carrying on the business of the company or bankrupt); and
- (b) adding to the sum arrived at under sub-paragraph (a) such sum as is arrived at by applying the distribution scale set out in Schedule 8 to the value of assets distributed to creditors of the company or bankrupt (including payments made in respect of preferential debts) and to contributories.

(11) That part of the trustee's remuneration calculated under paragraph (10) by reference to the realisation scale must not exceed such sum as is arrived at by applying the realisation scale to such part of the bankrupt's assets as are required to pay—

- (a) the bankruptcy debts (including any interest payable by virtue of section 328(4)) to the extent required to be paid by these Rules (ignoring those debts paid otherwise than out of the proceeds of the realisation of the bankrupt's assets or which have been secured to the satisfaction of the court);
- (b) the expenses of the bankruptcy other than—
  - (i) fees or the remuneration of the official receiver; and
  - (ii) any sums spent out of money received in carrying on the business of the bankrupt;
- (c) fees payable by virtue of any order made under section 415; and
- (d) the remuneration of the official receiver.

(12) If, in an administration, the basis of remuneration is not fixed as above after the office-holder has requested the creditors to fix the basis and (where appropriate) the percentage in accordance with paragraph (2) or in any event within 18 months after the date of the office-holder's appointment, office-holder is entitled to such sum as is arrived at by—

- (a) applying the value of the property scale set out in Schedule 8 to the property with which the administrator has to deal after deducting any sums paid to secured creditors in respect of their securities and any sums spent out of money received in carrying on the business of the company and
- (b) adding to the sum arrived at under sub-paragraph (a) such sum as is arrived at by applying the distribution scale set out in Schedule 8 to the value of assets distributed to secured creditors of the company and payments made in respect of preferential debts.

(13) Where a number of persons are appointed as office-holder, it is for them to agree between themselves as to how the remuneration payable should be apportioned; and any dispute arising between them may be referred—

- (a) to the court, for settlement by order; or
- (b) to the creditors' committee, a meeting of creditors or (in a members' voluntary winding up) the company in general meeting, for settlement by resolution.

### **Remuneration: recourse by office-holder to creditors**

**17.16.**—(1) If the basis of—

- (a) the administrator's or trustee's remuneration has been fixed by the creditors' committee, or
- (b) the liquidator's remuneration has been fixed by the creditors' committee, or
- (c) the liquidator's remuneration had, in a case falling within rule 17.15(4), been fixed by the creditors' committee in a preceding administration and the administrator had not subsequently requested an increase under this rule,

and the office-holder considers an amount fixed to be insufficient or basis fixed to be inappropriate, the office-holder may request that the amount be increased or the basis changed by resolution of the creditors.

(2) If the administrator has made a statement under paragraph 52(1)(b) of Schedule B1, the basis of the administrator's remuneration has been fixed by the creditors' committee, and the administrator considers an amount fixed to be insufficient or basis fixed to be inappropriate, the administrator may request that the amount be increased or the basis changed by the approval of—

- (a) each secured creditor of the company; or
- (b) if the administrator has made or intends to make a distribution to preferential creditors—

- (i) each secured creditor of the company; and
- (ii) preferential creditors whose debts amount to more than 50% of the preferential debts of the company, disregarding debts of any creditor who does not respond to an invitation to give or withhold approval.

**Remuneration: recourse by administrator, liquidator or trustee to the court**

**17.17.**—(1) If the basis of—

- (a) the administrator’s remuneration has been fixed—
  - (i) by the creditors' committee, the administrator has requested that the amount be increased or the basis changed by resolution of the creditors, but the creditors have not changed it,
  - (ii) by resolution of the creditors, or
  - (iii) under rule 17.15(12), or
- (b) the liquidator’s remuneration has been fixed—
  - (i) by the creditors’ committee, the liquidator has requested that the amount be increased or the basis changed by resolution of the creditors, but the creditors have not changed it,
  - (ii) by resolution of the creditors,
  - (iii) under rule 17.15(4) or rule 17.15(10), or
  - (iv) in a members’ voluntary winding up, by the company in general meeting, or
- (c) the trustee’s remuneration has been fixed—
  - (i) by the creditors' committee, the trustee has requested that the amount be increased or the basis changed by resolution of the creditors, but the creditors have not changed it, or
  - (ii) by resolution of the creditors, or
  - (iii) under rule 17.17(10),

and the office-holder considers an amount fixed to be insufficient or the basis fixed to be inappropriate, the office-holder may apply to the court for an order increasing the amount or changing the basis.

(2) An application to court must set out why the office-holder considers an amount fixed in accordance with rule 17.15(10) to be insufficient.

(3) If the administrator has made a statement under paragraph 52(1)(b) of Schedule B1, the basis of the administrator's remuneration has been fixed by the approval of creditors in accordance with rule 17.16(2) and the administrator considers an amount fixed to be insufficient or basis fixed to be inappropriate, the administrator may apply to the court for an order increasing the amount or changing the basis.

(4) Where an application is made under paragraph (2), the administrator must deliver notice to each of the creditors whose approval was sought under rule 17.16(2).

(5) The administrator, liquidator (except in a members’ voluntary winding up) or trustee must deliver at least 14 days' notice of the application to the members of the creditors' committee; and the committee may nominate one or more members to appear, or be represented, and to be heard on the application.

(6) If there is no creditors' committee, the office-holder’s notice of the application must (except in a members’ voluntary winding up) be delivered to such one or more of the company's creditors as the court may direct, and those creditors may nominate one or more of their number to appear or be represented.

(7) In a members’ voluntary winding up, the liquidator must deliver at least 14 days' notice of the application to the company’s contributories, or such one or more of them as the court may direct; and the contributories may nominate one or more of their number to appear, or be represented, and to be heard on the application.

(8) The court may, if it appears to be a proper case (including in a members’ voluntary winding up), order the costs of the office-holder’s application, including the costs of any member of the creditors' committee appearing or being represented on it, or of any creditor or contributory so appearing or being represented, to be paid as an expense of the administration or liquidation or out of the estate in the bankruptcy.

**Remuneration: review at request of administrator, liquidator or trustee**

**17.18.**—(1) Where, after the basis of the office-holder’s remuneration has been fixed, there is a material and substantial change in the circumstances which were taken into account in fixing it, the office-holder may request that it be changed.

(2) The request must be made—

- (a) where the creditors' committee fixed the basis, to the committee;

- (b) where the creditors fixed the basis, to the creditors;
- (c) where the court fixed the basis, by application to the court;
- (d) where the remuneration was determined under rule 17.15(10) or rule 17.15(10), to the liquidation or creditors' committee if there is one and otherwise to the creditors;

and the preceding provisions of this Chapter apply as appropriate.

(3) Where rule 17.6 is applied in accordance with paragraph (2), ignore the words in paragraph (1)(c) of that rule, "and the administrator had not subsequently requested an increase under this Rule".

(4) Any change in the basis for remuneration applies from the date of the request under paragraph (2) and not for any earlier period.

**Remuneration: review where assets subsequently become available for distribution to unsecured creditors**

**17.19.**—(1) Where—

- (a) the office-holder's remuneration has been fixed in accordance with rule 17.14(3) on the basis that there is insufficient property to enable a distribution to be made to unsecured creditors other than by virtue of the application of section 176A(2)(a); and
- (b) the office-holder becomes aware or ought to have become aware that there is likely to be property to enable a distribution to be made to unsecured creditors other than by virtue of the application of section 176A(2)(a)

the office-holder must request that the unsecured creditors fix the basis of remuneration in accordance with paragraph (2).

(2) The basis and (where appropriate) the percentage of remuneration must be fixed by a resolution of unsecured creditors —

- (a) as a percentage of the value of—
  - (i) the property with which the administrator has to deal, or
  - (ii) the assets which are realised, distributed or both realised and distributed by the liquidator or trustee; or
- (b) as a set amount.

and the preceding provisions of this Chapter apply as appropriate.

(3) The basis of remuneration fixed under paragraph (2) will be treated as having been fixed from the date that the office-holder becomes aware or ought to have become aware that there is likely to be property to enable a distribution to be made to unsecured creditors other than by virtue of the application of section 176A(2)(a).

**Remuneration: new administrator, liquidator or trustee**

**17.20.** If a new administrator, liquidator (including in a members' voluntary winding up) or trustee is appointed in place of another, any determination, resolution or court order in effect under the preceding provisions of this Chapter immediately before the former office-holder ceased to hold office continues to apply in relation to the remuneration of the new office-holder until a further determination, resolution or court order is made in accordance with those provisions.

**Remuneration: apportionment of set fees**

**17.21.**—(1) In a case (including in a members' voluntary winding up) in which the basis of the office-holder's remuneration is a set amount under rule 17.14(4)(b) or (5)(b) and the former office-holder ceases (for whatever reason) to hold office before the time has elapsed or the work has been completed in respect of which the amount was set, application may be made for determination of what portion of the amount should be paid to the former office-holder or the former office-holder's personal representative in respect of the time which has actually elapsed or the work which has actually been done.

(2) Application may be made—

- (a) by the former office-holder or the former office-holder's personal representative within the period of 28 days beginning with the date upon which the former office-holder ceased to hold office, or
- (b) by the office-holder for the time being in office if the former office-holder or the former office-holder's personal representative has not applied by the end of that period.

(3) Application must be made—

- (a) where the creditors' committee fixed the basis, to the committee;
- (b) where the creditors fixed the basis, to the creditors for a resolution determining the portion;
- (c) where the company in general meeting fixed the basis, to the company for a resolution determining the portion;
- (d) where the court fixed the basis, to the court for an order determining the portion.

(4) The applicant must deliver a copy of the application to the office-holder for the time being or to the former office-holder or the former office-holder's personal representative, as the case may be ("the recipient").

(5) The recipient may, within 21 days of receipt of the copy of the application, deliver notice of intent to—

- (a) make representations to—
  - (i) the creditors' committee,
  - (ii) the creditors, or
  - (iii) the company in general meeting, or
- (b) appear or be represented before the court, as the case may be.

(6) No determination may be made upon the application until expiry of the 21 days referred to in paragraph (5) or, if the recipient does deliver notice of intent in accordance with that paragraph, until the recipient has been afforded the opportunity to make representations or to appear or be represented, as the case may be.

(7) If the former office-holder or the former office-holder's personal representative (whether or not the original applicant) considers that the portion determined upon application to the creditors' or committee or the creditors is insufficient, that person may apply—

- (a) in the case of a determination by the committee, to the creditors for a resolution increasing the portion;
- (b) in the case of a resolution of—
  - (i) the creditors (whether under paragraph (3)(b) or under sub-paragraph (a)), or
  - (ii) the company in general meeting,
 to the court for an order increasing the portion;  
 and paragraphs (4) to (6) apply as appropriate.

**Creditors', members' or bankrupt's claim that remuneration is, or other expenses are, excessive**

**17.22.**—(1) The following may apply to the court for one or more of the orders in paragraph (9)—

- (a) a secured creditor,
- (b) an unsecured creditor with either—
  - (i) the concurrence of at least 10% in value of the unsecured creditors (including that creditor), or
  - (ii) the permission of the court, or
- (c) in a members' voluntary winding up—
  - (i) members of the company with at least 10% of the total voting rights of all the members having the right to vote at general meetings of the company, or
  - (ii) a member of the company with the permission of the court,
- (d) the bankrupt.

(2) An application may be made on the grounds that—

- (a) the remuneration charged by the office-holder,
- (b) the basis fixed for the office-holder's remuneration under rule 1.2 and 1.3, or
- (c) expenses incurred by the office-holder,

is or are, in all the circumstances, excessive or, in the case of an application under sub-paragraph (b), inappropriate.

(3) The application by a creditor or member must be made no later than eight weeks (or, in a case falling within rules [1986 4.108, 4.142 or 6.126], four weeks) after receipt by the applicant of the progress report, or the final report under rule 17.11 or 17.12 which first reports the charging of the remuneration or the incurring of the expenses in question ("the relevant report").

(4) Application by the bankrupt may be made only on one or both of the grounds in paragraph (2)(a) and (c) and no later than—

- (a) eight weeks after receipt by the bankrupt of the report under rule 17.12, or
- (b) in a case falling within rule 17.12, four weeks after receipt by the bankrupt of notice under rule [1986 6.126(1C)].

(5) If the court thinks that no sufficient cause is shown for a reduction, it must deliver to the applicant notice to that effect; and—

- (a) if, within five business days of delivery of that notice, the applicant applies to the court to fix a venue for a hearing, without notice to any other party, as to whether sufficient cause is shown, the court will do so; but
- (b) if the applicant does not deliver notice in accordance with sub-paragraph (a), the court may dismiss the application without a hearing.

(6) The bankrupt may only make an application with the permission of the court.

(7) Without prejudice to the generality of the matters which the court may take into account, permission must not be given unless the bankrupt shows that there is (or would be but for the remuneration or expenses in question), or that it is likely that there will be (or would be but for the remuneration or expenses in question), a surplus of assets to which the bankrupt would be entitled.

(8) The court must fix a venue for the application to be heard, and deliver notice to the applicant if—

- (a) the application is not dismissed—
  - (i) after a hearing under paragraph (5)(a), or
  - (ii) without a hearing in accordance with paragraph (5)(b), or
- (b) the bankrupt is given permission under paragraph (6).

(9) The venue must be not less than 28 days after delivery to the applicant of the notice under paragraph (7).

(10) The applicant must, at least 14 days before the hearing, deliver to the office-holder a notice stating the venue and accompanied by a copy of the application and of any evidence which the applicant intends to provide in support of it.

(11) If the court considers the application to be well-founded, it must make one or more of the following orders—

- (a) an order reducing the amount of remuneration which the office-holder is entitled to charge;
- (b) an order reducing any fixed amount;
- (c) an order changing the basis of remuneration;
- (d) an order that some or all of the remuneration or expenses in question be treated as not being expenses of the administration or winding up or bankruptcy expenses;
- (e) an order that—
  - (i) the administrator or liquidator or the administrator's or liquidator's personal representative pay to the company, or
  - (ii) the trustee or the trustee's personal representative pay to such person as the court may specify as property comprised in the bankrupt's estate,

the amount of the excess of remuneration or expenses or such part of the excess as the court may specify;

and may make any other order that it thinks just; but an order under sub-paragraph (b) or (c) may be made only in respect of periods after the period covered by the relevant report.

(12) Unless the court orders otherwise under paragraph (11), the costs of the application must be paid by the applicant, and are not payable as an expense of the administration or as winding up or bankruptcy expenses.

(13) The court may order that the costs may be payable by the applicant, by the respondent or as an expense.

### **Remuneration in winding up and bankruptcy where assets realised on behalf of charge holder**

**17.23.—**(1) A liquidator (including in a members' voluntary winding up) or trustee who realises assets on behalf of a secured creditor is entitled to such sum by way of remuneration as is arrived at—

- (a) in—
  - (i) a winding up where the assets are subject to a charge which when created was a mortgage or a fixed charge, or

- (ii) a bankruptcy,
- (b) by applying the realisation scale set out in Schedule 8 to the moneys received by the liquidator or trustee in respect of the assets realised (including any sums received in respect of Value Added Tax on the realisation but after deducting any sums spent out of money received in carrying on the business of the company or bankrupt);
- (c) a winding up where the assets realised are subject to a charge which when created was a floating charge, by—
  - (i) applying the realisation scale set out in Schedule 8 to moneys received by the liquidator from the realisation of those assets (including any Value Added Tax on the realisation but ignoring any sums received which are spent in carrying on the business of the company); and
  - (ii) adding to the sum arrived at under sub-paragraph (a) such sum as is arrived at by applying the distribution scale set out in Schedule 8 to the value of the assets distributed to the holder of the charge and payments made in respect of preferential debts.

(2) The sum to which the liquidator or trustee is entitled must be taken out of the proceeds of the realisation.

### Voting on remuneration

**17.24.** Where a resolution is proposed in an insolvent or compulsory winding up or bankruptcy which affects a person in relation to that person's remuneration or conduct as liquidator or trustee (actual, proposed or former), that person and the partners and employees of that person must not vote on it, whether as creditor, contributory, proxy-holder or corporate representative, except so far as permitted by rule 15.42.

## SCHEDULE 1

Ref Rule 17.15(10)

### Determination of insolvency office-holder's remuneration

**This table sets out the realisation and distribution scales for determining the remuneration of liquidators and trustees.**

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*The realisation scale*

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on the first £5,000	20%
on the next £5,000	15%
on the next £90,000	10%
on all further sums realised	5%

*The distribution scale*

on the first £5,000	10%
on the next £5,000	7.5%
on the next £90,000	5%
on all further sums distributed	2.5%.

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**This table sets out the valuation and distribution scales for determining the remuneration of administrators.**

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*Value of the property with which the administrator has to deal*

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on the first £5,000	20%
on the next £5,000	15%
on the next £90,000	10%
on all further sums realised	5%

*The distribution scale*

on the first £5,000	10%
on the next £5,000	7.5%
on the next £90,000	5%
on all further sums distributed	2.5%.

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## Annex B: List of consultation questions

### Part 1 – Regulation of Insolvency Practitioners

- Q1. Are the proposed regulatory objectives and the requirements for RPBs to reflect them appropriate for the insolvency regulatory regime?
- Q2. Do you have any comments on the proposed procedure for revoking the recognition of an RPB?
- Q3. Do you have any comments on the proposed scope and procedures for the Secretary of State to issue a direction to an RPB?
- Q4. Do you have any comments on the proposed scope and procedures for the Secretary of State to impose a financial penalty on an RPB?
- Q5. Do you have any comments on the proposed scope and procedures for the Secretary of State to publicly reprimand an RPB?
- Q6. Do you agree with the proposed arrangements for RPBs making representations?
- Q7. Do you have any comments on the proposed procedure for the Secretary of State to be able to apply to Court to impose a sanction directly on an IP in exceptional circumstances?
- Q8. Do you have any comments about the proposed procedure for the Secretary of State to require information and the people from whom information may be required?
- Q9. Do you agree with the proposal to provide a reserve power for the Secretary of State to designate a single insolvency regulator?
- Q10. Do you have any comments on the proposed functions and powers of a single regulator?

### Part 2 – Insolvency Practitioner fee regime

- Q11. Do you agree with the assessment of the costs associated with fee complaints being reviewed by RPBs?
- Q12. Do you agree that by adding IP fees representing value for money to the regulatory framework, greater compliance monitoring, oversight and complaint handling of fees can be delivered by the regulators?
- Q13. Do you believe that publishing information on approving fees, how to appoint an IP, obtain quotes and negotiate fees and comparative fee data by asset size, will assist unsecured creditors to negotiate competitive fee rates?
- Q14. Do you think that any further exceptions should apply? For example, if one or two unconnected unsecured creditors make up a simple majority by value?

- Q15. Do you have any comments on the proposal set out in Annex A to restrict time and rate as a basis of remuneration to cases where there is a creditors committee or where secured creditors will not be paid in full?
- Q16. What impact do you think the proposed changes to the fee structure will have on IP fees and returns to unsecured creditors?
- Q17. Do you agree that the proposed changes to basis for remuneration should not apply to company voluntary arrangements, members' voluntary liquidation or individual voluntary arrangements?
- Q18. Where the basis is set as a percentage of realisations, do you favour setting a prescribed scale for the amount available to be taken as fees, as the default position with the option of seeking approval from creditors for a variation of that amount?
- Q19. Is the current statutory scale commercially viable? If not what might a commercial scale, appropriate for the majority of cases, look like and how do you suggest such a scale should be set?
- Q20. Do you think there are further circumstances in which time and rate should be able to be charged?

**Impact Assessment questions:**

- Q21. Do you agree with this estimation for familiarisation costs for the changes to the fee structure?
- Q22. As a secured creditor, how much time/cost do you anticipate these changes will require in order to familiarise yourself with the new fee structure?
- Q23. To what extent do you expect the new fee structure to reduce the current level of overpayment?
- Q24. Do you agree with the assessment that the requirement to seek approval of creditors for the percentage of assets against which remuneration will be taken, will not add any additional costs?
- Q25. Do you agree with these assumptions? Do you have any data to support how the changes to the fee structure will impact on the fees currently charged?
- Q26. Do you agree or disagree in adding a weight in the relative costs and benefits to IPs and unsecured creditors? If you agree, what would the weight be?
- Q27. Do consultees believe these measures will improve the market confidence?
- Q28. Do consultees believe these measures will improve the reputation of the insolvency profession?

## **Annex C: Consultation Principles**

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

<http://www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf>