Index of Insolvency Practitioner Regulation and Fee Structure Consultation Responses

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Insolvency Law Committee response to the Insolvency Service consultation on strengthening the regulatory regime and fee structure for insolvency practitioners

The City of London Law Society ("**CLLS**") represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This response, in respect of the Insolvency Service consultation on strengthening the regulatory regime and fee structure for insolvency practitioners (the "**Consultation**") has been prepared by the CLLS Insolvency Law Committee.

Whilst the Committee welcomes the opportunity to respond to the Consultation, law firms may not be best placed to provide detailed comments on all of the points raised and we have not therefore responded on all points.

As a general comment, the Committee is of the view that the measures proposed in relation to insolvency practitioner fees are unlikely to improve market confidence or the reputation of the insolvency profession and may in fact discourage insolvency practitioners from taking appointments which may leave creditors in a worse position, for example where work currently undertaken by small practitioners is no longer economic.

Yours sincerely

Hamish Anderson
Chair of CLLS Insolvency Law Committee

31 March 2014

THE CITY OF LONDON LAW SOCIETY
INSOLVENCY LAW COMMITTEE

Individuals and firms represented on this Committee are as follows:

Hamish Anderson (Norton Rose Fulbright LLP) (Chairman)

C. Balmond (Freshfields Bruckhaus Deringer LLP)
G. Boothman (Ashurst LLP)
T. Bugg (Linklaters LLP)
A. Cohen (Clifford Chance LLP)
B. Klinger (Sidley Austin LLP)
J. Bannister (Hogan Lovells International LLP)
S. Frith (Stephenson Harwood)
S. Gale (Herbert Smith Freehills LLP)
I. Johnson (Slaughter and May)
B. Larkin (Berwin Leighton Paisner LLP)
D. McCahill (Skadden Arps Slate Meagher & Flom (UK) LLP)
Ms J. Marshall (Allen & Overy LLP) (Deputy Chairman)
B. Nurse (Dentons UKMEA LLP)
J.H.D. Roome (Bingham McCutchen LLP)
P. Wiltshire (CMS Cameron McKenna LLP)
M. Woollard (King & Wood Mallesons SJ Berwin)

Working party members for this consultation:

Jennifer Marshall
Byron Nurse
Ian Johnson
Stuart Frith

PART 1. COMMENTS ON SPECIFIC QUESTIONS RAISED IN THE CONSULTATION PAPER - REGULATION OF INSOLVENCY PRACTITIONERS

Question number	Question	Comment
1.	Are the proposed regulatory objectives and the requirements for RPBs to reflect them appropriate for the insolvency regulatory regime?	We welcome the Insolvency Service taking an active role, provided lack of resources does not lead to delays. We welcome generally the regulation of insolvency practitioners being aligned to that of the legal profession.
2.	Do you have any comments on the proposed procedure for revoking the recognition of an RPB?	As identified in the consultation, there will need to be a period of time factored in to pass cases over and this may impact on the overall cost of an insolvency procedure.
3.	Do you have any comments on the proposed scope and procedures for the Secretary of State to issue a direction to an RPB?	
4.	Do you have any comments on the proposed scope and procedures for the Secretary of State to impose a financial penalty on an RPB?	
5.	Do you have any comments on the proposed scope and procedures for the Secretary of State to publicly reprimand an RPB?	
6.	Do you agree with the proposed arrangements for RPBs making representations?	
7.	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?	Sanction from the RPB should be sufficient.
8.	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	

Question number	Question	Comment
	required?	
9.	Do you agree with the proposal to provide a reserve power for the Secretary of State to designate a single insolvency regulator?	This proposal is fine for now as it is subject in any event to further consultation at the time, and best considered in light of developments at that stage. Obviously the revocation powers would need to be amended/removed if there was to be only one regulator.
10.	Do you have any comments on the proposed functions and powers of a single regulator?	

PART 2 - COMMENTS ON SPECIFIC QUESTIONS RAISED IN THE CONSULTATION PAPER - INSOLVENCY PRACTITIONER FEE REGIME

11.	Do you agree with the assessment of the costs associated with fee complaints being reviewed by RPBs?	We welcome the idea of an RPB being a check and balance.
12.	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?	Yes
13.	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?	It is desirable to share information and introduce measures to increase creditor understanding, but this does not follow that this will give creditors greater bargaining power. The use of websites to share information is to be encouraged to save costs.
14.	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?	Yes. The imposition of a fixed fee or percentage of realisations fee will not, in our view, serve creditors in many cases.
15.	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	Creditors' committees cost money and take time which may impact on the success of certain insolvency procedures. See comments above and below: arbitrary measures will lead either to over-

Question number	Question	Comment
	secured creditors will not be paid in full?	estimating or under-performing.
16.	What impact do you think the proposed changes to the fee structure will have on IP fees and returns to unsecured creditors?	Fixed fees will be larger on big cases to take account of unknown variables or may not be undertaken by larger firms, which could impact on quality/lack of relevant expertise and be unnecessarily inflexible. It could also see a marked rise in pre-packs instead of trading insolvencies because the costs of pre-packs may be perceived to be easier to estimate/fix at the outset. IPs may be forced to make decisions based on cost/time not return for creditors. New proposed rule 17.14(6) which gives the ability to fix different percentages for different types of work, so for example some tasks may be outsourced.
17.	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?	Yes CVAs and IVAs seem to lend themselves (perhaps even better) to fixed fee arrangements. Members' voluntary liquidation makes sense in theory (because of solvency) but when a members voluntary liquidation converts into a creditors voluntary liquidation, we assume the new Rules will apply to that part of the process.
18.	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?	We do not agree with the sliding percentage scale which decreases based on the size of assets/realisations. This could act as a disincentive to take on larger/more complicated cases and make more realisations. In general it could lead to fees disproportionate to the work done (particularly in smaller cases).
19.	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?	
20.	Do you think there are further circumstances in which time and rate should be able to be charged?	Yes. Fixed or percentage fees lend themselves to routine matters (e.g. realising assets) but not other circumstances E.g. the fees involved in a) defending vexatious litigation/claims (in particular in English appointments over foreign companies) b) defending ROT claims. We are concerned that court sanction to proceed on many matters not currently requiring

Question number	Question	Comment
		sanction will be necessary just to get fees agreed.

Impact Assessment questions:

21.	Do you agree with this estimation for familiarisation costs for the changes to the fee structure?	
22.	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?	
23.	To what extent do you expect the new fee structure to reduce the current level of overpayment?	Not in larger cases.
24.	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?	
25.	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?	
26.	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?	
27.	Do consultees believe these measures will improve the market confidence?	No
28.	Do consultees believe these measures will improve the reputation of the insolvency profession?	No

COMMENTS ON DRAFT RULE 17

New rule	Comment
17.13	(b) should be amended to state "liquidators in **a** creditors' voluntary winding up or **a** winding up by the court" to keep consistency with the rest of the rules and avoid a cumbersome plural (c) should be amended similarly "liquidators in a members' voluntary winding up"
17.14(1)	Amend ending to "receive remuneration for **their** services as **an** office holder"
17.14(7)	There are a lot of variables to consider in arriving at the basis for fixing remuneration. Setting them out is helpful.
17.15(5)	Particularly in larger cases it is going to be difficult to fix remuneration for an administration and a subsequent liquidation at the outset.
17.15(8)	We do not understand the rationale for the time limit imposed on making an application to court to fix remuneration.
17.15(10-12)	It is useful to have a fall back position should remuneration not be agreed.
17.16(2)	Third line there should be a "the" added before the word basis.
17.17	Whilst it is important for an office holder to have ultimate recourse to the court if it is not happy with the basis of remuneration, this could prove a considerable drain on court time. The cost should be an expense as per 17.17(8) but this will obviously impact on returns to creditors generally.
17.21(7)	We believe this should read "upon application to the creditors' committee or the creditors".

Steve.Spong

From: Peter Tutton <Peter.Tutton@stepchange.org>
Sent: 28 March 2014 18:34
To: Sam.Roberts
Subject: RE: Consultation on Strengthening the Regulatory Regime and Fee Structure for Insolvency Practitioners

Hello Sam

Hope all is well with you.

We tried to put together a supporting comment for this consultation – but alas we couldn't get our heads round the top lines quick enough to respond in time.

In terms of the consultation response itself, I'm afraid that we have not had time to either put in to our clients or to respond to the consultation in a formal and detailed way .

However can I give you a couple of quick comments which hopefully might help you a bit:

On the regulatory objectives – these seem appropriate. However:

- it is not entirely clear what protecting and promoting the public interest might cover. Should this be defined more clearly , perhaps in terms of four key aims: ensuring the integrity of the insolvency profession, maintaining public trust in insolvency, protecting financially vulnerable firms and individuals and maximising returns to creditors.
- We note that the principles require regulators to both consider the interests of creditors and maximise returns to creditors, but there is nothing there equally explicit about fair treatment of consumers, which is surprising given that RPB's are overseeing a mass consumer IVA market.
- The principles are fairly abstract with not many 'doing words' for the regulator – could there be more reference to prevention of problems and specific special mention of consumers and small creditors with respect to fair treatment
- Could the principle of fees go further than value for money (value for money for who?) – maybe say something about fees not being disproportionate to debts or assets on levied in a way that is unfair to debtors or small creditors

On the reserve power for a single regulator: We would tend to agree with Professor Kempson that the structure should move to a single regulator to increase clarity and regulatory effectiveness. We see no particular reason why this should be particularly difficult to achieve for a fairly compact industry. We would also contrast the IVA sector to the DMP sector that is about to come under a single, well equipped regulator with a clear set of regulatory objectives. We are concerned that the relatively weaker IP regulatory regime may create an opportunity for regulatory arbitrage.

However we accept that the Government may prefer an evolutionary approach and so a reserve power is a welcome step forward. But we would be concerned should the reserve power become lost in the long grass of passing time. Therefore we would ask the Insolvency Service to include with the reserve power a commitment (enshrined in the legislation) to regularly review (every year or two years perhaps) the need to implement the power until it is implemented.

We have not had time to reflect deeply on fees. A main concern here is with the problem identified by Professor Kempson whereby people made bankrupt for relatively small debts can face disproportionately large IP fees. Is the Insolvency Service confident that these proposals will resolve this problem? Should the settlement of fees (whether fixed fee or % realisation) include some provision that the fees must be reasonable and not disproportionate to the level of the debt.

Sorry that this is a short note rather than a detailed consultation response. Hopefully it might help you a bit. As ever I'm happy to talk if there is anything useful I can add.

Best wishes

Peter

PS – would it be possible to catch up again soon on DRO authorised intermediary costs – the situation is beginning to get critical in terms of our need to address this issue.

Peter Tutton
Head of Policy

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From: Sam.Roberts [mailto:Sam.Roberts@insolvency.gsi.gov.uk]
Sent: 17 February 2014 11:22
To: Peter Tutton
Subject: FW: Consultation on Strengthening the Regulatory Regime and Fee Structure for Insolvency Practitioners

Peter – in case you haven't received it yet. There will also be a link to a survey monkey option for responses (just on fee aspects) – that may be easier for your clients?

Kind regards

Sam

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From: Policy.Unit
Sent: 17 February 2014 11:03
Subject: Consultation on Strengthening the Regulatory Regime and Fee Structure for Insolvency Practitioners

Dear Recipient

I am writing to inform you that today our Minister, Jenny Willott, has launched a consultation on strengthening the regulatory framework and fee structure for Insolvency Practitioners ("IPs"). This consultation builds on earlier consultations, following the Office of Fair Trading (OFT) market study into corporate insolvency in 2010,[1] and is in response to Professor Elaine Kempsons' review of IP fees[2], published in July 2013.

The very nature of insolvency means that some people will not recover all that they are owed but what is important is that creditors have confidence that they will recover the maximum amount possible under the circumstances. Both the OFT and Professor Kempsons' report conclude that there is clear evidence of the difficulty unsecured creditors face in controlling fees, which can result in over-charging in some circumstances. Both reports highlight the need to strengthen the regulatory framework in this area.

Part 1 of the consultation sets out measures to strengthen the regulatory framework 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. These measures will bring the regulation of IPs into line with other regulatory systems, such as for auditors.

Consultation questions responses:

11. Yes
12. No, it will only add a further layer to costs, and the justification for them will escalate the work involved disproportionately.
13. No.
14. No.
15. No.
16. IP fees will be rendered unviable. Returns to unsecured creditors will suffer as no one will want to take on the smaller cases.
17. Yes.
18. It might be viable if it reflected reality – all of these added layers of regulation add considerably to the unavoidable costs of compliance. Suggest say that the first £10,000 should be available 100%, maybe £10,000 to £30,000 at 50% etc.
19. The current statutory scale is not commercially viable for small cases – see 18 above. I suggest as 18 for a scale with regular appraisals of rates. It is hard not to notice that the OR's office (in NI at any rate) is adopting this kind of approach at the expense of the funds available for everyone else including the IP! The IP is not subsidised like the OR is.
20.

Other comments:

When taking a case we are often unable to assess how difficult or easy a job will be. Difficult to set a fixed fee in those circumstances.

I often write off fees due to lack of funds or to ensure creditors get something back. We are unable to resign easily and must continue to deal with the baby and its soiled nappy (so to speak) as we have adopted it!

The creditors actually have the option to challenge the level of fees under the current rules.

I am of the opinion that a reported difference of 9% in fee levels between Bank work and Unsecured work is reflective more of how <u>well</u> the current system of fees reporting and agreement is working, rather than how badly it works. While the 9% may be statistically significant, it is quite remarkably small, given the fundamentally different parameters involved between the two kinds of work.

The Secretary of State fees are often greater than the IP's fees and they are taken in priority to other fees and expenses.

By fixing a charge structure, the work of an IP will just be a commodity and will fall into the hands of the process-driven IVA factories. Smaller firms will be driven out of business. Competition will be reduced.

Edward Walsh, Chartered Accountant & Licensed Insolvency Practitioner, Edward Walsh Corporate Services Limited

CHARTERED ACCOUNTANTS REGULATORY BOARD

Response to The Insolvency Service Consultation Paper entitled "Strengthening the regulatory regime and fee structure for insolvency practitioners"

28 March 2014

carb
Chartered Accountants
Regulatory Board

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Part A Executive Summary

The Chartered Accountants Regulatory Board (CARB) was established in 2007, under the Bye-laws of the Chartered Accountants Ireland (the Institute), to regulate Institute members (including Insolvency Practitioners (IPs)) and member firms independently, transparently and in the public interest. As a demonstration of independence the Board of CARB and its regulatory and disciplinary committees are made up of a majority of persons who are not members of the Institute.

CARB is committed to fair and proportionate regulation, operating in the public interest and has set out its strategy in the Regulatory Strategy 2011-2015 and the Operating Plan 2014; these are available at www.carb.ie.

CARB welcomes the opportunity to comment on this Consultation Paper issued by the Insolvency Service on behalf of the Department of Business, Innovation and Skills. We have been pleased to engage with the Insolvency Service (GB) and other interested parties in recent months; this has understandably assisted us in forming the opinions expressed in this submission.

In forming our opinions and presenting our proposals, CARB is mindful of a number of important factors which we believe should influence the manner in which the regulatory structure should be strengthened. These are:

1. The proposals should be consistent with the Regulators Code (as recently updated). This will ensure that changes to the current regulatory environment will be efficient, effective and proportionate and will ensure that the burden of regulation is not so disproportionate as to stifle economic development.
2. CARB authorises the majority of IPs in Northern Ireland and we are disappointed to read that "none of the proposals in this consultation document would apply in Northern Ireland'. We strongly recommend that constructive dialogue occurs between the Insolvency Service (GB) and Insolvency Service (NI). We would want to avoid any developments that would only benefit the regulatory regime in GB as happened with the Complaints Gateway, the Northern Irish IPs are paying for a facility that does not review the complaints generated under Northern Irish insolvency legislation which would be almost the entirety of our complaints. The roles of these bodies should be consistent as IPs are authorised to act within both jurisdictions; inconsistency within the regulatory regime would be undesirable.
3. Where matters need to be addressed by legislation this should be as high level as possible to ensure the law is sufficiently flexible and adaptable to future changes in the regulatory environment and evolves with ever changing best practice. In this regard it is highly desirable that when matters are included in legislation that they are clear and concise and not open to ambiguous interpretation.

In order to assist the Insolvency Service (GB) we have made a number of overarching comments in Part B together with more detailed commentary to questions 1-10 posed in the Consultation Paper in Part C.

We are happy to discuss any comments or proposals contained in this submission and to provide any further appropriate assistance you consider necessary.

Yours sincerely

Heather Briers

HEATHER BRIERS
DIRECTOR
CHARTERED ACCOUNTANTS REGULATORY BOARD

Part B Overarching Comments on the Consultation

1. Oversight Body

CARB recognises the significant value to the public of ensuring that there is robust supervision of the regulatory responsibilities of the RPBs. However there are many ways that this can be achieved with a wide range of complexity and associated costs.

We believe that the oversight body will play a fundamental role in promoting trust in the quality of the insolvency profession through independent oversight in the public interest.

However, we have concerns that the Insolvency Service has expressed its desire to adopt the regulatory framework of the Legal Services Board (LSB) or the Financial Reporting Council (FRC).

Firstly, the role of the FRC derives initially from a European Directive. Such a structure was not created from a six week consultation period. The FRC has an income from the accountancy bodies of £4.7m, but total income of £21.6m derived from various stakeholders (taken from FRC Annual Report 2011/12). The regulated population with the FRC's regime is significantly larger than the IP population as it comprises statutory auditors and members in public interest entities.

In contrast, there are approximately 1,735 IPs within the current insolvency regime. The Insolvency Service GB receives £300 per IP for 2014. We do support enhanced powers for the independent oversight body but in our opinion there may be a more cost effective way of achieving this. Many of the proposals referred to within this Consultation will lead to increased costs which will inevitably be passed on to the IP. It is important that the cost implications for the IP are properly considered before any decisions are taken.

Secondly, as previously stated, we support in principle the Insolvency Service becoming an independent oversight body and we understood that this was the desire of the Insolvency Service (GB). However, the proposal for the Secretary of State to be able to apply to Court to impose a sanction directly on an IP in exceptional circumstances, brings the Insolvency Service within the function of a regulator. We have previously expressed our concern if the oversight body performs the dual function of oversight body and regulator. We have discussed this further in our response to question 7 in Part C.

2. Package of Reforms

In response to your previous consultation entitled 'Reforming the Regulatory Framework for Insolvency Practitioners', the Insolvency Service (GB) and the RBPs discussed in May 2012 a detailed package of reforms including the following:

- Common Sanctions Guidance;
- Common Independent Reviewers;
- Common Appeal Chairperson;
- Publicity;
- Complaints Gateway;
- Quantum of fee complaints.

It is disappointing to read about the proposal for a Single Regulator within this Consultation at a stage when certain reforms have yet to be implemented and with those currently in place it is too soon to measure their success or otherwise. It raises the question what was the purpose of this package of reforms if the Insolvency Service (GB) has already decided failure before completion.

3. <u>Insolvency Fee Disputes</u>

Part 2 of the Consultation entitled 'Insolvency Practitioner Fee Regime' relies heavily on the OFT Report and Kempson Report.

The major issue in the OFT report appears to relate to complaints about fees, generally, but not exclusively, to the quantum of fees and the difference in the fees charged to the secured and unsecured creditors. The fee rate charged to the unsecured creditors, who do not have the advantage of the discounts agreed with the secured creditors, is generally higher.

As we have previously stated a problem which has been not fully addressed yet by relevant parties is the lack of involvement of the unsecured creditor in the process.

It is also worthy of note that although HMRC no longer has preferential status, our experience in Northern Ireland is that they do not participate in the process. If such a sizeable Government unsecured creditor does not see the value in being involved, then what is the incentive for the others?

We believe that an important issue to be addressed is seeking a way to involve the unsecured creditors in the fee approval process. Whilst we understand that the culture is that they do not get involved, we feel it is essential that everyone plays their role in the process.

We agree that the current court process is costly and slow and hence not attractive to creditors. However in our opinion the Court is the proper arena for fee disputes to be settled. Therefore thought should be given to addressing this problem not creating a whole new structure with a new set of problems. The Insolvency Service (GB) and Insolvency Service (NI) should consider the development of proposals to ensure the fast tracking of fee disputes through the court process at minimal cost. In addition, we support the development of a joint Alternative Dispute Resolution (ADR) regime as a first phase for dealing with insolvency fee disputes.

CARB is not responding directly to the questions posed in Part 2 of the Consultation on the proposals relating to the quantum of fees as these questions have been answered by our colleagues within the Institute's Insolvency Technical Committee and we fully support those comments.

Part C Responses to Specific Questions

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

We support the introduction of regulatory objectives for the regulatory regime. We agree that the oversight body should have responsibility for delivering high level standards and identifying objectives necessary to meet the public needs and welcome the inclusion of regulatory objectives within this Consultation.

However, these objectives as currently drafted require significant clarification as discussed below.

Firstly, fulfilling the objectives appears to be used throughout the Consultation as the 'benchmark' to be achieved by all RPBs; and failure to achieve the 'benchmark' is the justification for further action by the Insolvency Service.

With this in mind, the objectives should be drafted as SMART objectives:

- Specific;
- Measurable;
- Achievable;
- Realistic and Relevant;
- Time based.

The Insolvency Service should also provide detailed guidance as to what is required of the RPB to demonstrate acting in a manner compatible with the regulatory objectives.

Objective 1:

The term 'public interest' may be interpreted in many ways. Guidance as to what is meant by this term should be developed to ensure a consistent outcome. Also it could be argued that acting in accordance with legislation does not always ensure protecting and promoting public interest, so is this objective achievable? As currently drafted, this is extremely wide; we suggest that this objective be qualified to refer to insolvency matters.

Objective 2:

This objective refers to the 'fair treatment for persons affected by 'IPs' actions and omissions. It would be difficult for unsecured creditors or employees within an insolvent company to agree that they had been fairly treated.

Objective 3:

We agree that the objective should adhere to the regulatory principles but the additional phrase 'and any other principle considered to represent best regulatory practice' should be deleted. This additional phrase is unnecessary unless the Insolvency Service can define what is meant by 'any other principle'.

Objective 4:

This objective requires the 'Promoting the maximisation of the value of return to creditors'.

How does the Insolvency Service intend to measure whether or not such an objective has been achieved by the RPB?

Objective 5:

As previously stated we do not believe that the RPBs should be involved in the commercial negotiation of fees. This objective is suggesting that the RPB should become the economic regulator of the market. We do not support this objective.

How does the Insolvency Service intend to measure whether or not such an objective has been achieved by the RPB?

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

We agree that an effective oversight body requires a range of sanctions to effectively carry out the oversight function. However, we are concerned that the notice of revocation referred to in paragraph 60 of the Consultation, is to be published before the RPB has an opportunity to make written representations and this intention could be subsequently reversed. We believe the reputational damage at this stage from such publication would be irrecoverable. The publication should only be made by the Secretary of State once his decision to revoke has been made after considering any representations from the RPB.

The current proposal also refers to written representations being made by 'other affected persons', such a phase requires careful consideration as in an insolvency environment there will always be disgruntled creditors who may believe they have motive to cause reputational damage to an IP or RPB.

The perceived reasoning for this early publication is discussed within paragraph 61 of the Consultation. The negative impact of the reputational damage to the RPB in a situation where the revocation may not be upheld by the Secretary of State is much greater than any inconvenience to IPs in requiring time to explore alternative authorisation. This time period may be taken into account in deciding upon the date of revocation.

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

As previously stated we agree that for the Insolvency Service to be an effective oversight body it is necessary to have a range of proportionate powers of sanction which the Insolvency Service may impose in certain circumstances. We are concerned that there is significant reference to the imposition of sanctions where the RPB has not acted in a way which is compatible with the regulatory objectives. This emphasises the importance of stipulating SMART objectives as we have discussed in detail in our response to Question 1 and for the provision of detailed guidance for RPBs.

One point which does require clarification is discussed within paragraph 67. Within CARB we have recognised for some time the importance of the autonomy of the disciplinary regime. We have lay representations within the Complaints Committee and Disciplinary Panel and believe such a structure protects the public interest. We believe the power discussed within paragraph 67 interferes with the fulfilment of this independent process.

From our experience of oversight bodies' involvement within the disciplinary regime leads to significant resource implications both in terms of cost and time.

We understand why the Insolvency Service believes such a power is desirable but we would welcome the opportunity to discuss this in more detail. Questions such as "At what stage would the Insolvency Service become involved in the disciplinary regime?" "What if the Insolvency Service is not content with the decision of the RPB's disciplinary committees?" "What if the Insolvency Service was asking the RPB to act in breach of existing disciplinary bye-laws?"

It should be highlighted that any amendment to our Disciplinary Bye-Laws would require the approval of our members.

In addition, in relation to this new proposal regarding issuing a direction, we would request that a longer time period be allowed for the RPB to make written submissions – 14 days would be an insufficient period of time; we would suggest a 28 day period.

If the power to issue a direction is introduced then it should be subject to a right of appeal and not simply to Judicial Review.

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?

We note the proposal to impose a financial penalty on a RPB. We would request that the time period referred to in paragraph 71 be extended to at least 28 days.

As CARB imposes regulatory penalties upon our members in certain circumstances we do not consider it appropriate to oppose the possibility of such a sanction being imposed upon CARB. In paragraph 70(b) there is the reference to the RPB being obliged to act in a way which is compatible with the regulatory objectives and we again emphasise the importance of agreeing appropriate regulatory objectives at the outset.

We would ask for further clarification as to how the Insolvency Service will calculate the financial penalty. Further guidance is required on the assessment of "an amount commensurate to the breach and likely to deter future misconduct".

We would recommend that there be a maximum penalty.

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

We are very concerned that the Insolvency Service seeks the power to publicly reprimand the RPB. We would request that such publication only be considered after all other relevant sanctions have been imposed upon the RPB. This must definitely be a last resort.

The new powers discussed in previous paragraphs including issuing a direction and/or a financial penalty should be pursued in the first instance.

The impact of the reputational damage to a RPB of such a publication is immeasurable and the sanction may even relate to matters beyond the RPB control.

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

We strongly support the ability for the RPB to make representations. We would emphasize the need for a realistic time period to allow the RPB to gather the necessary advice before making such written representations. Allowing an informative input at this stage will inevitably lead to better decision making throughout the process.

No detail has been provided as to the nature of the representations. Is it just written representation or will there be a hearing with legal representation or other representatives such as another RPB?

In relation to all the new powers, we would expect the RPB to have a right of appeal and not simply require the RPB to revert to Judicial Review.

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?

As we have discussed in Part C, we support the development of an independent oversight body with sufficient powers to provide robust supervision of the regulatory responsibility of the RPBs. However, involvement in the disciplinary process would bring the oversight body within the function of regulator.

In our opinion the oversight body should not fulfil this dual role. We believe that this division of responsibility (as discussed in Part B) is the best way to ensure that the integrity of the oversight body is preserved and that it can avoid being tainted should a commercial failure result in accusations from the public that the regulatory system has failed. If the oversight body is not kept above the line of executive responsibility, then the regulator has no defence against public criticism and the public cannot be protected from the cost and consequences of over-regulation. The Consultation does not suggest that the FRC structure including a Conduct Committee will be established to allow the IP a fair trial.

However, should the Secretary of State decide to pursue this power we have summarised our additional concerns below.

Public Interest – this term requires clarification. It is also not clear from the Consultation if the Secretary of State intends to intervene only in the circumstances when it is in the public interest to do so, or could such interventions occur even if not in the public interest?

We believe that the intervention by the Secretary of State in the regulatory function should be restricted to important issues affecting the public interest as is currently undertaken by the FRC in relation accountants and actuaries. How this term requires further consultation. A further concern relates to the resources required to fund such a structure. The accountancy bodies currently pay a direct cost to the FRC (based on number of registered auditors and size of membership) and additional costs may also be required on an ongoing basis to cover any current public interest investigation.

Ultimately these fees are passed on to the auditing profession.

Double Jeopardy – clarification is required as to 'when' the Secretary of State may initiate proceedings. Is it prior to any disciplinary investigation by the RPB? It is important that IPs are not subject to multiple disciplinary proceedings in relation to the same allegation.

The Consultation refers to such intervention also being required where 'the RPBs following their own procedures have been slow; or felt they were unable to bring disciplinary proceedings against an IP that they authorise'.

We are not aware of the Insolvency Service (GB) expressing concern with the efficiency and effectiveness of the current disciplinary regimes. This new proposal would require significant extra resources within the Insolvency Service and we are not aware of such additional funds being available from government. It is likely that this would result in additional cost to the IP.

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?

The MOU currently provides for the disclosure of information between the relevant parties. We are concerned about the impact of the Freedom of Information legislation as the RPBs are currently not subject to these provisions. Further discussions as to how the Insolvency Service would provide assurances as to the protection of such confidential information would be necessary.

We do support this proposal in principle but are unsure as to how successful this power would be in practice.

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

We are disappointed that this proposal has been included within the Consultation. The designation of a single insolvency regulator demonstrates a significant diversion from the current regime that such a decision would absolutely merit a full detailed consultation process.

It would be fundamentally wrong to grant this power to the Secretary of State at this stage as it undermines the cooperative and collaborative relationship which currently exists between the Insolvency Service and the RPBs. Also to include such a reserve power does create the impression that the Insolvency Service does not have faith in these proposals achieving the desired outcome.

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

As discussed in our response to question 9, the development of a single regulator should not be pursued at all at this stage.

CONSULTATION: STRENGTHENING THE REGULATORY REGIME AND FEE STRUCTURE FOR INSOLVENCY PRACTITIONERS

We have considered the proposals in The Insolvency Service's ("IS") consultation paper on "Strengthening the regulatory regime and fee structure for insolvency practitioners" (the "Paper") and our comments are below.

In principle, the Bank is supportive of recommendations that would further improve the UK's insolvency regime and maintain and enhance its credibility.

We hope that our comments are helpful and look forward to seeing the conclusion of the consultation. In the meantime, should you have any queries with regards to our comments please contact me at matthew.creed@rbs.com or on 020 7672 0874.

Part 1 – Regulation of Insolvency Practitioners

Q1) Are the proposed regulatory objectives and the requirements for RPB's to reflect them appropriate for the Insolvency regulatory regime?

We consider that any objectives for RPBs should be (a) consistent with the objectives/duties of IPs to avoid conflicts arising and (b) clear and unambiguous.

As the objectives are currently drafted (as per paragraph 50 of the Paper), there may be scope for conflicts between an interpretation of the RPB's objectives and the statutory duties of an IP. For example, an RPB's objective of "protecting and promoting the public interest" may differ from an IP's duty to act in the best interest of creditors.

The draft objectives are relatively broad and we consider they may be open to different interpretations (e.g. what is meant by "quality services", "value of returns" and "value for money"?). Any ambiguity or lack of clarity in the wording of the objectives may make them difficult to enforce and could create a risk of misinterpretation by various parties that would either be required to follow them or are affected by them (e.g. the IS, RPBs, creditors, the public and IPs).

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

We would expect that if the recognition of an RPB is revoked it would create a large amount of disruption for both the RPB's licensed IPs and the insolvency cases that those IPs are appointed on. Therefore, we would expect this procedure to be used only where absolutely necessary and for appropriate plans to be put in place to ensure there is no adverse impact on the affected IPs' ability to continue to perform their roles and discharge their duties.

The proposed procedure for revoking an RPB's recognition sets out the RPB's ability to respond to the IS's notice and to appeal any decision via the courts. In the event of a successful appeal by the RPB, it seems unlikely that any damage to the RPB's reputation could be reversed and by this time the RPB's licensed IPs are likely to have moved to an alternative 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?

As per the answer to Q2, although an RPB has the ability to appeal the IS's decision, any successful appeal is unlikely to prevent/reverse damage to the RPB's reputation or ability to retain its IPs.

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

It will be important to ensure that any penalties are applied consistently although this may be difficult to demonstrate given the broad nature of the proposed objectives for RPBs and the potential for different interpretation.

The consultation paper is silent on what happens to the financial penalty once it has been paid. Is there scope for the fine to benefit the creditors of a particular case that was subject to the IP's misconduct?

We would be keen to ensure that any actual or potential financial penalties imposed on an RPB are not ultimately paid by creditors via increased license fees for IPs and subsequently IPs' fees.

As per the answer to Q2 and Q3, although an RPB has the ability to appeal the IS's decision, any successful appeal is unlikely to prevent/reverse damage to the RPB's reputation or ability to retain its IPs.

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

And

Q6) Do you agree with the proposed arrangements for RPB's making representations?

And

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?

As per the answer to Q2, Q3 and Q4, although RPB has the ability to appeal the IS's decision, any successful appeal is unlikely to prevent/reverse damage to the RPB's reputation or ability to retain its IPs. To mitigate this, consideration could be given to whether the RPB's representations should also be published.

As with all of the proposed actions available to the IS to sanction an RPB, we consider it equally important that where the RPB's failure is that it did not prevent inappropriate action by its licensed IPs (or an RPB's failure to sanction IPs for such actions), the IPs in question should also be subject to appropriate sanctions. Sanctions only on the RPB would not prevent the underlying IPs from reoffending or seeking to be licensed by an alternative RPB.

One concern we do have with this process is that the IS will likely incur costs to impose sanctions either on the RPBs or directly on IPs. We would not want those costs to be passed onto creditors either through fees imposed on IPs or increased IPs' fees.

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?

Consideration should be given to ensuring that the information obtained is complete and accurate. Information provided by an RPB or parties engaged by them may not provide the complete picture and the IS may want to consider its ability to request information from other, independent sources.

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

And

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

This reserve power, if implemented, would have a large impact on the RPBs, their licensed IPs, public confidence in the UK insolvency regime and potentially the return to creditors from individual insolvencies.

The Paper states that further consideration and consultation would be undertaken prior to this power being implemented in which case we cannot see the benefit of seeking a reserve power at this time. The benefits and risks of a reserve power can be more fully considered, when and if needed.

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

The estimated cost (c£1.7m) of RPBs assessing fee complaints is significant and, as discussed in the Paper, these costs would be passed onto IPs. Our concern is that IPs would then look to recover these costs through additional fee charging on insolvency appointments thereby reducing the assets available to creditors.

As a comment specifically on the calculation of the estimated cost, we would if anything expect the number of fee complaints to increase if creditors essentially have access to a free complaints service by the RPBs rather than having to incur the costs of applying to court. In this event, the estimated cost of £1.7m may be too low.

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?

We consider that, in principle, the consideration by RPBs of whether their licensed IPs' fees provide value for money (either through the usual monitoring visits or handling fee related complaints) is deliverable and may improve market confidence and the reputation of IPs. However, careful consideration should be given to what constitutes 'value for money' and what principles the RPBs would need to follow to ensure they take a consistent and robust approach to considering the reasonableness of fees.

As an example of how interpretations may differ depending on the case and perspective of each creditor group, value for money may include continuation of services, preservation of jobs or reducing creditors' claims as well as purely distributions to 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?

Additional information may enable creditors to make more informed decisions regarding the appropriateness of the level and basis of IPs' fees. This information should be clear and concise. If information is provided on comparative fee data, care should be taken to ensure creditors understand that no two insolvency cases are the same and there are numerous variables that may cause fees charged to differ materially between insolvencies, even if those insolvencies appear the same in the early stages of the process.

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?

And

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?

As a general comment on the issue of fees charged on a time cost basis, we consider that time costs may be the most appropriate basis in a number of situations and it would seem prohibitive to limit its use as strictly as the proposals seek to do.

Consideration should be given to whether the proposed amendments to IPs' fee structure will result in the formation of creditors' committees in more insolvencies. In this event, IPs may incur additional costs reporting to and dealing with creditors' committees potentially without any material improvement in the outcome for creditors.

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

The impact on fees and returns is difficult to predict.

We would expect IPs to prudently seek high fixed fees/% of realisations in order to ensure the amount of time costs incurred are recovered in the event their work takes more time than expected. The IP will always have better information than the unsecured creditors regarding the amount of work required to realise the assets and this imbalance will always undermine unsecured creditors' ability to form a fully informed view of whether they are being charged fairly.

As an example of how this may occur, an IP may prudently estimate the amount recoverable from debtor realisations which would result in a lower estimate of fees to be charged on a % basis and increase the likelihood of the fee % being approved. However the actual realisations may be higher and so the fees charged would also increase (whereas on a time cost basis the fees would have been the same).

Should IP's fees be reduced by a significant degree, consideration should be given to whether some firms can no longer support their cost base with potential sacrifices made in technical, training and IT support functions that may have an adverse effect on the efficiency of the work they do (and therefore increase fees or decrease their ability to maximise realisations).

Q17) Do you agree that the proposed changes to basis for remuneration should not apply to company voluntary arrangements, member's voluntary liquidation or individual voluntary arrangements.

The underlying concern with overcharging of IP fees is that, in the event the secured creditors are expected to be paid in full, the stakeholders who are being asked to consider the appropriateness of IPs' fees may not be sufficiently informed to make an appropriate decision. We cannot see that that position is any different for CVAs, MVLs or IVAs so we consider the proposed changes to be equally relevant to those processes.

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?

And

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?

In order for creditors to make a fully informed decision on the basis of fees they would need an estimate of realisations. In some circumstances it may be prejudicial to an IP's ability to maximise realisations from an asset if he has already published the amount he thinks he can realise (e.g. by providing creditors/the public with valuation amounts prior to the IP negotiating with a purchaser for the sale of the applicable assets may undermine the IP's ability to drive the price higher).

The suggested scale incentivises IPs to realise readily available assets (i.e. the low hanging fruit) but those assets that may take longer to realise are subject to a lower percentage fee. This may mean IPs have little incentive to maximise realisations for creditors but rather to only realise the assets where the % fee will exceed the time costs incurred.

A prescribed scale will inevitably not take into account the individual nature of each insolvency and the nature of the assets. We consider that unsecured creditors may see a prescribed scale as being the appropriate fee basis for every insolvency and lead them to be more sceptical where IPs request a higher % fee because of the nature of the work they will be required to do – this may lead to IPs incurring additional costs applying to court in a greater number of cases in order to agree an appropriate fee structure.

Under Cayman Islands insolvency law, in circumstances where an official liquidator's fees are based on time costs the insolvency law prescribes a minimum and maximum hourly rate for various grades of the liquidator's staff. This is in addition to a statutory scale for where fees are charged as a % of realisations. The IS may wish to seek the views of IPs/other parties with experience of Cayman Islands insolvency to consider whether similar hourly rate ranges could be appropriate to provide more certainty and clarity for creditors.

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

Time cost fees can be an appropriate basis for ensuring IPs are remunerated for the time they incur. Rather than prohibiting fees on this basis perhaps, as the Paper suggests, the issue to address is how to ensure that creditors are sufficiently informed to challenge the time and/or hourly rates incurred by IPs.

Where appropriate, the Bank seeks to ensure it obtains best value from IPs that it uses by undertaking a tender process involving at least two IP firms prior to insolvency. That process also ensures an appropriate insolvency strategy is implemented. As an alternative/additional consideration to ensure unsecured creditors obtain fair value for the work of an IP, the IS may explore whether it is possible to require alternative fee quotes to be provided either at the point unsecured creditors are asked to approve the basis of an IP's fees or, for example, by the debtor's directors prior to them appointing an IP.

Clearly there may be issues with making this work in practice to ensure any tender process is fair (e.g. ensuring the tendering IPs have access to the same information). However, we consider this would be worth exploring as a mechanism to drive competition amongst IPs in respect of both the amount and basis of their fees.

Q21) Do you agree with this estimation for familiarisation costs for the changes to the fee structure.

The familiarisation costs relate to the costs of IPs only and the Bank is not in a position to comment on the work that may be required for IPs in this regard. In addition to the familiarisation costs for IPs, presumably there will also be costs for the IS, RPBs, material unsecured creditors (e.g. HMRC) and lending institutions to the extent they will be unsecured creditors in some insolvencies.

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?

This is difficult to estimate but we anticipate that there will be some time and cost incurred to ensure the Bank fully understands the implications for it of the proposed changes. The Bank may sometimes be an unsecured creditor so will need to fully understand how it may be impacted by the proposed changes.

Q23) To what extent do you expect the new fee structure to reduce current level of payment.

As mentioned above, IPs may prudently structure their fees on either a fixed fee or % of realisations basis to ensure that their recovery is similar to/no worse than if they had charged on a time cost basis. In this event, there may be little/no reduction in the level of fees.

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 add no additional costs?

In order for unsecured creditors to estimate the amount of fees on the basis of a % of realisations, they will need to understand the nature and amounts that may be realised from the assets. This may require some additional work/explanation by the IPs but the Bank is not in a position to comment on how much additional work that may be.

25) 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?

The Bank is not in a position to assess whether the assumptions of how much (if at all) returns to unsecured creditors will increase are correct. We cannot see from the Paper how the expectation that the proposed changes may "increase returns to unsecured creditors by 60% or £9m per annum" is supported/calculated.

26) 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?

Although not entirely clear, the section of the Paper that this question relates to refers to whether the assets realised in an insolvency (where the secured creditors are expected to be repaid in full) are better paid to IPs as fees or unsecured creditors as a distribution in terms of fairness and the impact on the wider economy. Essentially, we consider that the "fair" outcome would be that IPs receive an appropriate amount of fees for the work that they do and the value that they add and they should not overcharge.

27) Do consultees believe these measures will improve the market confidence?

And

28) Do consultees believe these measures will improve the reputation of the insolvency profession?

Increased regulatory oversight by both the IS and the RPBs along with tighter controls on IPs fees may improve market confidence and the reputation of IPs but this is very difficult to quantify. We consider the biggest risk to market confidence to be inappropriate action by a minority of IPs undermining the reputation of IPs more generally. To the extent the proposed reforms (a) prevent inappropriate action by IPs and (b) further enable action to be taken against IPs who act inappropriately then they should be progressed.

However, careful consideration should be given to ensure that IPs who do not act inappropriately are not penalised by any reforms and that the position of creditors/other stakeholders is not inadvertently worsened. For example, we are concerned that the increased costs of implementing and maintaining the changes suggested in the Paper may inadvertently increase IPs' fees paid from both secured and unsecured assets.

Dear Minister,

BIS consultation: Strengthening the regulatory regime and fee structure for insolvency practitioners (March 2014)

I write in response to your consultation on Insolvency Practitioners (IP) fees. Whilst I support two out of the three government proposals to "improve returns to unsecured creditors; and improve the reputation of and confidence in the insolvency profession", I have serious concerns that your third proposal (simplification of the fee structure) will cause significant 'harm' to creditors, small insolvency firms and the UK's globally renowned insolvency regime. I share your priorities to have a competitive, fair, transparent, world-renowned insolvency profession, which is currently 7^{th} best in the world in terms of the amount returned to creditors and speed of the process, according to the World Bank. However I am worried that the proposal to simplify the fee structure through restricting the use of time-cost (where there is no secured creditor or no creditor committee) will undermine these common goals.

Before summarising my concerns, please note that I have significant concerns that the fees consultation is based on perception rather than fact and evidence. IPs' fees comprised just 2% of all complaints about IPs in in 2013 (down from 7% in 2010). To put this in perspective, in 2013, there were approximately 116,000 new insolvency cases, and there were just 13 complaints to the government about insolvency fees (0.01%). Even accounting for the fact that many of these 116,000 cases would have been handled by the Official Receivers – about whose fees there have also been complaints – the proportion of cases that are attracting official complaints about fees is negligible.

I support a number of the fee proposals set out in previous government reports. However the proposal to simplify the fee structure through restricting the use of time-cost was not recommended in any of those reports. Furthermore, I am unaware that the structure is used anywhere else in the world and so I am concerned that it has not been 'tried and tested'. I therefore ask that the government drops its proposals to restrict the use of time-cost as a method to charge fees, and ask that it reviews alternative recommendations as proposed by previous government reports that will address its goal of reforming IP fees and improving unsecured creditor engagement.

My other main concerns about restricting the use of time-cost and relying solely on fixed fee and percentage of realisations include:

- It does nothing to address the problem of a lack of engagement by unsecured creditors.
- It could lead to outsourcing of specific insolvency procedures to unregulated individuals. This would shift the cost rather than reduce it.
- It is impossible for an Insolvency Practitioner to 'guestimate' what might be involved in a case from the outset. Relying on an up-front fixed fee without an option to review the fee later would see IPs and creditors routinely short-changed.
- Because IPs cannot resign from a case, once they have reached their fixed fee level, they will almost certainly not optimise recoveries as there is no incentive to do so. This would lead to lower returns for creditors.
- Many cases would not be taken on by IPs at all because the fee could be too small to be economical.

- Creditors will lose out through the use of percentage of realisations where large returns might not reflect the amount of time an IP is required to dedicate to a case. IPs will lose out through the use of percentage of realisations where there are smaller cases with smaller returns which often involve greater investment in terms of hours and resources that would be reflected in the final settlement.

The UK's insolvency regime is the 7th best in the world based on returns and costs to creditors, the likelihood of business rescue and the speed of the insolvency process. Given it is one of the best in the world, and given concerns around IP fees are negligible, I ask that the government reviews alternative proposals which are in proportionate to the problem that it seeks to address.

Yours sincerely,

Steven Law

Former R3 President and

Partner Baker Tilly Restructuring and Recovery LLP

IP regulation and fee consultation question response sheet
(Consultees may wish to respond just to those questions that are of relevance to them)

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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?

Yes, they are a welcome move towards making explicit the expectations of the role of the RPBs especially with regard to the level and value for money of IP fees.

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?

A2-A6: We recognise that these proposals are a serious attempt to remedy a perceived gap in the current system and they have potential to strengthen the SoS' position in ensuring that the new regulatory objectives are complied with. However by retaining seven RPBs rather than moving to a single regulator the practical difficulties in identifying and evidencing the sorts of practices that would justify such action will prove challenging.

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?

An individual sanction could prove helpful in the small number of cases where it is appropriate. The circumstances under which such powers are to be used will need clarification otherwise there is a risk that they will be seen as an 'appeal' route from any decision by the RPB that the complainant disagrees with.

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?

This seems a necessary power if the proposals above are to operate effectively.

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

We consider that taking a reserve power rather that moving straight to a single regulator misses an opportunity to move to a clearer and more effective regulatory structure. If the SoS is in effect the 'regulator of regulators' that role is made more complicated than necessary by the retention of so many RPBs.

Although the move to a single RPB could be initially disruptive, over time it would be a route to clearer communication and better understanding in both directions which in turn would support the overall aim of improving public confidence in the profession.

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

We consider that the proposed functions and powers of a single regulator capture the key elements of the role.

Part 2 – Insolvency Practitioner fee regime

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

This isn't something that we are able to comment on but we are not against the proposal

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?

In principle the proposed reform should achieve this aim but there may be a risk that the various RPBs will approach this new aspect of their role in different ways. Work will need to be done in advance of any change to ensure a shared understanding of what 'value for money' actually means. It will then require regular validation once in operation.

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?

Yes – this could be helpful to all creditors and supports the transparency agenda. There clearly is a need to build creditor engagement and understanding so we support this proposal.

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?

The risk of adding to the exceptions is that they will add to the complexity and potentially recreate the weaknesses of the present fee structure. There may however be a case for allowing an exception where there is only one unsecured creditor in the insolvency.

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?

It would be useful if the draft rules were to include a requirement for the office-holder to include an estimate of the value of the property with which he is likely to deal or for fixed fee resolutions, a breakdown of how that fixed fee is calculated. Without these creditors are just as much in the dark as before. It is accepted that as the insolvency progresses things might change but this would not only help creditors but also RPBs assess the reasonableness of what is being sought.

As far as the individual draft rules are concerned:

- **17.14(2) gives scenarios and sub-paragraph (4) gives the relevant bases of remuneration. 17.14(3) relates to sub-paragraph (5) in a similar way. It would be easier to follow if they were re-ordered so that the bases of remuneration followed immediately after the applicable scenario.**

- **17.14(8)(a) Although this explains what needs to be taken into account in reaching the determination by one of the methods in rule 17.15, it should be made explicit that the office-holder or intended office-holder must provide all such information as is required or requested to enable that determination to be reached.**

- **17.15(2)(b) The wording "the basis (and where appropriate) the percentage of remuneration must be fixed by a resolution of creditors" suggests a mandatory involvement by creditors that the provisions in rule 17.15(10) show to be optional.**

- **7.15(5) and sub-paragraphs (10)-(12) – there needs to be clarity that different rates can be imposed for the administration and the CVL or compulsory liquidation. Also is it intended that fees based on realisations can only be charged in the insolvency in which assets were realised and similarly, that distribution based fees can only be charged on the event in which those distributions were made?**

- **17.15(10) – (12) as indicated in our response to Q.18 it would be our preference that a suitably amended Schedule 6 (to be revised as Schedule 8) scale is the default method of calculation.**

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

This should be beneficial in the majority of cases. There is a risk that by restricting the use of time and rate will limit investigative work to the bare minimum necessary to comply with an office-holder's obligations. Much will depend on how effective any work on identifying the right scale to replace the current schedule 6 turns out to be.

We are unclear how these reforms will work in situations such as pre-pack administrations where the bulk of costs are incurred before creditors have the opportunity to have a say on proposals or the basis of remuneration. Where there is a sale of the business, whether via a pre-pack or otherwise there needs to be further thought as to how fees based on a percentage of value of property would be calculated when consideration for the sale of the business has been deferred. It would be our view that remuneration should be based on actual receipts rather than contractual expectations.

We currently work with IPs on contentious litigation cases where there are no funds in the estate and where the IP, operating under a CFA, relies on a recovery for payment of their fees. We are uncertain how such cases will be impacted by the change. However these are the cases where we are already working closely with the IPs to monitor their fees. So long as there remains scope for continued flexibility in these more complex cases we expect to be able to mitigate any impact. The proposals appear to offer such flexibility.

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?

We agree that control is reasonably effective in these areas particularly in the context of the large number of primarily 'consumer credit' IVAs. Creditors in voluntary arrangements are increasingly effective in controlling obviously excessive fees but we consider that any work that is done to review the Schedule 6 figures might well enable creditors to extend this control further.

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?

This would be our preferred position. There should be an expectation that any variation from the prescribed scale would have to be justified and explain clearly why it was in creditors' interests to depart from the set figures. Given the difficulty that major creditors such as HMRC will have in resourcing large scale reviews of fee levels departure from the scale should be regarded as exceptional and requiring a strong case to be put forward.

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?

No – the current fee is inadequate to recompense for up-front work and as it stands would act as a disincentive to taking on appointments and to conducting effective investigation. There is a need for the Insolvency Service to work with the profession to established revised figures that provide a fair return whilst meeting the objective of this exercise which is to ensure value for money.

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

No - we consider that the likely pulling together of a creditors' committee provides a route to setting a time & rate basis where it would be of value although there is a risk that there may be occasions where there is insufficient creditor engagement to allow this to be viable.

Impact Assessment questions:

Q21: Do you agree with this estimation for familiarisation costs for the changes to the fee structure?

No comment.

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?

No comment.

Q23: To what extent do you expect the new fee structure to reduce the current level of overpayment?

No comment.

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?

There will be costs for both IPs and creditors in dealing with this although they are difficult to quantify.

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?

No

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?

No comment.

Q27: Do consultees believe these measures will improve the market confidence?

No comment.

Q28: Do consultees believe these measures will improve the reputation of the insolvency profession?

No comment.

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For the attention of:

Jenny Willott MP

Minister

Policy.Unit@insolvency.gsi.gov.uk

Dear Minister,

BIS consultation: Strengthening the regulatory regime and fee structure for insolvency practitioners (March 2014)

I write in response to your consultation on Insolvency Practitioners (IP) fees. Whilst I support two out of the three government proposals to "improve returns to unsecured creditors; and improve the reputation of and confidence in the insolvency profession", I have serious concerns that your third proposal (simplification of the fee structure) will cause significant 'harm' to creditors, small insolvency firms and the UK's globally renowned insolvency regime. I share your priorities to have a competitive, fair, transparent, world-renowned insolvency profession, which is currently 7th best in the world in terms of the amount returned to creditors and speed of the process, according to the World Bank. However I am worried that the proposal to simplify the fee structure through restricting the use of time-cost (where there is no secured creditor or no creditor committee) will undermine these common goals.

Before summarising my concerns, please note that I have significant concerns that the fees consultation is based on perception rather than fact and evidence. IPs' fees comprised just 2% of all complaints about IPs in in 2013 (down from 7% in 2010). To put this in perspective, in 2013, there were approximately 116,000 new insolvency cases, and there were just 13 complaints to the government about insolvency fees (0.01%). Even accounting for the fact that many of these 116,000 cases would have been handled by the Official Receivers – about whose fees there have also been complaints – the proportion of cases that are attracting official complaints about fees is negligible.

I support a number of the fee proposals set out in previous government reports. However the proposal to simplify the fee structure through restricting the use of time-cost was not recommended in any of those reports. Furthermore, I am unaware that the structure is used anywhere else in the world and so I am concerned that it has not been 'tried and tested'. I therefore ask that the government drops its proposals to restrict the use of time-cost as a method to charge fees, and ask that it reviews alternative recommendations as proposed by previous government reports that will address its goal of reforming IP fees and improving unsecured creditor engagement.

My other main concerns about restricting the use of time-cost and relying solely on fixed fee and percentage of realisations include:

- It does nothing to address the problem of a lack of engagement by unsecured creditors.
- It could lead to outsourcing of specific insolvency procedures to unregulated individuals. This would shift the cost rather than reduce it.
- It is impossible for an Insolvency Practitioner to 'guestimate' what might be involved in a case from the outset. Relying on an up-front fixed fee without an option to review the fee later would see IPs and creditors routinely short-changed.
- Because IPs cannot resign from a case, once they have reached their fixed fee level, they will almost certainly not optimise recoveries as there is no incentive to do so. This would lead to lower returns for creditors.
- Many cases would not be taken on by IPs at all because the fee could be too small to be economical.
- Creditors will lose out through the use of percentage of realisations where large returns might not reflect the amount of time an IP is required to dedicate to a case. IPs will lose out through the use of percentage of realisations where there are smaller cases with smaller returns which often involve greater investment in terms of hours and resources that would be reflected in the final settlement.

The UK's insolvency regime is the 7th best in the world based on returns and costs to creditors, the likelihood of business rescue and the speed of the insolvency process. Given it is one of the best in the world, and given concerns around IP fees are negligible, I ask that the government reviews alternative proposals which are in proportionate to the problem that it seeks to address.

Yours sincerely

David Thornhill
Partner

Response to The Insolvency Service Consultation:
"Strengthening the regulatory regime and fee structure for insolvency practitioners"

Overview and general remarks

I am a licenced insolvency practitioner and managing director of a provincial insolvency practice that undertakes a mix of corporate and personal insolvency work. As a firm we deal with around 100 corporate appointments and 15 personal insolvency appointments each year.

I am also a former President of the IPA and currently act as its representative on the Joint Insolvency Committee, although I am submitting my response to the consultation in a personal capacity.

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

In my view, the regulatory objectives are generally vague and badly defined.

1. The concept of 'protecting and promoting the public interest' is laudable, but vague in the extreme. It is not defined in the document and without a definition that allows measurement is not a viable objective, through lack of certainty as to what it might mean to different people at different times.

2. I can anticipate conflicts between the general concepts and the statutory role of an appointed IP. 'Fair' is a subjective test. A bankrupt whose home is being sold may not consider my actions as trustee to be 'fair' – who is to be the arbiter of what is 'fair', the oversight regulator, the RPB, the IP or the court?

3. I do not understand what is meant by 'independent'. Of whom is the profession to be independent and what is the reason? "Considers' all creditors is also disingenuous as an action. I could consider all creditors, and then ignore that consideration, but have fulfilled my obligation. The statutory role of each insolvency appointment varies and none of then include 'considering' the interests of all creditors. It is not clear what is sought to be achieved by the proposed 'consideration' or how it interacts with my actions taken in the statutory role as a result of any specific insolvency appointment.

4. There is a potential conflict between 'value' and 'time' and also acting in the 'public interest'. Often a choice can be made between achieving an early sale of an asset which compromises the sale consideration, or carrying out extended marketing over a longer period which may enhance the value, but delays payment to creditors – which is appropriate and which is 'fair'? There are further potential conflicts such as where selling a business with a TUPE transfer of employees may be 'protecting' the public interest, if the 'public interest includes preserving employment, but as a result it significantly reduces the value of returns to creditors – which is 'fair' and which represents 'value'?

5. The concept of 'value for money' cannot easily be applied in an insolvency process, where the statutory role and responsibilities of the IP are not based on value. In addition, on a practical level, as a simple example, a report on the proceedings could be 10 page or 100 pages depending on the detail required. Some creditors may want 100 page reports; others may not even read a 10 page report. Who would asses the value of the report to each creditor and the costs of preparing the report?

   IPs carry out a huge range of tasks which appear not to create value, or if they do, only to a specific person or persons with a specific interest. Dealing with ROT claims is of value to the party claiming ROT, but potentially of negative value to the other creditors who potentially suffer reduced realisations and extra IP costs. Assisting employees with their DOE claims is of value to them, but why should the other creditors suffer the cost? Queries from HMRC, regarding anomalies with the PAYE scheme assists the employees and HMRC, but not the general body of creditors. I am currently holding open a liquidation and bearing additional costs, due to litigation against the company's insurers by a third party, but that is of no benefit to the creditors.

   The list of work undertaken by IPs that appears not to be of value to creditors, is different in every case, but incredibly varied.

The IPs role therefore, extends to countless other tasks that do not represent value for money to creditors, but which the IPs role requires him to undertake. Further comments are provided in the section regarding IP fees.

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

I have no comments save that the regulators must have sufficient safeguards to protect those licenced by them in the event that action is taken to revoke recognition. I can anticipate a potential problem that if the proposed revocation became public knowledge prior to the process, including any appeal process having been concluded, it could cause considerable disruption to public confidence in the profession.

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

I have no comments save that the regulators must have sufficient opportunity to challenge the direction given by the secretary of state

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?

I would oppose unlimited financial penalties and suggest a maximum penalty of up to £50,000.

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

The proposed power does not appear to give adequate time for an RPB to fully make its case.

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

I believe the RPB should have more time to investigate the circumstances and fully make its case.

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?

I am concerned at the risk of double jeopardy for an IP by the IS duplicating a role that is the responsibility of the RPB.

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?

I am concerned that the IS could abuse these powers to obtain information in advance of an action against the IP. As an example I would refer to the precedents in relation to S236 IA86 by office holders when contemplating actions against third parties.

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

No comment

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

No comment

Insolvency Practitioner Fee regime

General comments:

I believe that the consultation has started from the wrong place.

The statistics used by the OFT were deeply flawed, as was pointed out at the time of their report, but as there was no right of redress or opportunity to disprove their calculations these statistics have since been adopted as credible.

To suggest that PWC, or any of the bank panel firms, charge less than my firm when appointed by a bank, on a comparable corporate insolvency, is absolutely ridiculous. I can provide real case examples where bank panel firms have charged far more than a non bank panel firm on a similar case.

I also strongly dispute that there is little competition for insolvency work and would ask for evidence for that assertion, as my firm is constantly in competition with other firms.

What the report fails to take account of is that not only the volume of insolvency appointments in decline, but the value of assets available to pay costs has reduced significantly at a time when the regulatory responsibilities of IPs has been increasing significantly.

The problem as I understand it is not so much that there is evidence of widespread 'overcharging' but that there is no effective right of redress for creditors who may perceive overcharging has taken place, couple with no effective 'oversight' on fees charged, as unsecured creditors have little knowledge or resource to challenge fees paid to IPs.

I strongly oppose the proposed changes to the basis of fees to either a fixed fee or percentage in the circumstances described in the consultation document, but do support an enhanced role for regulators to protect creditors if there is evidence or a perception of overcharging and to provide confidence in the fee setting process. I also suggest that this is most in keeping with the principals set out in regulatory objective 2 in the consultation document.

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

It is impossible to assess the likely costs as it is depends on the system applied and how it works in practice. I do believe that it is possible to enhance the RPB role at relatively little additional cost by focussing on the RPBs role being around the IPs requirement to justify the quantum of fees to creditors and by taking additional powers where the justification is deemed insufficient.

I propose that the objectives sought in the consultation document could be achieved by the RPBs and without a change to the current legislation and at relatively little additional cost.

My proposal falls under two headings:

Initial fee setting by unsecured creditors in the absence of a creditors committee:

An overhaul of SIP9 to include:

a) IPs seeking a timecosts resolution should be obliged to provide an estimate of fees at the time of the resolution. The fees drawn by an IP on the authority of this resolution cannot exceed this estimate, without a further resolution, with an explanation as to why the estimate has been exceeded, justifying to creditors satisfaction, the requested increase together with a further estimate for the additional authority being provided to be approved by creditors. This would act as a 'cap' on timecosts similar to a fixed fee, but without taking away the opportunity for fees to be less than the amount approved, if the time is not required to be spent on the case.

b) The requirement in SIP9 to explain and justify fees to creditors be expanded to accommodate regulatory action by the RPBs, if the claimed fees are not adequately justified to creditors.

c) The reporting requirement in SIP9 to be made 'user' friendly and more meaningful to creditors, providing not just reported timecosts and a short narrative, but a more detailed analysis as to why the time has been incurred and what has been achieved as a result.

Fee challenge by creditors through the RPBs

a) Following the amendment to SIP9, the RPBs accept 'complaints' from creditors regarding fees on the basis of 'justification' of the fees. Rather than the RPBs carry out a form of taxation which brings about significant costs, the focus is on whether the IP has provided sufficient 'justification' for the level of fees sought. If the fee has not been adequately justified to creditors, the RPBs adopt powers to impose suitable remedies. If a creditors complains the process would be:

    a. RPB requests copies of documents provided to creditors to justify the fee.

    b. Compare the quantum of the fee, with the level of 'justification' provided to creditors and asses with the benefit of a mixture of IPs and lay persons input on the regulatory committee, whether with the benefit of the IPs collective experience and the lay persons external view, if the fee is proportionate in the context of the case and the justification provided to creditors.

    c. If it is the view of the RPB regulatory committee that the IP has failed to justify the level of fees, the RPB has a number of sanctions available:

        i. Require further information to be made available to enable the IP to satisfy the complainant. If the IP does so and the complainant is satisfied, the RPB could drop the matter or proceed to sanction the IP with a fine for failing to provide adequate information in the first instance.

ii. Require the IP to seek a specific further resolution of the unsecured creditors to approve the fees, with the opportunity to provide any further information required by the complainant.

iii. Order the IP to pay back to the estate, the amount deemed by the regulatory committee to be in excess of the amount 'justified' by the IP.

iv. If the IP fails to satisfy the RPB, but persists with a claim for fees that it has failed to justify to the regulatory committee - order the IP to seek approval from the court for the fees claimed.

The benefits of this approach is that with the focus being on the IPs justification of fees and a possible challenge requiring reimbursement to the estate, it will raise accountability to creditors for fees on all cases, not just the ones where complaints are made and the onus will always be on the IP to demonstrate, through justification, that the fees are appropriate for the work required to be undertaken. If the fees have not been justified, they must be reimbursed to the estate and in addition, where appropriate the IP could bear a financial regulatory penalty.

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?

Yes, provide the approach adopted by the RPBs is in accordance with proposed regulatory objective 2

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?

No. I believe that the consultation is wholly misguided on the subject of creditor engagement. It is my view, having dealt with 1000's of insolvency cases that unsecured creditors do not engage in insolvency process, simply because in the vast majority of cases, irrespective of the IPs fees, they do not and will not get a financial return.

The fact is that the combination of secured creditor, including banks and asset based lenders priority rights, together with directors who are able to exhaust all value in a company prior to the insolvency, means that there is rarely going to be a meaningful dividend to unsecured creditors, irrespective of the IPs fees.

The lack of unsecured creditor engagement is a factor of their low ranking in priority for payment, together with a lack of incentive for directors to deal with the company's financial position at an early stage and lack of effective remedy against directors, who fail to protect the position of unsecured creditors.

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?

I think the proposal in the case of secured creditors approving fees is wholly counter productive. In cases where the secured creditors debt is able to be discharged, there is no reason for them to exercise any control over the IPs fees. In fact the proposal works to encourage secured creditors (not all of whom are reputable or even regulated) to inflate their debt through termination fees, management fees, interest rates etc to leave them with a notional shortfall, so that they can approve their favoured IPs fees on a timecosts basis and cross subsidise cases where fees are reduced, if the lender is suffering a genuine shortfall.

Where there is a creditors committee, I think timecosts can be agreed by the committee, although as a matter of broad principle, I still think these fees should still be subject to RPB oversight under the process described under answer 11.

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?

I believe that the proposal is fundamentally misguided. It does not create better 'value' for creditors. IPs will naturally seek to fix fees or percentages at the higher end of the potential possibilities, to take account of the fundamental uncertainty, as to the work required in each case. The speculative nature of a 'fixed' or 'percentage' fee will also compromise the RPBs ability to asses whether the fee is appropriate, if the RPBs are going to have an oversight role on fees.

Even if the overall intention of reducing actual fees was achieved, the consequences would ultimately result in a dumbing down of the service provided by the IP and lower standards. If fees are reduced, it follows IPs will have to reduce costs to be viable. Training budgets would be cut. Reports to creditors would become thin on detail, ROT claimants would have to fend for themselves, employees would not receive the same level of support, HMRC queries would be left unresolved, and equally important, uneconomical assets would not be pursued, reducing overall returns to creditors.

I agree with the concept of oversight on fees by the RPBs and more 'up front' estimating, and expect that this is more likely to achieve the outcome sought.

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

I believe that IP fees will remain broadly the same, but will become less comparable, and less open to challenge. This may lead to an actual increase in some cases, where the funds are available.

The greater damage I envisage will be a reduction in realisations, as certain assets become uneconomical to realise. An example would be a debtor ledger. Typically, by the time an IP has been appointed, the directors will have already collected (and spent) the easy to collect debts. The remaining debts, left for the IP to collect on behalf of creditors, are typically the older and harder to collect debts that may also be disputed. On a percentage fee basis, it becomes uneconomical to continue to pursue the tail end of these debts, leading to more being written off.

I also believe that allowing timecosts where a secured creditor is approving fees, but imposing fixed or percentage fees on other, likely to be smaller cases (where it is also harder to form a creditors committee), will create a two tier insolvency system, where unsecured creditors will suffer on both accounts. In secured creditor controlled cases, where unsecured creditors may get a return, fees will be approved not by the unsecured creditors but by the secured creditor and there is no incentive on the part of the secured creditor or the IP to create a fund for unsecured creditors, if the IPs costs are likely to be at risk.

In smaller cases, assets will become uneconomical to recover and will be lost and 'customer care' standards, not directly paid for under the fee structure, towards stakeholders will be reduced to match reduced fees.

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?

I agree

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?

The answer depends on how the prescribed scale is set. My fear would be that it would be set too low and lead to chaos in the market. The complex nature of insolvency appointments, including the variation in the types of procedures, would make a one size fits all approach unworkable. Collection costs of a £1m debtor ledger have a very different cost base to a £10,000 debtor ledger. Realising a prime property with planning permission is much easier than a derelict property with environmental problems.

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?

Clearly not.

Not only has the cost base of an IP firm increased massively since the scale was set over 28 years ago, but the work has become far more complex, with much higher regulation and overall costs of operation have massively increased. Any comparison with the official receivers office does not apply, due to a different cost base and completely different types of work undertaken. In addition, whilst the scale was originally designed for the official receivers work, other fees were payable to the official receivers office, in addition to the percentage rates.

It is very difficult to describe a 'one size' fits all scale as there are so many variables.

The starting point would have to be a fixed fee for the statutory obligations imposed on an office holder. The number of creditors also influences the amount of work required. A low value asset case, such a furniture retailer with stock subject to ROT, with 100's of consumer deposit creditors, has a very different profile to a construction company with significant projects in hand, requiring specialist industry knowledge of JCT contracts, subcontractor behaviour, supply chain issues and an ability to obtain value from the contracts by assignment or novation.

There is also an uncertainty in the consultation regarding fees around investigation work. Much of this work in recovering funds for creditors is speculative. There is however, a general obligation under the CDDA. In addition there is the 'public interest' element referred to as a regulatory objective, so the investigation work required to be undertaken is not solely determined by unsecured creditors, from whom, approval for costs may be required. It is often the case that more investigation work is required where the assets have been paid away and disseminated. It is not clear from the consultation how it is proposed that the costs of investigation, in cases where creditors do not wish to participate in a committee, would be approved and the link to the proposed 'public interest' objective.

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

I believe that 'time and rate' is the most appropriate basis for fees in the majority of cases – subject to an easily accessible, before and after the event challenge process being available at low or zero cost to creditors. In that regard, I believe it is incumbent upon the regulators to ensure that an appropriate process is put in place for fee reviews

Impact Assessment questions:

Q21: Do you agree with this estimation for familiarisation costs for the changes to the fee structure?

No – The cost of amending systems, forms, resolutions, guides for creditors are significant. In addition staff training will be required

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?

N/A

Q23: To what extent do you expect the new fee structure to reduce the current level of overpayment?

I think the statistics used to asses alleged 'overpayment' are flawed and discreditable by any meaningful analysis. I think the key issue is for the profession to provide a method by which informed parties, with an understanding of the processes involved, can assess whether the level of fees are justified. In fact, the better question to ask would be whether the proposals would create an 'overpayment, which is an equally plausible outcome.

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?

Additional costs will be incurred

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?

No.

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?

I think both IPs and unsecured creditors will suffer a financial loss under these proposals.

Q27: Do consultees believe these measures will improve the market confidence?

I believe market confidence may would be improved if the regulators provided a process to review fees where required.

Q28: Do consultees believe these measures will improve the reputation of the insolvency profession?

Yes as regards the RPB role, no as regards simply changing the basis to fixed fees or percentages.

Carl Faulds
Managing Director

28th March 2014

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RESPONSE TO THE CONSULTATION:
STRENGTHENING THE REGULATORY REGIME
AND FEE STRUCTURE FOR INSOLVENCY PRACTITIONERS

BY MICHELLE BUTLER

Overview

This response reflects my own views as an individual. I am drawing on my experience in working as a consultant to insolvency practitioners, assisting them to comply with existing insolvency legislation, and previously as the Head of Regulatory Standards and Monitoring at the IPA.

The introduction of statutory regulatory objectives is welcome, although, given that there have been few criticisms about the operation of the existing regulatory structure, it is hoped that these would merely make formal and transparent the objectives that underpin the regulatory system at present. The consultation document states that "the new framework will better direct the activity of the regulators; for example, minimising unnecessary bureaucracy on IPs by ensuring that regulation is undertaken proportionately and consistently". This is also welcomed and it is hoped that this will bring a renewed, and long-lasting, focus to the Hampton Principles of Better Regulation.

The difficulties in following through with these noble aspirations begin when one considers the proposals around changes to the IP fees regime. There seem to be some extraordinary expectations levelled at the regulators to monitor, assess, and even adjudicate on, IPs' fees, but the Impact Assessments seriously underestimate the associated costs – costs that inevitably will be passed on to IPs, who will then be under pressure to seek to recoup them from the insolvent estates. Of course, it is appropriate that the regulators remain alert to identify and deal with IPs who abuse their positions of control over estates, but it is difficult to see how regulators might manage the costs of examining in detail the fairness of fees and whether those costs might be considered well-spent if, as is considered likely, few examinations will lead to identifying, and dealing with, any instances of abusive over-charging. The consultation notes that "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", which suggests that lessons may be drawn from the Scottish approach.

Fundamentally, the proposals seek to address the issue identified by the OFT and Professor Kempson of inadequate engagement of unsecured creditors. Proposing to restrict the fee bases in certain cases would seem to be a curious reaction to this issue: unsecured creditors have not been refusing to approve fees on a time cost basis; in all cases (apart from Receiverships, MVLs, and some Administrations), the power to approve fees lies with the unsecured creditors, so it is unclear why eliminating the time costs basis as an option and requiring IPs to seek creditors' approval to a fixed or percentage fee is considered to be the solution to lack of creditor engagement. More must be done to encourage unsecured creditors, and particularly "repeat" creditors such as HMRC, to engage with the process.

I believe that creditors may be encouraged to engage if they receive clearer and more useful information, not only about the insolvency process including the tasks that the office holder will carry out or has carried out, but also about the fees likely to be incurred. It appears that the proposals seek to do this by restricting fees to a fixed sum or percentage of assets realised/distributed, because these bases are seen as more concrete. However, an IP's fees are not the only cost on insolvent estates and such a move may result in more sub-contracting out of work to parties whose fees have not been so restricted. Given the limited knowledge that an office holder has on many cases when he seeks to agree a fee basis, it is also questionable whether a fixed sum/percentage fee can be calculated at a level to reflect the relevant matters described in the Rules. In contrast, the time costs basis surely is the fairest basis for fees, when agreed at an early stage in the case.

The consultation document touches on what I believe is the solution, but fails to grasp it. It states that a difficulty with the time costs basis is "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". Surely, there lies a potential solution: if the issue is that creditors, focussing on an excluding costs Statement of Affairs, become upset and disillusioned when they learn that all asset realisations have been "swallowed up" by fees and other costs, then perhaps IPs should provide more prospective information when seeking approval for fees. This does not have to mean that time costs cannot be sought, but rather that, in common with a fixed/percentage fee, creditors are provided with some indication as to how much the fees are likely to be and what work is expected to be done for that fee. Of course, it is difficult for IPs to be certain of these at the outset – and they would encounter the same difficulties in setting an appropriate fixed or percentage fee – but I would expect that IPs could communicate effectively and promptly with creditors when original estimates turn out to be unrealistic, or, if additional safeguards are considered necessary, legislation could provide a simple low-cost mechanism for revising a fees estimate. The advantages of this approach include that time costs *is* a fair basis for fees – it reduces the risk of cross-subsidy of costs between cases – and creditors will be able to envisage at the start the likely impact of fees and thus will have some idea of their prospects of a dividend. In receiving this information when they are asked to consider a resolution for fees, creditors may be encouraged to engage to a greater degree in the process.

I would strongly urge the Government to reconsider its proposal to restrict the time costs basis as an option for IPs' fees only to certain cases. It risks reducing competition by unfairly disadvantaging IPs with a low presence in the secured creditor-led insolvency market, will increase costs leading to reduced returns to creditors, and will complicate further an already complex insolvency regime thus discouraging creditors further from engaging in the process with the potential consequence of damaging public confidence in the profession.

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30 March 2014

Consultation Questions

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

The objectives proposed have departed quite considerably from the four objectives suggested by the OFT in its 2010 market study and it is pleasing to note that the concerns of some, as regards the OFT's suggestions that were not suited to the legislative boundaries within which insolvency office holders must operate, have been taken into account. However, I do not believe that all the proposed additions to the OFT's suggested objectives are advantageous or appropriate. For example, not all insolvency procedures are collective processes (e.g. Receivership) and thus it would not be appropriate to encourage members to "consider the interests of all creditors in any particular case".

It is also interesting to note that none of the OFT's suggested objectives tally with the Service's proposed objective of "ensuring that the fees charged by IPs represent value for money". The consultation states that "the regulatory objectives should include broad aims that might be expected in any professional regulatory system… There should also be specific insolvency-related objectives." This fifth, extremely narrow, objective does not fit these criteria and is inappropriate as an overarching principle for insolvency regulation. It is also impossible for any regulatory system to "ensure" anything.

I see no reason why the regulatory objectives for the insolvency profession should not be aligned more closely with those set out in the Legal Services Act 2007. It seems to me that the regulatory objectives set out in that Act are more appropriate, aspirational and better aimed at building and maintaining confidence in a profession.

Presumably, the regulatory objectives would replace – or at least require a revision of – the Memorandum of Understanding and Principles for Monitoring between the Secretary of State and the RPBs, which would be welcome, as in my view those documents fail to promote a regulatory regime compliant with the Hampton Principles of Better Regulation.

The Impact Assessment ("IA") suggests that, if statutory regulatory objectives were not introduced, "more detailed guidance would also have to be regularly produced, updated and disseminated through the JIC… The RPBs would have to additionally monitor compliance with the new codes and guidance resulting in additional costs which would be passed on to IPs… The oversight regulator would have to agree the contents, promulgate them and monitor compliance… The same prescriptive type of regulation would continue to exist whereas the intention is to move to a principles and objectives based regulatory system." In contrast, the IA suggests that, if the regulatory objectives were introduced, "any additional familiarisation and implementation costs would be negligible". It is naïve to believe that the statutory regulatory objectives (however they are worded) will eliminate the need for SIPs, the Ethics Code, and other guidance from the regulators and it is misleading to indicate that far more costs will fall to IPs without the objectives. In addition, in my experience, it has been the Insolvency Service that has insisted on many of the prescriptive regulatory standards now encapsulated in SIPs and Dear IP guidance. I find it difficult to envisage a world where the Insolvency Service operates with only the statutory regulatory objectives as their guide in acting as oversight regulator, although I would welcome such an attempt.

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

No

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

No

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?**

No

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

No

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

I have no comments.

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?**

I struggle to envisage any circumstances when this action would be appropriate. The consultation document cites the examples "where RPBs following their own procedures have been slow, or felt they were unable to bring disciplinary proceedings against an IP that they authorise". However, in both these examples, if there were any failures to address, it would seem to require the Secretary of State to enquire of the RPB and address these, if necessary, via directions, penalties etc. on the RPB. Only if the RPB's recognition were revoked, thus leaving the past actions of its regulated IPs unresolved, would any action by the Secretary of State directed at IPs appear appropriate.

In other circumstances, it would be inappropriate for the Secretary of State to take steps directly on the IP, which would only duplicate costs unnecessarily with the Secretary of State and the RPB conducting their own parallel, but seemingly independent, investigations and requiring the IP to account to two bodies; an "oversight regulator" should not "leap-frog" the IP's direct regulator, the RPB.

The IA also indicates that the concern is that "there is a perception that RPBs are reluctant to bring disciplinary proceedings against their own authorised practitioners" and that "even if they do, their disciplinary committees are not sufficiently independent to ensure fair outcomes". If the Secretary of State were to deal directly with an IP, this may simply fan the flames of such perceptions and could lead to a call that the Secretary of State should take on every case on the basis that, if the Secretary of State has reached a conclusion contrary to the RPB in one instance, how can the public be confident that any of the RPB's decisions are the right ones? I fail to see how such "leap-frogging" could work to improve public confidence in the regulatory regime.

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?

As explained in my answer to Q7 above, I do not believe that it is an appropriate strategy that an "oversight regulator" deals directly with IPs, rather than their authorising bodies. Such measures are likely to involve the doubling-up of the regulators' efforts and unnecessary costs for the IPs as they seek to satisfy both bodies.

I note that the proposals include authorising the Secretary of State to require information from parties other than IPs. These measures would put the Secretary of State in a stronger position than the RPBs in investigating the conduct of their regulated members, which makes me uneasy. I am not aware that the RPBs' investigation efforts are hampered by the absence of a power to require information from parties other than their members. Granting the Secretary of State this additional power and information resource would not only appear to be unnecessary, but also has the potential for creating much confusion and additional costs thus obstructing efficient investigation work.

The proposals also include creating a statutory framework for the transfer of information from the RPBs to the Secretary of State. However, I am not aware of any instances where the existing Memorandum of Understanding has proven insufficient for the oversight regulator's purposes.

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

No.

The case for moving to a single regulator has not been made out and it is therefore inappropriate even for a reserve power to be introduced. I also have concerns as regards the apparent rationale for taking steps in this direction. The consultation document states: "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." It seems to me that, if the Government believes that the absence of a single regulator is the key to improving public confidence, then why is that not the focus of attention at present? On the other hand, if regulatory objectives, powers, and IP fees are considered the keys, then why, if these proposed measures fail, should the consequence be a move to a single regulator? It is appropriate for legislative changes to be proposed only once the case for a move to a single regulator has been made out.

The Government's current proposals include many changes to the relationship between the RPBs and the oversight regulator. It would seem to me to be more sensible to examine how these changes affect insolvency regulation before contemplating, even by means of proposing a reserve power, the move to a single regulator.

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

I have not been persuaded that a single regulator is advantageous or necessary and therefore I do not believe that statute should be introduced describing the functions and powers of a single regulator.

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

No.

The consultation document is confusing: it states that "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… The regulators will be expected to take a full role in assessing the fairness of an IP's fees, including the way 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". However, the IA estimates the costs of dealing only with additional *complaints*; there is no additional cost in relation to *monitoring*.

The IP regulation IA seems to envisage that there will be no increase in monitoring costs, but that the RPBs' monitoring activity will simply be focussed better on "areas where creditors are likely to suffer larger losses". Therefore, presumably the Service envisages that a typical 3-day monitoring visit will involve examining the fees drawn on a sample of cases – presumably RPBs are not expected to examine all cases, notwithstanding the proposed regulatory objective of "ensuring that the fees charged by IPs represent value for money" – as regards fairness and value for money, rather than examining the IPs' compliance standards with the vast majority of other statutory, SIP, and Ethics Code requirements. Would the oversight regulator be satisfied, if the consequence were that, in the time allowed, monitoring visits could deal with no other matter but fees or would it conclude that the RPB were failing to meet the other regulatory objectives in taking such a narrow approach on monitoring visits? On the other hand, if RPBs are expected to continue to monitor statutory, SIP etc. compliance generally, as well as assessing fees, this will significantly lengthen monitoring visits. It would seem to me that the monitoring resource of RPBs would need to double in order even to get close to the "full role" that the consultation document describes and this cost, as well as that incurred by IPs in servicing longer monitoring visits, is entirely absent from the IA.

The IA also provides no set-up costs for handling fee complaints or dealing with fee monitoring. Whilst it is accepted that RPBs' existing complaints and monitoring structures will provide the framework, the RPBs will need to establish how practically to assess fees and train their monitors and Committees. In addition, whilst RPBs, monitors, and Committees will be familiar with fees based on time costs and principles may be drawn from the courts' Practice Directions as regards assessing fees based on time costs, in the event that percentage-based and fixed fees become more prevalent as a consequence of these proposals, it would seem that assessing the fairness of these fees would require the establishment and agreement of new and untested principles and methods. Ironically, it would seem that examining time records may be the most useful starting point when considering the fairness of fixed and percentage-based fees.

The IA suggests that the RPBs may be required to deal with 300 additional fee complaints each year. It has assessed the cost of these on the basis of the current cost per complaint (provided by one of the regulators in 2011). It would seem very likely that complaints involving fees, particularly if they required the RPB's detailed assessment based on an examination of the IP's files and time records, would be far more complex and time-consuming than the current "typical" complaint, which may involve investigating whether an IP has breached an unambiguous statutory or SIP requirement. Therefore, it would seem to me that 300 fee complaints will involve far greater costs than 300 non-fee complaints, with the result that the costs have been significantly underestimated in the IA.

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?

I cannot see that the absence of "IP fees representing value for money" from the regulatory framework is the core reason why regulators generally are not monitoring or handling complaints regarding fees quantum. I would have thought it is because the case has not been made that the RPBs' complaints process should depose the court's role in this regard.

There is also the question of cost, as explained in my answer to Q11 above: it seems inequitable to me that the significant costs associated with these changes should be carried equally by each IP (by reason of increased licence fees and levies). However, the alternative – perhaps that the IPs that are the subject of fees complaints or increased monitoring activity bear the costs – seems little better: would an IP be expected to bear the cost of an investigation that resulted in no finding of misconduct? If not, then who would bear this cost? A further inequity would arise if the recommendations of the OFT and Professor Kempson were taken forward: they suggested that assessment of IPs' fees for large insolvency cases might be left to the court process. This would seem grossly unfair to IPs in smaller practices: if the RPBs are to take a "full role" in assessing the fairness and value for money of IP fees, no case should be too great or complex for such attention.

It is interesting to note that the consultation document states that "in Scotland the Court Reporter system is used as a check and balance" and it seems that little criticism or lack of public confidence is levelled at this system. Although I appreciate the drive to avoid incurring court costs, I would have thought that this apparently successful process merits further attention in relation to IP fees in England & Wales.

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?

Information on approving fees has been made available to creditors for many years in the form of the SIP9 Creditors' Guides. Although it is accepted that these simply set out (and in not particularly reader-friendly terms) the statutory provisions, it seems that they were so rarely read that the requirement to provide a copy with reports issued to creditors was removed when SIP9 was revised in April 2010. It seems to me that the information suggested in this question similarly would have little effect on helping creditors engage in the process.

In addition, as the consultation document admits, substantial resource would need to be applied in order to provide "comparative fee data by asset size". Given the variety of circumstances and complexities of cases, this likely would provide such a wide range of fees – often bearing very little connection to asset size, as the *nature* of assets is as relevant, if not more so – as to be of little assistance.

Professor Kempson criticised heavily the poor quality of many creditors' reports in assisting them to assess the value of work done by IPs. I believe that this is not aided by the prescriptive Rules regarding the content of reports, which takes no account of proportionality of the circumstances of a case or the level of fees and costs. I believe that much work could be done in improving the delivery of useful information in creditors' reports regarding the case in hand; the required contents could be streamlined to focus squarely on a key principle of SIP9, that of explaining what has been achieved and how it has been achieved to enable the reader to discern the reasonableness of the fees.

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?

I object to the removal of the option for fees to be based on time costs for any case. An office holder cannot draw fees unless he obtains creditors' approval. The fact that, in the vast majority of cases, fees are approved on a time cost basis demonstrates, not only that this is preferred by IPs, but also that it attracts creditors' approval. The proposal to take away this option from creditors in certain circumstances is irrational and would be a wholly inappropriate step to take to remedy what is seen as a lack of engagement by unsecured creditors in the fee-approval process.

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?

The possibilities for unintended consequences of setting criteria for cases where fees set on a time costs basis is an option are endless and some would risk impairing further the public confidence in the insolvency regulatory regime. Given that IPs clearly prefer fees set on a time costs basis, it would seem illogical to "penalise" IPs for administering cases successfully so that the secured creditors' claims are discharged in full and could result in scepticism in unsecured creditors where realisations have been just insufficient to settle the secured creditors' debts (including termination charges and interest). In addition, this proposal would have a greater impact on IPs working in small practices, as much of their work involves insolvencies with no secured creditor and no need for creditors' committees.

It is true that creditors' committees are rare, but this is entirely appropriate and helps to keep costs down. Creditors' committees are a useful forum for office holders to engage with a representative sample of the larger body of creditors in relation to complex cases where the distinction between creditors' interests in "the bird in the hand or two in the bush" is almost indiscernible. I fail to see how the costs associated with establishing, reporting to, and meeting with, creditors' committees can be justified only to decide on the office holder's fees. It is misguided to suggest that restricting time costs fees would "encourage the creation of creditors' committees": this should not be the purpose behind a committee's creation and it does nothing to deal with the issue that creditors seem reluctant to engage in the process in the first place.

Strangely also, these proposals do not acknowledge the fee-approval processes of (S98 and compulsory) liquidations and bankruptcies: the office holder's fees are approved by the general body of unsecured creditors (in the absence of a committee). I struggle to see how secured creditors control fees in these cases, regardless of whether or not they are paid in full. Although the OFT market study concluded that fees were higher in cases where secured creditors were paid out, I would recommend caution when assuming that this applies to all insolvencies, given that the OFT's study was restricted to Administrations and CVLs that followed them; the market in S98 CVLs, bankruptcies, and other insolvencies is quite different.

The draft Rules set out in Annex A patently would not implement the proposal to restrict the time costs basis to cases "where secured creditors will not be paid in full": draft R17.14(2)(b) provides that time costs would not be available where "there is likely to be property to enable a distribution to be made to unsecured creditors" (other than by the prescribed part). In many cases, assets are insufficient to discharge costs (including the office holder's) in full and, in the event there is no secured creditor, the draft Rules would allow the office holder's fees to be based on time costs.

The costs to IPs of monitoring threshold cases would be significant. As an example, if a liquidator obtained unsecured creditors' approval for fees on a time cost basis on the understanding that asset realisations would be insufficient to pay a distribution to unsecured creditors, he would have to continually monitor how realisations of the company's assets were progressing – including keeping in continual contact with the company's factor or his debt collection team, solicitors acting for the liquidator in pursuing difficult assets, agents progressing piecemeal sales of chattels, the liquidator's investigation team exploring the existence and likelihood of successfully challenging and recovering antecedent transactions – as well as keeping up to date with the accumulating fees and costs of all these parties, to identify the point at which, if at all, it was *likely* (as R17.19(1)(b) states) that realisations would be sufficient to enable a distribution to be paid to unsecured creditors. At that point, assuming that he had identified *the* point and he did not have to track back to the point when he "ought to have become aware" that a distribution had become likely, he would need to review the case and endeavour to establish a proposed fixed fee or percentage (presumably of future asset realisations?) with which he would be comfortable to continue to act. He would need to revert to unsecured creditors, explain why the fee basis needed to be changed, provide a progress report explaining what he had done to date and seek to justify the proposed revised fee basis, and seek creditors' approval by physical meeting or meeting by correspondence. All this effort – and cost – would seem entirely unnecessary, particularly given that the unsecured creditors had approved the liquidator's fees on a time costs basis in the first place.

More fundamentally, however, it is difficult to see how the solution to an apparent lack of control exerted by unsecured creditors on IPs' fees, resulting allegedly in "overcharged" or "excessive" fees, lies in removing the option for fees to be set on a time costs basis. If unsecured creditors do not "negotiate" time cost rates with IPs now, why would they do so if IPs were to propose fixed or percentage fees? IPs would still be free to propose fees at a fixed sum or percentage that enabled them, in effect, to recover their time cost equivalent, which would result in no change in outcome. In fact, if, as Professor Kempson suggests, fees set on a time costs basis do not discourage inefficiencies, then it might be suggested that fixed/percentage fees would enable an IP to improve efficiencies and thereby increase his profit margins with no improved outcome for creditors. Worse, it risks dissuading some IPs from doggedly pursuing doubtful or difficult assets with the consequences of reduced returns to creditors and growing a culture of debtors making things difficult for office holders in the expectation that they will leave off the chase. The UK has much to be proud of in its insolvency profession and such proposals risk inflicting much damage.

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

I believe that the impact would be little, if any.

If IPs were restricted to a fixed/percentage basis for fees, they would seek to propose them at a level that would result in a time cost equivalent. It is extremely difficult to assess that outcome at the commencement of an insolvency process, which is likely why time costs are preferred. Some of the most costly assets to realise are the most uncertain, such as disputed debts and antecedent transactions that potentially could be challenged. An IP likely would be compelled to propose a fee at a high enough level to cover all contingencies, which likely would do little to improve the perception that an IP's fees are value for money. This may enable IPs to achieve larger profits on some cases – in the event that assets were easier to realise than estimated at first – than they would have achieved had the fees been based on time costs and thus this would reduce returns to unsecured creditors.

The only way that I could see these proposed changes reducing IP fees and increasing returns to unsecured creditors would be if those unsecured creditors engaged with the process and voted for lower fixed sums/percentages (provided that this action did not result in the office holder applying to court for an increase). Given the lack of engagement to date and the absence of measures proposed in this consultation to remedy this, I do not believe that this is likely, and in any event these proposals do nothing to encourage such a change.

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?

I believe that the proposed changes should not apply to any cases. Not permitting fees to be based on time costs is an inappropriate and ineffective step to take to remedy the apparent lack of creditor engagement in the fee-setting process.

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?

A prescribed percentage scale does not promote fair fees, as it treats all cases as equal. In that regard, it takes no account of the matters relevant to determining the basis of an office holder's fees, as already set out in the Rules (for example at R2.106(4)):

(a) The complexity of the case;
(b) Any respects in which, in connection with the insolvent'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, his duties as such; and
(d) The value and nature of the property with which he has to deal.

Thus it is a crude and inappropriate basis on which to calculate an office holder's fees. It begs the question: could an IP be criticised for not providing value for money by relying on a default scale, in the event that the circumstances of the case and his administration of it would suggest that the prescribed scale is excessive?

Although the imposition of a prescribed scale may overcome the difficulty of absent creditor engagement, few meetings are inquorate and it would seem that disenfranchising creditors entirely from the process would do nothing to improve public confidence in the profession.

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?

I am not in a position to answer this question. However, given that the current statutory scale has remained unchanged since 1986, it would seem to me that it is certainly less commercially viable than it was when originally devised. Any statutory scale, even those designed as percentages of realisations and distributions, should be adjusted regularly to reflect inflationary changes.

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

I believe that the time cost basis should remain an option for all cases and for all areas of case administration, as it is capable of accommodating all matters relevant for determining the basis of fees as set out in the Rules (see my answer to Q18 above) and it gives office holders the confidence to conduct quality administration, to act rigorously in pursuing difficult assets in the interests of creditors, and to satisfy other requirements that do not contribute to maximising asset realisations, such as reporting on directors' conduct and adjudicating on creditors' claims.

It has been suggested that the time cost basis does not encourage IPs to become efficient and perhaps even rewards inefficiency. The consultation document also identifies that "allowing time and rate… 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." If these are the fundamental concerns as regards the time cost basis, it would seem sensible to take steps to address these, rather than to eliminate the basis for some cases altogether.

<u>Impact Assessment Questions</u>

Q21 Do you agree with this estimation for familiarisation costs for the changes to the fee structure?

No.

1.5 hours of an IP's time is a staggering underestimate. The IA states that "this change is not complex to understand and would only need to be understood once before being applied". The draft Rules are by no means simple to understand, particularly as they do not implement the policy objective, as explained in my answer to Q15 above. An IP's systems would need to be substantially altered to accommodate the change; standard reports and meeting templates would need to be changed to accommodate fixed/percentage fee resolutions; diaries would need to be devised to check frequently whether the case has reached the R17.19 threshold; IPs would need to devise a method of calculating a reasonable fixed/percentage fee for the circumstances of the case and calculating approved fees to be drawn throughout the life of the case; revisions of bases would be more likely, so systems, procedures, and templates would need to be created to provide for these; and finally all administration, cashiering, and compliance staff would need to be trained to operate these new processes.

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?

Not applicable.

Q23 To what extent do you expect the new fee structure to reduce the current level of overpayment?

See my response to Q16.

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?

No.

As explained in my response to Q21 above, the revised fee structure will require many new procedures including: the calculation of an appropriate percentage fee to propose given the circumstances of the case; the calculation of that fee; monitoring of the threshold where a fee has been agreed on a time cost basis; and proposing changed percentages where the circumstances of a case change, e.g. new assets come to light or unexpected difficulties are encountered. None of these procedures would be necessary if IPs' fees continued to be allowed to be based on time 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?

As explained above, I do not believe that the proposed changes will lead to an increase in dividends to unsecured creditors, but I have no data to support this belief.

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?

I am not in a position to express a view on this matter.

Q27 Do consultees believe these measures will improve the market confidence?

The introduction by Ms Willott MP betrays an expectation that, if widely felt, inevitably will be disappointed: unless changes are so extreme and unfair as to threaten the solvency of IP practices, they will never "ensure that there will be funds available to make a payment to creditors" in every case. As long as the idea that all insolvencies should return something to creditors is kept alive, IPs' fees may always suffer from a perception that they are unfair and excessive. Fortunately, I do not believe that this is a widely-held misconception, but it is disappointing to note that it appears to underpin the key aims of these proposals.

The IA suggests that a consequence of increased market confidence will be that businesses will make more use of IPs' services, including advisory services. I do not believe that measures designed to affect IPs' fees or to change the regulatory oversight of IPs will bring about this outcome. I do not see businesses declining to seek the assistance of IPs because of their fees or because of a perception that they might act unprofessionally; quite the contrary, I would suggest that some businesses may be attracted away from IPs by some unregulated advisers' marketing materials that suggest that IPs will side more with creditors than with the debtor/company seeking help.

It seems to me that a significant driver for these proposals is the fact that "in the past 6 months 23% of all IP related ministerial correspondence has been in relation to fees". Both the OFT and Professor Kempson identified the high costs of raising challenges to fees through the courts as an issue that needed to be address. Although these proposals seek to involve the authorising bodies to a far greater degree in this area, I fear that the costs have been wildly underestimated. If these significant costs are passed on entirely to IPs, inevitably this will increase office holders' fees sought from insolvent estates and reduce creditors' returns. It may also lead to some IPs leaving the market, which will run contrary to the OFT's recommendation of increasing competition.

Q28 Do consultees believe these measures will improve the reputation of the insolvency profession?

Professor Kempson's report indicated that most people come into contact with the insolvency profession only once or a few times during their working lives; and that when they do they lack a general understanding of the insolvency process and of the office holder's role and responsibilities. The proposals include some suggestions as to how this can be improved, but they have not incorporated all of Professor

Kempson's recommendations as regards the provision of clear, useful, information to creditors. I believe that restricting the bases of IPs' fees in certain circumstances will do nothing to improve the reputation of the profession – it will simply make the picture more bewildering to creditors – but it is right that IPs explain clearly to creditors how they have spent, in effect, their money. The insolvency profession has much to be proud of – in the main, IPs are highly skilled at working hard and sometimes creatively to achieve positive outcomes from extremely difficult and pressured situations. However, sometimes some could do better at communicating their actions and decisions to creditors in justification of their fees and the regulatory requirements could be amended to make such clear communication easier. I believe that the public's increased understanding of the work of IPs would improve the profession's reputation.

IP regulation and fee consultation question response sheet

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I am concerned that given the significant changes proposed and the volume of documentation to review that I have only been given six weeks to respond to this consultation.

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?

In terms of regulatory objectives and public policy generally, I believe that greater emphasis should be placed on creditor engagement and making debtors and directors more accountable for their actions.

The Insolvency Act 1986 followed the publication and most of the findings in the Cork Report including enactments concerned with the administration of insolvency procedures and the penalisation and redress of malpractice and wrongdoing.

It is extremely concerning for both the insolvency profession and creditors generally that over the past decade updates to the Act, in particular the Enterprise Act 2002, have significantly diluted much of what the original legislation was trying to achieve.

Too much emphasis has been placed on the concept of the 'honest failure' which has left creditors feeling disengaged and detached from insolvency processes.

As an IP, I work closely with a broad spectrum of creditors, both secured and unsecured, and the feedback received is that stakeholders are less concerned about the existing frameworks for fees and regulatory bodies, but rather the shift in attitude and processes in favour of the debtor. These concerns include:

- The abuse of connected-party pre-packs undertaken in conjunction with a flawed administration regime which promotes creditor disengagement;
- The reduction of the bankruptcy discharge period from three years to 12 months
- The Insolvency Service's ability to properly investigate cases of alleged misconduct leaving blameworthy directors free to start up other companies;
- The Government's latest proposals (as part of the proposed reform of the Insolvency Rules) to abolish creditors' committees;
- The Jackson reforms which seek to curtail the use of 'no win, no fee' arrangements in insolvency; and
- The lack of regulation and licensing in the LPA Receivership market.

It is disappointing that the Government has chosen to overlook these issues ahead of the those covered in this consultation paper.

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

I have no objections in principle to the proposed procedure for revoking the recognition of an RPB. However I am concerned with the proposal that the Secretary of State would be able to revoke the recognition due to a single act or omission, especially given that one of the proposed regulatory objectives is ensuring that the fees charged by IPs represent value for money which is very subjective.

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

I have no objections in principle to the proposed scope and procedures for the Secretary of State to issue a direction to the 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?

I am concerned that the Secretary of State will have the power to impose a financial penalty on an RPB. This would result in increased licensing fees as the licence holders would be financially penalised for the RPB's performance. Ultimately these costs would be borne by creditors.

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

I agree in principle that the Secretary of State in exceptional circumstances would be able to publicly reprimand an RPB. However should this eventuality arise I am concerned that this may damage the RPBs and the insolvency profession's reputation and reduce market confidence.

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

Given my concerns detailed above I would suggest a far greater time frame to allow the RPBs to make 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?

Given that the insolvency complaints gateway was only introduced in June 2013 and the RPBs have worked together to develop common sanctions for IPs against whom complaints are upheld, there appears to be no rationale for the statement that 'the perception that the current disciplinary procedures for IPs are not always effective on delivering fair, effective and prompt outcomes for those affected.'

I can only envisage that such a sanction would be needed where there is overriding evidence that the RPB has failed in its role to impose a sanction on an IP. This would be relevant in only extremely rare circumstances.

The Secretary of State should only be able to impose a sanction directly on an IP where the evidence provided to the RPB has been fully considered by the Secretary of State. I also envisage that this could slow down and complicate the complaint process rather than provide a prompt outcome.

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?

I am concerned that this power could be used too freely. IPs and their staff would face two separate line of enquiries which is disproportionate and inconsistent with the objectives of the Red Tape Challenge.

The Secretary of State's involvement should be limited to the review of the information provided to the RPB.

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

I agree in principle with the Secretary of State having the ability to appoint a single body to authorise and regulate IPs. I note that the proposed functions and powers appear in line with the current functions and powers of the existing RPBs.

I have concerns regarding the implications in practice of moving to a single regulator and the impact on maintaining standards in the regulatory process. There is no evidence to suggest that the current RPBs are not professionally and efficiently run.

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

No.

Part 2 – Insolvency Practitioner fee regime

There appears to be no rationale for the suggestion that fee complaints are not being addressed by the current framework. The RPBs when conducting monitoring inspections already look at various aspects of the time recording and the drawing of fees such as ensuring that the appropriate authorisation is obtained, fees are not duplicated or drawn in excess of time and compliance with the reporting obligations of SIP 9, etc.

In 2013, there were approximately 19,000 corporate insolvencies (liquidations, receiverships and administrations). If one assumes that each insolvency case involved 100 stakeholders (including bank, trade, employee and Crown creditors), then over the course of the 12 month period, the IP profession dealt with some 1.9 million creditor claims.

The Impact Assessment estimates that there will be 300 fee complaints each year. Based on the assumptions above in relation to stakeholder numbers, the insolvency profession would last year have expected to receive fee-related complaints from just 0.016% of total creditors. If the number of creditors decreases to 50 per case, then the figure is 0.032%, which is still a tiny figure. These figures do not take into account the 73,000 personal insolvency appointments.

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

No. As stated in the Impact Assessment, there are currently very few fee related complaints. There is appears to be no support for the assertion that fees complaints would represent half of the total number of complaints received and I am unable to estimate how many fee complaints I would expect to be made annually.

Costs would be proportionate to the number of fees complaints and no comment can be made as to whether the cost per case is realistic.

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?

Value for money is a subjective issue especially given the highly complex and highly compliance orientated nature of the insolvency profession. IPs are expected to do a substantial amount of work which does not relate to asset realisation or the payment of dividends, nor add benefit to the case in order to comply with insolvency legislation which unsecured creditors may not understand as this is outside normal business activity.

The RPBs are not set up to monitor value for money and to do so would result in a significant cost both in the training of staff and the time taken to conduct the monitoring visit. This cost would be passed down to IPs and ultimately be born by creditors.

I do not consider it appropriate for a single inspector on a monitoring visit to assess whether fees on a particular case represent value for money. Furthermore, if fixed or scale fees were imposed on the insolvency profession I do not consider it appropriate that the fairness of these fee could be assessed by the RPBs if unsecured creditors have agreed the basis of remuneration.

The existing framework already allows creditors the mechanism to challenge IPs fees and the insolvency profession should not be subject to the burden of a further review process if creditors choose not to exercise these rights.

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?

I welcome transparency of information and enhanced creditor engagement from the unsecured creditors who are generally the HMR&C, the RPO, financial institutions and corporate entities rather than unsophisticated individuals.

The Insolvency (Amendment) Rules 2010 and the revised SIP 9 were brought into force to ensure more detailed information is provided to creditors and to encourage enhanced creditor engagement. More time will be required to ascertain whether these changes are sufficient.

There is a risk that aggressively capping IPs' fees will act as a disincentive to carrying out work for creditors. This would undoubtedly result in businesses falling by the wayside without being subject to a formal process which would include an investigation of the debtor's affairs and conduct.

The OFT and Professor Kempon's reports did not establish that IPs charge out rates are unfair when these are compared to other professional advisors. In the vast majority of cases, the time charged to the case is not recovered in full and generally at a 60% recovery rate.

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?

I do not agree with the proposed changes to the fee structure. Clearly where the basis of remuneration is agreed by the majority of the unsecured creditors in value there should be no restriction on time and rate as a basis of 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?

I do not agree that the charging on a time and rate bases should be restricted to those cases where there is a creditors committee or where secured creditors will not be paid in full.

It is noted in the proposed rules that where a dividend will not be payable to unsecured creditors, the basis of remuneration can be fixed by reference to the time properly given.

I also note that it is proposed to abolish creditors' committees which would decrease rather than increase creditor engagement.

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

It could be inferred from the consultation document that unsecured creditors would always receive a return if it not were for IPs fees which is not the case.

There has been a noted increase in cases where there are insufficient assets to enable a meaningful return to be made to unsecured creditors. This is due to assets being more heavily geared and suppliers exercising their retention of title powers.

As every case is different it is impossible to comment on how the proposed changes would impact on the insolvency profession's fees as a whole. However, on a case by case basis the proposed changes could result in an overcharge of fees in a simple case with an easily realisable assets. In contrast in a complex case with low value assets, it is likely that the IP will not be properly recompensed.

I am also concerned that investigations into the conduct of the debtors and directors would reduce significantly, which would have a detrimental impact on returns to unsecured creditors and director accountability. The non commercial aspects of an appointment, including the high level of statutory compliance, might also not be undertaken properly if the IPs' fees were restricted.

IPs may be unable to continue to practice due to restriction of fees. The lack of competition within the market could result in more cases being administered by the Insolvency Service.

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?

The proposed changes to the basis of remuneration should not apply of any type of insolvency procedure. There is no apparent justification for a difference in the basis of remuneration in voluntary arrangements and members' voluntary liquidations as compared to other types of insolvency appointments.

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?

Only in cases where a creditors' resolution to agree the basis of remuneration cannot be obtained should a default position be available.

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?

The current statutory scale which was prescribed in 1986, 28 years ago is no longer commercially viable. Secretary of State fees now include a 100% band.

Unlike the Official Receiver, IPs operate in the private sector and in a highly competitive market. If limited to a scale rate IPs would be encouraged to recover only the largest value or easiest to realise assets. It is unlikely that it would be economical for IPs to take on low value asset cases or cases which would require investigation. This would result in far more appointments being retained by the Official Receiver and there is no evidence to suggest that the cases being administered by the Official Receiver would provide better returns to unsecured creditors than if they were administered by IPs under the current fee regime.

As each insolvency case is different, a scale rate which might appear fair on one case might be considered unfair on another. Scale rates would not give creditors a clear picture from the outset on the quantum of fees which would be charged to a particular case as the amount of realisations and distributions would not be known until the conclusion of the appointment.

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

Time and rate should be charged in all cases where agreement has been obtained from the creditors. To charge by hourly rates is the fairest mechanism for both the IP and the creditors. Creditors are provided with the hourly charge out rates in advance of a time cost resolution being sought and have the ability to challenge the quantum of the fee.

Impact Assessment questions:

Q21: Do you agree with this estimation for familiarisation costs for the changes to the fee structure?

The estimate only makes reference to the cost of the IPs to familiarise themselves with the change in legislation rather than the profession as a whole. The estimate does not take into account the cost in training staff, amending standard documentation etc.

Existing users are familiar with the legislation as it stands.

Users will undoubtedly find having two sets of fee rules, one for cases pre implementation of the rules and the other post implementation very confusing especially given the proposed new rules differentiate between different types of appointment.

There are clear cost issue implications in devising and maintaining dual fee systems.

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?

No comment.

Q23: To what extent do you expect the new fee structure to reduce the current level of overpayment?

Notwithstanding that the OFT data used is five years out of date, there is no rationale to suggest that IPs are being overpaid in cases where the secured creditor is paid in full.

In the vast majority of cases IPs carry out work where there are insufficient asset realisations to cover the time charged to the case, resulting in a write off of time. Decisions are often taken by IPs to cap their fees to enable a return to be made to unsecured creditors.

The OFT appears to have decided that discounted rates represent a correct market price for IPs' services and that IPs' standard rates are too high. It might equally have taken the opposite view that IPs' standard rates represent the correct price and discounted rates result from unfair buying power on the part of a handful of major creditors. In the absence of a comprehensive examination of the profits earned by the Insolvency profession from different sources of work, we believe that this part of the OFT report doesn't not provide a sound basis for a change in the fee structure.

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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?

In principle, yes.

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?

I completely disagree with the assumption that there is an overpayment of fees in cases where the secured creditor is paid in full.

The assumption that should the full £15m be returned to creditors this would only equate to an additional 0.1p in the pound recovery rate for unsecured creditors appears reasonable.

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?

I agree to adding a weight in the relative costs and benefits to IPs and unsecured creditors.

Q27: Do consultees believe these measures will improve the market confidence?

No. The Impact Assessment stated that if the full £15m was returned back to creditors this would only equate to an additional 0.1 pence in the pound recovery rate for unsecured creditors.

Other measures could be taken to improve market confidence, for example making directors more accountable for their actions and increased resources for the Insolvency Service to pursue more directors' disqualifications. The preferential limit of £800 per employee should also be raised.

Q28: Do consultees believe these measures will improve the reputation of the insolvency profession?

No, I believe it would have the opposite effect. Creditors would be engaged less under these proposals. Should scale rates be enforced, complaints are likely to increase to the level they were pre 1986. There would be no incentive for the profession to undertake investigation work or realise low value or difficult to realise assets.

28 March 2014

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Strengthening the regulatory regime and fee structure for insolvency practitioners – consultation paper

The Australian Restructuring Insolvency & Turnaround Association is the professional body in Australia of company liquidators and bankruptcy trustees, and lawyers, financiers and others working or interested in the insolvency field.

We take the opportunity to make this submission both because the issues in Part 2 of the consultation paper are of direct relevance to issues we are considering in Australia, and because Australian law and practice was the subject of focus in the report of Professor Kempson, with whom we had detailed discussions during her inquiry.

The nature of this submission is to provide some clarification and explanation of Australian law and practice, and then to give some responses, from our perspective, to some of the questions you ask. We focus in particular on the proposal to remunerate practitioners on a commission based. We hope these comments may be of assistance to you.

Briefly, we say that while a commission based system for remuneration has the benefits of simplicity, it would necessarily have to be economically feasible, and given the nature of insolvency, this is unlikely unless the commission rate is set at a very high level.

The Australian regime

Initially, we need to explain some fundamental differences between our insolvency regimes that impact upon the remuneration issues raised and should assist you in understanding what we are saying in our submission.

Australia has two separate insolvency regimes, with the Corporations Act 2001 covering corporate insolvency and the Bankruptcy Act 1966 covering personal insolvency. We have two regulators and regulatory regimes, corporate regulated by the Australian Securities and Investments Commission (ASIC), and personal regulated by the Australian Financial Security Authority (AFSA). Practitioners are separately registered by ASIC as company liquidators, or by AFSA as trustees in bankruptcy, and many are registered as both. In the particular context of remuneration, practitioners must therefore abide by the laws and regulatory guidance in corporate, and by the laws and regulatory guidance in personal insolvency. These are not consistent, including in relation to remuneration. This bifurcation is seen to add to the cost of the overall regime, including its fees, and recommendations have been made by the Australian Productivity Commission, and others, for a closer alignment of personal and corporate insolvency laws.[1]

[1] Productivity Commission Research Report Annual Review of Regulatory Burdens on Business, Business and Consumer Services, ch 4.5, August 2010

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Further, we have a government bankruptcy trustee, the Official Trustee in Bankruptcy, who administers over 80% of what are largely assetless bankruptcies. It charges on a commission basis; broadly taking the first A$4,000, and then on a percentage basis beyond that. It does not operate on a commercial basis. The government charges a fee on all bankrupt estates (currently 4.7% of gross realisations of every bankrupt estate, soon to increase to 6%), to assist with funding the role of the Official Trustee in Bankruptcy.

Private registered trustees administer the remainder of bankruptcies, which are generally the more substantial and complex, with their remuneration taken from realised assets and recovered funds in the estates. It is often the case that there are insufficient assets to fully remunerate the trustee. It is accepted therefore, that one of the factors practitioners take into account when setting their hourly rates is the level of unfunded work. Under the Bankruptcy Act, commission rates for registered trustees are available but are prescribed and set so low as not to be commercial and are not to our knowledge used.

In contrast, Australia has no government liquidator; all corporate insolvency administrations are handled by the private profession. Remuneration taken is taken from assets in the insolvent companies. It follows that there are often insufficient assets to fully remunerate the liquidator; the liquidator is obliged to undertake certain minimum tasks whether paid or not. ARITA recently funded a research study which determined that the private profession contributes A$40 million each year in unfunded work in court appointed liquidations.[2] It is also accepted therefore that one of the factors practitioners take into account when setting their hourly rates is the level of unfunded work. As to percentage rates, while the Corporations Act allows these, we are not aware of any liquidators using them.

Our ARITA Code of Professional Practice, to which Professor Kempson refers in some detail, attempts to give detailed guidance in relation to the recording and approval of remuneration by practitioners, both in personal and corporate. It attempts to give creditors more open and transparent information about the remuneration being sought, in order to allow creditors to make an informed decision. The Code is referred to and relied upon by the regulators, and by the courts. The Code, consistent with the law, gives guidance on the claiming of remuneration on a commission or fixed fee basis, or any other basis approved by creditors. By far the norm is that hourly rates are used.

ARITA also has a complaints process, which allows a creditor to make a complaint about the conduct of an ARITA member, and this may include a review of the member’s remuneration.

The fact that in Australia there is no government liquidator means that there is no alternative appointee for nil or low asset administrations. In the case of voluntary liquidations, a liquidator will not generally take the appointment unless there is director or other external funding. But in the case of court appointments, official liquidators are required to accept such appointments. Based on the ARITA research study undertaken, liquidators recoup from company assets only 15% of their remuneration, resulting in A$47 million annually in unpaid remuneration. It is therefore unlikely, in Australia at least, that a percentage of realisations would be possible for such administrations as there are no to low realisations against which to apply the percentage. It would be uncommercial to expect an insolvency professional to undertake this work without having the right to draw remuneration from the limited realisations made.

[2] An analysis of Official Liquidations in Australia, Amanda Phillips, February 2013, at www.arita.com.au

Public interest work

The pricing of insolvency work in Australia, and the UK, is impacted by the fact that a proportion of insolvency work done by the practitioner is in the public interest - reporting to the regulator, investigating offences, enforcing director or bankrupt compliance. This work is required to be done whether there are funds available or not. If there are funds, the practitioner is entitled to be remunerated for it, but this work does not necessarily result in a return to creditors. Indeed it consumes funds otherwise available to creditors. This is a proper outcome given the wide range of interests that an insolvency regime is meant to serve.

In that respect, the concept of 'value for money' in relation to fees, referred to in the consultation paper,[3] has to be applied carefully. The 'value' may in fact not be a commercial return for creditors but rather may be that the directors are prosecuted, or that unlawful transactions are undone.

A submission by ASIC in a reported case that value or benefit to creditors should be a relevant factor in determining remuneration was rejected by Justice Barrett of the NSW Supreme Court in *Onefone Australia Pty Ltd v One.Tel Ltd*[4]

.... 29 A question debated before me is whether a liquidator seeking remuneration for specified activities must show that "benefit" flowed from those activities. I was taken to pronouncements said to support the proposition and pronouncements said not to support it. The debate is, to my mind, a sterile one, if the question of "benefit" is approached in some undefined evaluative sense. ...

30 The real question is whether the activities for which remuneration is claimed are within the scope of the liquidator's functions.

We agree with that statement. We further comment that a significant, and increasing, amount of work must be done by insolvency practitioners to comply with requirements imposed by government, statutory bodies and regulators, and this does not necessary balance well with the expectations of creditors seeking to recover their lost monies.

But we of course agree that a practitioner must act in a commercial sound way in administering an insolvent estate, for example in assessing whether to pay a dividend out of existing funds, or to use some or all of those funds to pursue recovery proceedings. To this extent, value for money is a relevant concept.

Creditor disengagement

Australia has the same issues of creditor disengagement as in the UK, which we understand is universal internationally. While ARITA's approach under its Code has been to give creditors information about what work was done in an administration, and for how much, we have feedback that creditors consider there is now *too much* information provided. That assumes creditors even attend the meeting, at which remuneration is to be discussed and approved, which is always at their time and expense. 'Postal voting' by creditors does assist in remuneration being approved, but this is only available in personal insolvency (although law reform has been proposed which would see it extended to corporate insolvency).

[3] [101] –[102]

[4] [2010] NSWSC 1120

For those creditors who are engaged, there is a ready fee challenge process in personal insolvency to AFSA. There is no equivalent avenue in Australia in corporate insolvency; a creditor must apply to the court.

ARITA itself does provide a process for creditors who wish to complain about fees, however only a small percentage of complaints to ARITA concern fees, and in those instances fees are generally only one of a number of concerns raised in the complaint.

Nevertheless we appreciate the fact that creditors are generally ill-equipped to provide a monitoring role over fees.

Market

As to the market, there is some competition at play in relation to fixed fees for standard insolvency work in the SME section - that is, handling the liquidation of a company, investigating and reporting, dealing with creditors, realising available assets, and paying a dividend. The unpredictability of insolvency, as the consultation paper says, means that any work beyond that would have to be priced, and agreed by creditors, outside the fixed fee.

Risk

In Australia, and we understand in the UK, practitioners take on personal risk when they are appointed. Indeed, this underpins our voluntary administration regime, in that the voluntary administrator is personally liable for certain debts incurred, subject to right of indemnity out of the assets. We see this risk, and the need for caution and time in avoiding or managing it, is a factor in the remuneration costs of the insolvency regime.

The problem

We note that the consultation paper accepts there is a problem with the level of practitioners' fees, expressed as a market failure or otherwise. We cannot comment on this in the UK context, but from experience we do raise the question as to whether the "problem" is sufficiently identified for "action" to be taken on it, and indeed whether the problem is only related only to insolvency. We point out that knowledge imbalance between client and service provider is not peculiar to insolvency; and the question of hourly charging is one that is a live issue across many professions. It should also be emphasised that insolvency is generally accepted as requiring the attention of experienced and qualified professionals. Taking over a failed business and dealing with its problems is inherently labour intensive and difficult in most cases. Regulatory, reporting and accountability obligations are (properly) imposed. Insolvency is therefore an inherently expensive process under Australian law. ARITA is examining a more streamlined approach to certain types of insolvencies, and we are looking to UK experience in that regard, that would involve less work, but at the same time potentially less investigation and accountability.

For these and other reasons we have outlined, largely common between Australia and the UK, the issues are complex.

If we were to accept there is a problem, we in Australia suffer from a lack of statistics that would allow us to try to identify the problem. We are not aware of information here that would allow us to "cost" the corporate insolvency regime. However, in personal insolvency, AFSA does provide fee statistics that show the fees, in comparison to receipts, and dividends. These statistics are provided for the commission based remuneration of the Official Trustee, and the hourly based remuneration of registered trustees.

2012-2013[5]	Percentage of all bankruptcies	Receipts	Remuneration	Dividends	Other payments[6]
Official Trustee	80%	$34m	$7m	$12m	$15m
Registered Trustees	20%	$270m	$70m	$38m	$133m

Registered trustee remuneration therefore represents 26% of receipts; for the Official Trustee, the percentage is 20.5%. This is not significantly different considering that the Official Trustee is remunerated at what would be considered an uncommercially low percentage rate, though it is noted that there is an initial flat fee of A$4,000.

Therefore, it appears that private trustees' fees as a total may not be unreasonable when considered as a percentage of realisations and compared to the Official Trustee. However, it would be fair to suggest that by charging remuneration on an hourly basis it better ensures that the estates where more work is required appropriately pay more for that service. In comparison, a commission based system would not take account of this and may in fact result in inequity for those straightforward estates that may in fact have higher asset realisations.

Commission based fees

For the reasons we have set out in this submission, we do not think that commission based fees are feasible in the insolvency context, except in particular cases. They can been seen to offer the benefit of certainty and simplicity, however, they can also result in perceived inequitable outcomes should asset realisations prove to be higher than expected.

We consider that these features of insolvency go against commission based remuneration:

- The uncertain and often limited nature of assets in a significant number of insolvencies;
- The public interest and other such work of an insolvency practitioner, which goes far beyond that of simple asset sales;
- The significant personal liability risk assumed by insolvency practitioners;
- The high risk nature of insolvency recovery proceedings and associated litigation and that commission based remuneration may provide a disincentive for risk taking;
- The difficulty of setting one percentage rate to apply across a spectrum of very different situations, and if it is proposed that creditors determine the appropriate percentage there will be the same difficulties as what is currently suggested occur with time based remuneration;

[5] ITSA annual report 2012-2013.

[6] These comprise government charges and other payments: see www.afsa.gov.au

- That, in reality commission based rates are rarely used, and where set by the law in Australia, are not practical or commercially viable.

They are a proper and useful basis for government insolvency work, where commercial viability is not expected or required.

Nevertheless, if commission rates were to be applied generally, or in a particular category of matters, they would need to be set at a level that serves to maintain the commercial viability of the profession. Insolvency and its practitioners perform an important public function which would otherwise need to be performed by government. In the UK, and in personal insolvency in Australia, it is accepted that the government must play a role where there is a lack of commercial viability, and therefore a lack of interest, for the private insolvency profession to be involved. That viability has to take into account the need for practitioners to be properly remunerated for what is complex and responsible work, where personal risk is assumed, the public interest functions performed, the extent of unfunded work, and the need for maintenance of expertise and capacity in the profession to meet the peaks and troughs of the insolvency market.

If you have any questions about this submission, other about the insolvency regime in Australia, please contact ARITA's Legal Director, Michael Murray, at mmurray@arita.com.au or + 61 2 9290 5700.

Yours sincerely

John Winter
CEO

Steve.Spong

From: John Briggs <johnbriggs@southsquare.com>
Sent: 28 March 2014 17:48
To: Policy.Unit
Subject: Consultation: Strengthening the regulatory regime and fee structure for IPs

Dear Mr Beale,

I have considered the Consultation above and Prof Kempson's report and have a few brief points to make:

Part 1: Regulation of insolvency practitioners

1 In my view, there should only be one RPB. This will make it easier to regulate the profession, maintain consistency of sanctions and standards, and hopefully strengthen public confidence. The RPB should be independent and underpinned by statute in the way envisaged in the Consultation. Compliance monitoring of fees by the RPB which I advocate will thereby be strengthened and simplified. I also advocate that the RPB would have power to deal with complaints of excessive remuneration, with appeal to the court. It would then build up the expertise and consistency that is now lacking in the court based remedy. And hopefully be much cheaper.

2 I also agree that the SoS should have a reserve power to sanction IPs in particularly serious cases. There are some types of conduct (for instance breaches of ethics or fraud) that should have publicity more than just an entry in the relevant RPB publication. I would suggest extending the power of removal from office of the SoS to a general power to remove from office (as was the position under the 1914 Act s 95 for a trustee in bankruptcy) and not just restricted to SoS appointments (IA s 298(5)). This could be supplemented by a power of the court in such cases to sanction the IP.

Part 2: Fee regime

3 I do not accept the comparison between control of secured creditors on the one hand and unsecured creditors on the other as an analogy applying to insolvency proceedings generally. It is like comparing apples and pears. Realisation of an asset subject to security is a task that can be estimated and for which a price can be quantified. Accordingly it is amenable to ready agreement on a percentage basis, particularly where there is the prospect of repeat business for the IP and on the supermarket principle, a discount can be offered.

4 The same principle applies in some other insolvency procedures when costs and realisations can be predicted with reasonable certainty. IVAS and CVAS, and administrations akin to receiverships are examples. Hence, creditor engagement and interest in the IP fees because of the likelihood of benefit.

5 Many CVLs, winding ups and bankruptcies are not of this ilk. There are no ready assets to realise, investigatory obligations, statutory compliance functions, and hence little competition for the role of office holder and creditor disengagement. In these times of recession, with little money about and lowered expectations of selling assets and recovering claims (claims may be good but offer poor recovery prospects), this problem is exacerbated.

6 I am surprised that what is being advocated is a return to percentage based remuneration. This was well recognised before the introduction of the Insolvency Act 1986 to be unfair and outdated. Has this been forgotten? Unfair because it either over remunerated (realisation fee for moving funds from one bank account to

another) or under remunerated (did not reward the effort and risks involved in most forms of insolvent liquidation). Hence, time based remuneration.

7 My fear is that if percentage based remuneration is reintroduced it is going to drive out just those IPs who will likely do a good job, because it will be regarded as unprofitable work. Those will be the very cases that need investigation. The word will be out among the crooks that they are even more likely to get away with it than before.

8 I would advocate that statutory work be fixed rate but that other work remain on a time basis if creditors so vote by majority, but perhaps with a banding of fees for IPs as applies for solicitors, to control the costs to an extent.

9 I also fear that if the percentage rate is adopted with appeal to the court, it will spawn a plethora of expensive satellite litigation. Better that the RPB should deal with allegations of over–charging.

10 I acknowledge that there are some inefficiencies and perhaps abuses with time based remuneration, but some are the result of the need for compliance reviews by the office holder of what is done by other staff.

11 Some control could be introduced by trade bodies or Government departments taking a real interest in the insolvency. Perhaps, the former could be encouraged, with the aid of a small levy as operates for banks in the IVA/CVA sector. As for Government departments their disengagement is lamentable. The attitude seems to be that once they have done their job and put the company into liquidation or made the individual bankrupt their job is done. No funding, no interest.

12 In times past, the office holder looked to creditors to fund difficult cases of investigation and litigation. In consequence they engaged, and looked for recompense and dividend. No longer. With the backing of the powers that be, CFAs for lawyers and uplifts for IPs seem to have dominated in recent times. With high uplift rates in those insolvencies where claims come good, this will have fed its way into the figures of higher fees in bankruptcies and liquidations, and increased the phenomenon of creditor disengagement (and IP disinterest in creditor returns). CFAs in this field are due for abolition in 2015 and it is consequently necessary to think carefully about IP remuneration in the future, for a healthier, happier and balanced outcome for all. Otherwise, if IPs are not adequately remunerated, the crooks are going to get an easier time than hitherto.

13 There is obviously a temptation to set fees at a percentage since this is an easy default position and also easy to regulate (under the 1914 Act fees and expenses were audited by the DTI). However attractive at first sight, I am not convinced that this is adequate for much of the very difficult and necessary work which an IP is expected to do.

2

I hope the above is helpful. I am responding as an individual.

I am a practising barrister specialising in insolvency related matters and a Deputy Registrar in Bankruptcy and Companies. I am also a writer of / contributor to a number of Works, including Muir Hunter on Personal Insolvency.

Regards

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Steve.Spong

From: William Turner <William.Turner@frpadvisory.com>
Sent: 28 March 2014 17:18
To: Policy.Unit
Subject: BIS consultation: Strengthening the regulatory regime and fee structure for insolvency practitioners (March 2014)

IP regulation and fee consultation question response sheet

(Consultees may wish to respond just to those questions that are of relevance to them)

Name: William Turner

Organisation (if appropriate): FRP Advisory LLP

Contact Details:

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07720 291600

Dear Minister,

I write in response to your consultation on Insolvency Practitioners (IP) fees. Whilst I support two out of the three government proposals to "improve returns to unsecured creditors; and improve the reputation of and confidence in the insolvency profession", I have serious concerns that your third proposal (simplification of the fee structure) will cause significant 'harm' to creditors, all insolvency firms and the UK's globally renowned insolvency regime. I share your priorities to have a competitive, fair, transparent, world-renowned insolvency profession, which is currently 7th best in the world in terms of the amount returned to creditors and speed of the process, according to the World Bank. However I am worried that the proposal to simplify the fee structure through restricting the use of time-cost (where there is no secured creditor or no creditor committee) will undermine these common goals.

Before summarising my concerns, please note that I have significant concerns that the fees consultation is based on perception rather than fact and evidence. IPs' fees comprised just 2% of all complaints about IPs in 2013 (down from 7% in 2010). To put this in perspective, in 2013, there were approximately 116,000 new insolvency cases, and there were just 13 complaints to the government about insolvency fees (0.01%). Even accounting for the fact that many of these 116,000 cases would have been handled by the Official Receivers – about whose fees there have also been complaints – the proportion of cases that are attracting official complaints about fees is negligible.

I support a number of the fee proposals set out in previous government reports. However the proposal to simplify the fee structure through restricting the use of time-costs was not recommended in any of those reports. Furthermore, I am unaware that the structure is used anywhere else in the world and so I am concerned that it has not been 'tried and tested'. I therefore ask that the government drops its proposals to restrict the use of time-costs as a method to charge fees, and ask that it reviews alternative recommendations as proposed by previous government reports that will address its goal of reforming IP fees and improving unsecured creditor engagement.

My other main concerns about restricting the use of time-cost and relying solely on fixed fee and percentage of realisations include:

- It does nothing to address the problem of a lack of engagement by unsecured creditors.

- It could lead to outsourcing of specific insolvency procedures to unregulated individuals. This would shift the cost rather than reduce it.

- It is impossible for an Insolvency Practitioner to 'guestimate' what might be involved in a case from the outset. Relying on an up-front fixed fee without an option to review the fee later would see IPs and creditors routinely short-changed.

- Because IPs cannot resign from a case, once they have reached their fixed fee level, they will almost certainly not optimise recoveries as there is no incentive to do so. This would lead to lower returns for creditors.

- Many cases would not be taken on by IPs at all because the fee could be too small to be economical.

- Creditors will lose out through the use of percentage of realisations where large returns might not reflect the amount of time an IP is required to dedicate to a case. IPs will lose out through the use of percentage of realisations where there are smaller cases with smaller returns which often involve greater investment in terms of hours and resources that would be reflected in the final settlement.

The UK's insolvency regime is the 7th best in the world based on returns and costs to creditors, the likelihood of business rescue and the speed of the insolvency process. Given it is one of the best in the world, and given concerns around IP fees are negligible, I ask that the government reviews alternative proposals which are in proportionate to the problem that it seeks to address.

Yours sincerely,

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?

The assessment of costs has made sweeping assumptions on the level of complaints anticipated, while the reality is that the number of complaints received concerning fees in the industry is extremely low.

I would suggest a better reflection would have been to consider the number of fee queries/complaints actually received by IPs in the first instance and how these were addressed. It is appropriate to ascertain the strength of creditor views in this area that are actually expressed in the field, combined with an independent check on the reasonableness of those views.

Following the rule changes in 2010 creditors have an 8 week window to object to fees charged to an estate and I would suggest that consideration could be given to increasing the power to creditors at this stage may be more appropriate without necessarily requiring the costly intervention of the courts.

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?

Measuring value for money is subjective and it is difficult to see how the various RPBs in their capacity will be able to ascertain on a like for like basis whether value for money has been achieved. However, broadly we are in agreement that the RPBs currently monitor compliance with best practice and ensuring fees drawn have been properly approved. A more detailed over-sight in this area may well improve confidence.

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?

No. Creditors are already provided with a significant amount of information on charge out rates, the ability to approve the fee basis and how to challenge the level of fees. Creditors very rarely engage in this process and providing more information is unlikely to encourage active participation in the process.

I agree that currently creditors do not engage in the process despite the number of tools available to them, IPs and creditors would benefit from greater creditor engagement.

The consultation notes that Government creditors have a role to play and I think is the area where more attention should be given. If creditor ability to communicate with each other were improved they would be in a position to exert more influence utilising the existing tools available.

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?

I consider the fixed fee/percentage basis of approving of an office holder's remuneration is flawed. Indeed it is arguable that this is easier in a CVA/IVA/MVL to agree a fixed fee when the work the IP is likely to undertake is largely known prior to appointment, unlike most other forms of insolvency.

Having different bases for different types of work is confusing both within the profession and to the creditors.

The consultation has discounted different methods of charging for different aspects of the case as adding more complexity and difficult to define. The current proposal is overly simplistic and will result in IPs being unwilling to accept assignments where asset levels are low or not readily realisable (antecedent transaction/ assets where ownership is disputed etc).

A fixed fee basis will be likely to lead to a lower level of service and will penalise the recovery of more difficult assets.

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?

I believe the conclusions drawn on the reasons why fees on secured creditor controlled work appear lower than those cases where the fees are in the hands of the unsecured creditors is flawed. Blended rates are often agreed with secured creditors which is normal in the industry and part the agreement of securing a place on bank panels where a regular flow of work is derived. Furthermore when a secured creditor is involved there is often good communication between the IP and the secured creditor which enables approval and agreement of strategy to be established promptly thereby enabling certain cost savings.

It is inappropriate to draw the conclusion that costs are inflated when control of costs rests with the unsecured creditors. A substantial proportion of work is undertaken by IPs where full recovery of time costs is not made; this is in respect of cases controlled by both secured and unsecured creditors. This is generally due to asset realisations being insufficient to pay all, or sometimes any, fees.

As a profession we accept this is part of the business risk in accepting appointments. Taking appointment over cases where there are "potential" assets if robust investigations/proceedings are taken against rogue directors and others is part of an IP's work. These type of cases often have high time costs and are often undertaken with a commercial risk to the IP. The change in fee structure as proposed will result in IPs not being prepared to accept these assignments or be willing to undertake sufficiently robust investigations within an appointment which could result in recoveries being diminished, a reduction in return to creditors and a reduction in sanctions being taken against directors.

A percentage basis for agreement of fees is only likely to be attractive if the value of the assets is substantial, this does not in any way relate to the amount of work required in realising the asset and is likely to result in a lower return to creditors than the current time cost basis.

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

IP’s fees will possibly be reduced but this is unlikely to result in a higher return to creditors as I anticipate recoveries are likely to also fall. Conversely, where a particularly high-valued asset is realised, which has required little by way of time costs (eg a valuable freehold property), the IP’s fees will most likely be higher under the proposed regime.

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?

I believe it will be confusing for all stakeholders to have a different approach across different types of insolvency.

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?

If anything, consideration could be given to some sort of fixed basis to deal with statutory compliance issues. This is known at the outset of a case and the time taken should be broadly comparable across the industry. A percentage based on realisations is unlikely to result in a fair result to creditors as this would only be the preferred option if the value of the assets is significant. I would anticipate that if creditors engaged in the process they would reject this basis Equally, if creditors were asked to set a percentage, why would they be any more able to assess the adequacy of the percentage than they were the reasonableness of time spent or hourly charge-out rates? It is open to abuse and will lead to assets that require significant time and effort to realise, being ignored, ultimately denying creditors a return and defeating the object if this ill-conceived exercise.

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?

No this is not viable. The starting point is not that in all cases the creditors will get a return. Any return to creditors is after certain costs are met which must include the IP's fees. There is a substantial amount of compliance work that all IPs have to conduct in every case regardless of case size/asset values or creditor numbers. In a low asset value case even these minimum costs would not be recovered utilising a scale rate.

Should this continue to be explored I would suggest it would be more appropriate to consider fixed fees for statutory work, some sort of commercial scale for known readily realisable assets with the ability to agree time costs for all other aspects if appropriate. However, as commented elsewhere in the consultation, this is a complex area; not one that most creditors will readily understand and it is therefore dangerous and perhaps unreasonable to ask them to consider and sanction fee requests on different bases. In fact, a combination of bases for charging fees is already available, but as noted elsewhere in this consultation, creditors do not engage and therefore, IPs generally default to time costs, because creditors do at least understand that this is the way the majority of professionals are paid.

Perhaps consideration could be given to addressing SIP9 in expecting the IP to document why the basis/mix of bases he has put to creditors is appropriate in the circumstances.

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

The existing basis of charging for time and rates is appropriate in the majority of circumstances. The level of work involved in any assignment is always uncertain at the outset and therefore the setting of a fixed fee is a gamble both for the IP and for the creditors, as is a percentage basis. I would suggest more thought should be given to initial capped time costs based on an estimate provided at the time the fee basis is approved. At this point the IP can set out his assumptions made in setting an initial capped fee and thereby agree a budget to work to, if circumstances change the IP should then have the option to revert to creditors for approval of additional fees or approval to undertake any additional work identified as needed. This is in fact already an option for creditors and is included in Professor Kempson's review. It would be more helpful if "creditor panels" were created or HMRC took a more proactive approach in this matter in working with the industry to ensure the perception that IPs are over-charging is eradicated and where this is indeed found the IPs involved are made accountable.

Impact Assessment questions:

Q21: Do you agree with this estimation for familiarisation costs for the changes to the fee structure? Can't say I understand this question.

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?

I do not believe that there is a level of over-payment. The proposed fee structure is likely to reduce the overall IP fees at the expense of recoveries and action against errant directors.

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? I have no idea what this question is asking.

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? No and No

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? This again comes down to the flawed and offensive assumption that IPs routinely overcharge unsecured creditors, which they don't.

Q27: Do consultees believe these measures will improve the market confidence?

No

Q28: Do consultees believe these measures will improve the reputation of the insolvency profession?

No

If these measures are introduced, it will change the whole landscape of corporate insolvency, to the detriment of all stakeholders. Fixed fees and percentages will encourage a proliferation of one-man-band IP firms operating from home or small offices (as we now see with ESC C16 MVLs). These IPs will gather in easily recoverable assets and abandon anything that’s remotely time-consuming or requiring of some effort. Their work will be largely unregulated, since they won’t have the internal quality control regimes enjoyed at most established firms, whose cost is part of the overhead, allowance for which is made in calculating appropriate charge-out rates.

Generally, across the profession, quality will suffer. Errant directors will know that IPs have little appetite for anything more than the statutory minimum investigation and creditors will lose out across the board. IPs will not take the risks they do now to secure recoveries and I regret that the whole scheme is naïve and ill-conceived, aimed at being seen to be tough on an already heavily regulated profession, but it will backfire on the very unsecured creditors that it is claimed to be protecting.

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Strengthening the Regulatory Regime and Fee Structure for Insolvency Practitioners

General Comments

The response set out below has been provided on behalf of Baker Tilly Restructuring and Recovery LLP. Due to the limited time available the comments below are of a general nature and concentrate on the principle and intent, rather than the detail.

Given the significant impact the proposed measures would have on the insolvency profession, our preference would have been for the consultation to have a 12 week response time to allow more detailed consideration of the proposed measures. That said, we welcome the opportunity we have been given to comment on this consultation and would appreciate the opportunity to comment further prior to the draft legislative provisions, as set out in Annex A to the consultation, being redrafted.

In our opinion, the measures being proposed are neither proportional or appropriate, nor necessary. In parts they are ill-founded, based on out of date, flawed analysis and, if introduced, will do little to achieve the desired result. On the contrary, in our view, we believe that the proposed measures are not in the public interest and will move work from the private to public sector, undermine the profession, increase Insolvency Service costs, reduce competition and returns to creditors and encourage unscrupulous behaviour from directors and/or debtors.

We fundamentally believe that a percentage basis for fees is inherently unfair and anti-competitive, and would reflect neither the cost nor the value of the work done on an equitable basis, or accurately balance risk and reward.

It is essential, in our view, for the United Kingdom to have a robust regulatory and insolvency regime which provides confidence in the probity of doing business in the UK nationally and internationally and stimulates economic activity. We would suggest that the UK already has such a regime, as supported by the joint report of The World Bank and The International Finance Corporation; Doing Business 2013 ("the World Bank Report 3013), which ranks the United Kingdom 8th in terms of returns to creditors, ahead of all other countries whose insolvency processes are referred to within Professor Kempson's Report[1]. The report also suggests that the UK performs strongly in respect of cost to the estate at 6% and speed of process (1 year), ahead of other key economies including that of the USA.

It is our view that margins and profitability have stagnated across the profession and headline fee income has flat-lined and there has been a significant contraction within the Insolvency market place over the past few years; firms have consolidated and there have been numerous redundancies with many experienced Insolvency professionals unable to find full time employment. Accountancy firms entering insolvency processes have increased by 41% (2013)

It is also becoming increasingly common within the market place for directors to request quotations from a number of firms prior to instructions being given in relation to voluntary liquidations or voluntary arrangements. Similarly, there is an increasing use of a tendering process, prior to an appointment being granted; demonstrating that the market place is capable of generating competition. Professor Kempson's report promotes the use of "limited competitive tendering in the UK" as "worthy of further consideration"[2] in relation to increasing competition.

In addition, the lending market place has changed dramatically since 2008, with increases in 'peer to peer' 'circle' and 'crowd' funding, Asset Based Lending and, overall, greater asset leverage such that there are often few 'free' or, more importantly, floating charge assets available to Insolvency Practitioners, who are frequently the last resort once all other funding options have been considered.

It should also be acknowledged that Insolvency Practitioners and their staff are highly skilled and are required to acquire, and maintain, a great deal of knowledge to enable them to adequately and professionally deal with their appointments, across a diverse range of industries, utilising legislation

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1 Review of IP Fees, Professor Elaine Kempson, July 2013.

2 Section 6, Review of IP Fees, Professor Elaine Kempson, July 2013

that has been described as an ‘impenetrable thicket’ in the House of Lords: there have been 23 amending instruments to the Insolvency Rules since 1986. Insolvency Practitioners and their staff also have to acquire knowledge and skills in other areas of non-insolvency legislation, including compliance professional best practices (Statements of Insolvency Practice, Health & Safety, Anti-Money Laundering etc., to enable them to fully advise and administer insolvency appointments, in addition to dealing with a lack of legislative clarity in relation to key areas such as TUPE. The expertise and skill required to comprehend and apply such knowledge requires a significant level of investment in staff on an going basis to ensure that they can deal with insolvency work professionally, efficiently and effectively.

Evidence & Accuracy

Justification for the measures being proposed places heavy reliance on the Office of Fair Trading’s Market Study undertaken in 2010[3] (“the OFT Market Study”), which was also the starting point of Professor Kempson’s report of July 2013. Professor Kempson acknowledges in her report that “the evidence base is thin”[4]. It is notable that numerous assumptions are made in the Impact Assessments, which acknowledge that insufficient data is unavailable to reach a conclusion.

We consider the OFT Market Study to be flawed in its’ premise and overly reliant on imperfect and historical data, and that it failed to take into consideration the changes introduced by the Legislative Reform (Insolvency) (Miscellaneous Provisions) Order 2010, the Insolvency (Amendment) Rules 2010 and the Insolvency (Amendment) (No 2) Rules 2010, which gave greater powers to creditors to challenge remuneration, fix alternative fee structures (e.g. a mixed fee basis) in addition to increased reporting requirements in relation to bankruptcies and compulsory liquidations. In addition, the OFT Market Study considered only one corporate insolvency processes (Administrations), but has been extrapolated to form the basis of drawing conclusions in relation to all formal insolvency process, including both personal and corporate appointments, despite the report stating “”personal and corporate insolvency procedures are different, and involve key stakeholders and market dynamics”[5]. To issue a consultation based on flawed study is misguided and inappropriate and fails to demonstrate a full understanding of the practical and commercial realities of dealing with insolvency issues.

We are not aware of any evidence to support the subjective view expressed that there has been ‘over-payment’ or ‘over-charging’ of fees. This view is not supported by the level or nature of complaints received by this firm, or court applications challenging the level of fees. We consider it would be more appropriate to establish the impact of the changes introduced by the Insolvency Amendment Rules 2010 and the introduction of the Complaints Gateway, which aimed to address the perception that creditors did not know to whom to complain.

Terminology

Frequent reference is made to the ‘overpayment of’ or ‘excessive’ fees, with reference to the OFT Market Study[6]. We do not consider that this phraseology is appropriate; it is misleading and carries significant negative connotations, suggesting that there is a lack of authority to draw fees. It is also inappropriate to assume a correlation between an ‘increase in cost’ with an ‘overpayment’. We would also comment that the OFT Market Study seemed to fundamentally misunderstand that additional costs will be incurred as a case progresses, due to the realisation of more complex assets which are not readily recoverable at the early stages of an insolvency process, as well as continuing statutory reporting obligations and the additional costs incurred in adjudicating on claims and making distributions.

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[3] The Market for Corporate Insolvency Practitioners: A Market Study, 2010

[4] Paragraph 1, Review of Insolvency Practitioner Fees, Professor Elaine Kempson, July 2013

[5] Paragraph 2.9, The Market for Corporate Insolvency Practitioners: A Market Study, 2010

[6] Impact Assessment (Fees Regime), paragraph 41

Cost and Benefit Assumptions

The Impact Assessments do not appear to take into account the increase in government funding that will be required to enable the Insolvency Service to deal the increased work-flow that will likely arise as a result of the proposed measures being introduced.

In our view, if the measures are introduced as currently proposed, it will likely result in Insolvency Practitioners no longer accepting low asset or complex investigation cases as a consequence of the restriction on fees. These cases will then fall to be dealt with by the Insolvency Services.

We would also envisage a decrease in creditors' voluntary liquidations at the lower end of the market, with a corresponding increase in compulsory liquidations, which the Insolvency Service will again have to deal with, as a result of Insolvency Practitioners refusing to be appointed on low-asset creditors' voluntary liquidations which would no longer be commercially viable under the proposed fee structure. This will mean that the number of 'zombie' companies would increase waiting for a creditor to petition for a compulsory winding up. In that time, assets may be dissipated or put out of the reach of creditors, and in any event the winding up process will be much delayed with the process being driven by creditors not directors/debtors.

We would envisage that this would affect a significant number of appointments, which would then have to be dealt with by the Insolvency Service. We would question whether the Insolvency Service would be able to service an increased flow of work in its current guise, particularly given the well-publicised reduction in resources and funding cuts experienced by the Insolvency Service in recent years. It is our view that the Government will be required to significantly increase the resources available to the Insolvency Service to ensure that it is able to deal with both an increase in work flow in addition to an increase in the complexity of insolvency appointments, which will require a skilled and experienced work force.

The costs to the profession of these changes, and to the Insolvency Service, have been, in our opinion, significantly understated. For example:

- The Impact Assessment (Fees Regime) at Paragraph 47 assumes that decisions on fee related complaints will be appealed on only 17% of cases. In our view this assumption is inaccurate, with the majority of decisions being subject to appeal by either the complainant or the Insolvency Practitioner particularly given that, as the Impact Assessment notes at paragraph 47, "*[both] IPs and complainants having much to gain in over-turning a fee decision*". It is far more likely that the majority of decisions will be appealed by either the complainant or the Insolvency Practitioner
- The Impact Assessment (Fees Regime) calculates only the cost of Insolvency Practitioners acquiring additional knowledge, and ought to include their staff as well[7].
- No consideration appears to have been given to the cost of amending standard documents and reports, as well as the confusion that will arise by having another new set of rules in addition to the significant changes introduced as a consequence of the Insolvency Amendment Rules 2010, and the proposed Modernisation and re-drafting of the Insolvency Rules 1986. It is possible that Insolvency Practitioner firms will need to utilise at least three different sets of documentation, task templates and checklists to account for the differences. These changes will require significant investment on the part of all insolvency professionals but will have a disproportionate impact on sole or smaller practitioner firms.

Impact on the Profession, Wider Impact

Little consideration appears to have been given to the wider impact of the proposed measures such as the contraction of insolvency firms and the associated redundancy costs in doing so. Insolvency Practitioner firms may well be required to reconsider their existing business models. As noted above, in our view there will also be a significant cost to the Government and Insolvency Service. The proposed changes may lead to a less well educated profession as firm's seek to reduce costs, a lack of willingness to support staff through their professional exams (which costs in the region of £10,000 in course and entry fees, in addition to any loss in production as a result of study leave) , which itself will reduce competition in the market place in the longer term: Sole practitioners often tend to have

[7] Paragraph 34, Impact Assessment Insolvency Practitioner Fees Regime

been trained with a 'top 10 firm', and any contraction at the top end of the profession will ultimately flow to the smaller end of the market. In our view, the cost of Professional Indemnity cover, as well as obtaining adequate bonds, at the smaller end of the market place, is the greatest barrier to competition.

As noted above, we also consider that the impact of the proposed measures could undermine confidence in the robustness of the UK insolvency regime which would have an adverse impact on the UK economy as a whole.

Alternative Options

We suggest below greater use of existing legislation and regulatory powers to address the issues identified. In our view, encouraging creditor engagement and addressing creditor apathy should be the starting point for any changes, allowing the market place to operate freely in terms of Insolvency Practitioner fees.

We would welcome the opportunity to discuss any of the proposed alternative options below; we appreciate these may not necessarily have the support of the wider insolvency profession, and would require further detailed consideration as to the mechanics and practicalities of implementation, as well as wider consultation with the insolvency profession and stakeholders. We acknowledge that, whilst the options set out below may reduce cost within the estate and may lead to increased returns to creditors, the overall impact and cost to the wider economy has not been considered in the time available.

- Linking fees to case progression. The World Bank Report 2013[8] ranks the UK 8th (alongside seven other countries) in terms of the time required for creditors to recover their credit. In our experience, there is a direct correlation between the length of time an appointment remains open and a corresponding reduction in creditor engagement, returns to creditors as well as increased creditor apathy. Fees can increase, as a consequence of statutory reporting obligations, and profitability reduces. Linking fees to progression could improve creditor engagement and returns to creditors, in addition to reducing fees and improving profitability.
- Removing the requirement to fix the basis of fees within 18 months and/or preventing the fee basis and/or quantum being fixed until the 3 month stage across all case types, as is the case in administrations, once Insolvency Practitioners have had the opportunity to appraise the specific circumstances of the case, with an option for the position to be reviewed at a later stage.
- Introducing a 'fee cap'. Insolvency Practitioners could be required to provide a budget at the outset, irrespective of the basis proposed (e.g. time cost, percentage, fixed), with fees being capped at the budget level unless creditors approve an increase; for example if their investigations uncover further assets, or matters that require further investigation, analogous to the requirements of SIP 3 in relation to voluntary arrangements. This was also recommended by Professor Kempson in her report[9] based on the Australian Model.
- Greater use of the 'mixed fee' concept with fixed fees being mandated for certain statutory elements (which should be linked to the size and nature of the appointment), with time costs being retained for asset realisation, investigation, litigation, Retention of Title, and other work all of which can be variable in nature and risk depending on the size and type of appointment
- Extending the concept of the prescribed part. Rather than requiring a fund to be set aside after costs, Insolvency Practitioners could be required to set aside a percentage of realisations, after allowing for an initial fee for dealing with statutory matters, to be paid to creditors (subject to a de minimis level)
- Encouraging Creditor Committees. Professor Kempson's report notes that one of the disincentives is the out of pocket expenses that are incurred. These are actually payable as an expense in certain insolvency procedures and this should be better communicated which may encourage greater creditor engagement. Consideration should be given to requiring Insolvency Practitioners to inform creditors of the benefit of having a committee.
- Encouragement of Government bodies and credit insurers to take a more active role in the insolvency process and fee setting. HMRC, on average, accounts for 24% of unsecured debt[10].

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[8] Page 95, Doing Business 2013, The World Bank and The International Finance Corporation

[9] Paragraph 6.1.2, Review of Insolvency Practitioner Fees, Professor Elaine Kempson, July 2013

[10] Paragraphs 3.6 and 4.61 The Market for Corporate Insolvency Practitioners: A Market Study, 2010

The increased use of credit insurance creates a disconnect between individual creditors and the return on their debt which may disengage them from the insolvency process.

- Simplifying creditor reports, as well as standardising fee disclosure information, the latter of which was recommended by Professor Kempson in her report[11]. The length and content of reports confuses and disengages creditors, as acknowledged by Professor Kempson[12]. At the least a clear fact sheet should be provided, with dividend and fee estimates, with further information available on request. This would also reduce the cost of producing reports, which should focus on progress since any previous report.
- Improve creditor signposting for complaints. Currently the requirement is that this be included within letters of engagement, or as part of the terms and conditions. Given that letters of engagement are generally not issued to creditors, this isn't the most effective method of communicating or sign posting the Gateway. The Gateway should be signposted within creditor reports.
- Increasing the rate of director disqualifications and introducing more robust sanctions. Lack of director culpability encourages delinquent director behaviour which leads to dissipation of assets and reduces returns to creditors. The lack of disqualifications was recently criticised during a Parliamentary Debate on the Deregulation Bill: "In particular we would criticise how only 21% of D1 reports submitted by insolvency practitioners under this Government have resulted in a disqualification, which is down from 45% 10 years ago. It ought to be easier for insolvency practitioners to expose delinquent directors."[13]
- Increasing Director Responsibility. Directors could be required to seek professional assistance at an earlier stage such that Insolvency Practitioners would have greater opportunity to rescue businesses and maximise creditor returns. It should be a requirement of any going concern assessment (whether for a small or large company) that the advice of an Insolvency Practitioner should be sought where there is doubt as to the liquidity of the company.
- Increasing Accountant Responsibility. The existing going concern assessment should, in instances where there is doubt, be made only on the basis that the company in question seeks the advice of an Insolvency Practitioner.
- Increasing Responsibility in the Lending Market. Similarly, we frequently find that companies re-finance on increasingly unfavourable terms as they struggle with liquidity and cash flow issues. This area should be regulated such that, where there are concerns as to the liquidity of the entity, credit cannot be extended unless the advice of an Insolvency Practitioner has been sought.

Conclusion

In our view, it would be more appropriate for the Insolvency Service to work with RPBs to utilise the existing legislation to ensure that the Office Holder's fees are representative of the work done and to encourage greater creditor participation, including the active engagement of Government Bodies, who are often a significant unsecured creditors. We do not consider it appropriate, in a market economy, for fee levels to be driven by legislation rather than market forces.

Further work should be undertaken to measure the benefits, if any, of the changes introduced by the Amendment Rules 2010, and to assess what extent the lending market place and insolvency profession generally have had an impact on the fees charged by Insolvency Practitioners, and whether meritorious complaints against Insolvency Practitioner fees increase as a consequence of the Complaints Gateway and warrant the proposals set out in the consultation.

There are a number of alternative options available which we consider would be more effective, and less costly, than the measures being proposed. We have set out some options, which would obviously require further consultation and fuller consideration in terms of the practicalities. We would welcome the opportunity to discuss these further with the Minister and the Insolvency Service.

[11] Paragraph 6.1.2, Review of Insolvency Practitioner Fees, July 2013, Professor Elaine Kempson
[12] Paragraph 4.2.3, Review of Insolvency Practitioner Fees, July 2013, Professor Elaine Kempson
[13] Page 232, Clause 12, Parliamentary Debates, House of Commons Official Report, 6 March 2014

Consultation Response

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

Whilst, overall, the proposed objectives appear appropriate for the insolvency regulatory regime, subject to the points set out below, we would question whether these will achieve all the stated principles, particularly that of consistency . Given the consultation itself notes [p.38] that 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"* and further notes that 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",* it is unclear why enshrining these principles in legislation will have an impact, or improve consistency and confidence in the regulatory regime.

Professor Elaine Kempson's report[14] seemingly identified a variation in the rigour with which RPBs assess compliance. However, her findings could be equally as applicable to the quality of Insolvency Practitioner's licensed by the respective RPBs.

- The objectives do not appear to have fully considered the wider picture; for example, whereas there is a focus on returns to creditors, the objectives should also take into account returns to the economy in terms of the jobs and businesses saved as a consequence of the insolvency regime, in addition to minimising further employee liabilities, such as redundancy, pay in lieu of notice etc.,. A 2008 study[15], sponsored by R3, indicated that an average of 72% of a work-force is saved following a formal insolvency, with an average of 80% saved through rescue procedures. It is often the case that, due to the actions of the directors or individuals prior to appointment, and the increased securitisation and leverage of assets, that there are few funds available to be returned to unsecured creditors; however, if a workforce is preserved, that will clearly have wider economic benefits.
- It is unclear how the Regulatory Bodies ("RPBs") can increase competition through the introduction of objectives requiring the 'delivery of quality services transparently and with integrity' and acting in 'the interest of all creditors in any particular case'.
- We do not consider that it is appropriate for the RPBs to have a stated objective of increasing competition. Their objectives should be to improve the quality of service provided by Insolvency Practitioners to ensure that all Insolvency Practitioners operate to the same high standards expected of the profession, and allow the market to drive competition.
- The objectives should include provisions to promote and improve the responsiveness of RPBs which will ensure that any issues are dealt with expediently which, in turn, should improve stakeholder confidence in the regulatory regime. Excessive delays in dealing with complaints, or taking action against Insolvency Practitioners, undermines confidence in the regulatory regime.
- The objectives refer throughout to creditors, rather than stakeholders [paras. 50(3)(ii) and 50(4)]. A duty of care should exist to all stakeholders whether they are a creditor, shareholder, employee or other interested party, with the primary duty of care being to those who might reasonably expect a return (including secured, preferential, non-secured creditors and shareholders).
- The objective set out at para. 50(2)(ii) should state that regulatory activities should be targeted only at "Insolvency Practitioners in respect of those cases on which action is needed"
- RPBs should not be given the power to opine or arbitrate on fees which have been approved in accordance with legislation. This would leave Insolvency Practitioners in a unacceptable position of uncertainty with regard to any remuneration drawn; they should have the right to believe that remuneration drawn is valid and appropriate if creditors do not choose to exercise their powers to challenge the level of remuneration. RPBs should be encouraged to do more with their current powers to review time charged against work undertaken.
- We have made comments elsewhere in our response regarding the ability of RPBs to ensure that

[14] Paragraph 4.5, Review of Insolvency Practitioner Fees, July 2013, Professor Elaine Kempson

[15] Paragraph 3.3, 'The value of the Insolvency Industry', July 2008, R3

Insolvency Practitioner fees represent ‘value for money’

- We are concerned that the objective of ‘protecting and promoting the public interest’ is to wide-reaching and lacks clarity of definition

Whilst it is appreciated that there should be a mechanism for a body to make an application to the Secretary of State for recognition as an RPB, we are concerned that this will encourage other bodies to make such an application, resulting in even greater divergence within the regulatory regime and an inappropriate increase in the number of RPBs of which there are too many already, in our view. This also seems inconsistent with the evolutionary approach to regulation currently being promulgated by the Insolvency Service.

In our experience, there is a significant difference in the nature and approach of monitoring visit across the various RPBs, although the net findings appear to be consistent, from our perspective, across the two largest RPBs, being the IPA and the ICAEW. The differences in approach to the monitoring process may give the perception of a lack of clarity. This could be addressed by greater co-operative working, such as a single monitoring body whose findings would be considered at joint committee meetings. This used to be the case in respect of the IPA and the ICAEW, whereby all monitoring visits were undertaken by one body, the Joint Insolvency Monitoring Unit, with reports being considered by committees made up of representatives of both the IPA and the ICAEW, alongside lay members. Alternatively, a single disciplinary committee comprising of members from each regulatory body could be (re)introduced which would collectively consider monitoring reports undertaken by each individual Regulatory Body.

Changes to the regulatory regime are seemingly being proposed to address the findings of the Office of Fair Trading’s report of 2010 in relation to the complaints mechanism, without analysing or understanding the impact of the introduction of the single gate-way for creditor complaints, which was introduced in 2012 specifically to address these findings. Consideration should be given to delaying the introduction of further measures until the impact of those already introduced to address any apparent regulatory failings in this area are fully understood.

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

We agree with the proposal that the Secretary of State should have a wider and more proportional range of sanctions available. The current position, whereby the only sanction the Secretary of State can exercise is to withdraw recognition as an RPB, undermines the power of the Secretary of State to address anything other than the most serious of instances. That said, is there evidence to support the inference that the Secretary of State has found themselves frustrated by the lack of proportionality of sanctions available?

We do not consider it appropriate to publish notice of intention to revoke an RPBs recognition prior to the RPB being given opportunity to make representations, notwithstanding the precedent for this within other regimes. Any such publication should take place only once a decision has been reached, and if the matter is subject to Judicial Review, not until after the Judicial review has taken place and concluded in favour of the decision. Given the severity of the proposed sanction, the time period of 28 days seems overly contracted. Provisions should be built into the legislation such that an RPB is given the opportunity to address any findings before revocation.

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

No.

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?

Notwithstanding that the power to impose a financial penalty has precedence within the regulatory regime for auditors and legal services, it should be borne in mind that the RPBs are all funded by their members. Consequently, the cost of any such penalty will, ultimately be borne by members and innocent Insolvency Practitioners who in turn will pass this cost onto their clients. In relation to

Insolvency Practitioners the cost will, ultimately, be borne by creditors. We consider that public reprimands would be more appropriate, therefore.

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

As above, 28 days is considered a relatively short time period to respond to findings that are extremely serious in nature, the impact of which will have significant impact upon the RPBs members.

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

As above, 28 days is considered a relatively short time period to respond to findings that are extremely serious in nature; the impact of which will have significant impact upon the RPBs members.

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?

We do not consider it appropriate for the Secretary of State to have new powers to allow him to apply directly to the court to sanction an Insolvency Practitioner who is authorised by an RPB, particularly given the new powers and sanctions being granted to the Secretary of State to sanction RPBs generally.

We also consider that the need to grant this power to the Secretary of State would undermine public confidence in the Regulatory Regime and the ability of the Secretary of State to monitor the RPBs effectively. It would also create an unacceptable level of uncertainty from the Insolvency Practitioner's perspective, when he should be entitled to rely on the conclusions reached by his RPB on any given matter. Further, it would undermine the Secretary of State's position as a "Regulator of Regulators" if he were still able to exercise a power to take action against an Insolvency Practitioner that ought to be taken by the Insolvency Practitioner's RPB.

It is noted that concerns have been expressed in rare instances where RPBs have been slow, or feel unable, to bring proceedings against an Insolvency Practitioner they authorise. Comments have been made at Q1 above regarding the inclusion of responsiveness within the proposed RPB objectives. We consider it would be more appropriate to take action against the RPB, in such instances, than for the Secretary of State to effectively "leap-frog" the RPB.

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?

No

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

We do not agree with the proposal that legislative provisions should be introduced for the introduction of a single regulator without further analysis and consultation. It is our view that legislation should be amended in this respect only after further analysis and consultation has taken place, and once the impact of a more evolutionary approach has been fully understood.

We acknowledge that there may be a perception that RPBs are not as effective whilst in competition for the business of an Insolvency Practitioner, which may weaken the public perception of the robustness of the regulatory regime. However, we do have a concern that a single regulator would have little incentive to adapt to a changing market place, or provide the thought leadership required to shape and drive the industry.

It should also be noted that the OFT Market Study[16] notes that 83% (based on 311 responses) of Insolvency Practitioners have never changed Regulator. In our experience, such a change would be

[16] Paragraph 5.12, footnote 115, 'The Market for Corporate Insolvency Practitioners', Office of Fair Trading, June 2012

a rare occurrence. Whilst, in the last 10 years, there have been two instances of Insolvency Practitioners within this firm changing regulators, this was driven on a national level by a desire to reduce the number of RPBs that the firm dealt with and to bring consistency to the timing and structure of monitoring visits. We are not aware of any instances where an Insolvency Practitioner within this firm has requested, or changed, RPB as a consequence of the outcome of any regulatory or monitoring visit. The element of competition that exists between RPBs may therefore be of less impact than it is perceived to be.

We would also be of the view that all 'businesses' require an element of competition to prevent complacency and promote a culture of self-challenge to ensure that they are fit for purpose in a changing market place. The two main regulators of Insolvency Practitioners (the ICAEW and the IPA) have both changed their monitoring approach significantly over the last 10 years, and we have welcomed such changes albeit this has been, at the cost of consistency of approach between them in relation to the structure of monitoring visits as opposed to findings or sanctions.

We are of the view that there should be a clear separation between member services and regulatory processes, if the changes outlined in the current proposal do not result in a more focused, efficient and consistent regulatory regime. However, as noted in our response at Q1, there does not appear to be sufficient empirical evidence to support the assertions made in the consultation, particularly in relation to consistency of monitoring and sanctions, which therefore must be based on perception rather than reality.

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

No. See response to Q9 above.

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

This question should more correctly and appropriately be answered by the RPBs. However, we do not agree with the assessment of costs for a number of reasons.

We do not agree with the estimate of the number of fee complaints, which appears to be an arbitrary figure. The Impact Assessment (Insolvency Practitioner Fees Regime) at paragraph 47 estimates fee complaints at 300 per annum, representing 52% of total complaints. However, this does not accord with our own findings or that of the Insolvency Service:

- The Insolvency Services' Impact Assessment (Regulation – Regulatory Objectives and Oversight Powers) at paragraph 1.61 notes that the 2012 Annual Review of Insolvency Practitioner Regulation showed that there were 578 complaints against Insolvency Practitioners to the authorising bodies in 2012, of which "the majority…were in relation to possible breaches of ethical guidance and standards of communication" – no mention of fees at all, which suggests such complaints are minimal. Creditors can complain, even if a regulator is unwilling to become involved. Paragraph 1.60 also, seemingly, undermines the entire thrust of the proposed changes by acknowledging that "complaints about the insolvency profession are relatively low given the nature of the insolvency, the number of creditors (and other stakeholders) involved in cases and the extent of financial losses that can be incurred"

- In our own experience, less than 1% of complaints received, year on year, are in relation to fees. In the last 6 years we have had no formal challenges to court in relation to our fees.

- Since the introduction of the Complaints Gateway we have not seen an increase in fee complaints.

We also disagree with the assumption that only 17% of complaints against fees will result in an appeal; as the Impact Assessment notes, Insolvency Practitioners will have much to gain in over-turning a fee decision against them. We therefore consider it would be more accurate to assume that in excess of 70% of fee complaints will result in an appeal, if not the vast majority. It is likely a number of smaller practitioners will have no option but to appeal due to the direct financial impact this may have.

We also note that the costs set out at paragraph 48 of the Impact Assessment (Fee Regime) are based on outdated figures: an estimate provided in 2011 (3 years ago) by just one of the regulators, which does not appear to denote either proportional representation or an accurate estimate.

Notwithstanding the comments above, we note that these additional costs will be borne by the RPB, and passed on to Insolvency Practitioners, who will have to either absorb this additional cost, or pass it on to creditors. Based on c.1,735 Insolvency Practitioners, the estimate of costs of £1.68m (which we consider to be significantly under-estimated, will further increase the cost of regulation by c.£950 per Insolvency Practitioner, a significant amount in our view

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?

We do not consider it appropriate for an RPB to arbitrate on fees, for the reasons set out at Q1 above. The RPB should exercise their existing powers to clamp down on obvious over-charging, which could be done within the current legislative structure / fee regime, rather than enabling the RPBs to over-ride legislation, and stakeholder approval, or further amending legislation.

There are inherent difficulties with the RPBs determining or opining on value. The concept of 'value for money' should be driven and determined by the party that pays the expense. Value is determined on both a financial and non-financial basis. As the RPBs are not party to the relationship that existed between the creditor/lender and the insolvent entity it is difficult to see how they could be in a position to subjectively assess the non-financial benefit of the work undertaken by the Insolvency Practitioner which is valued by the creditor; particularly where the work done is driven by investigatory matters which may be at the direction of creditors.

Other work undertaken by an Insolvency Practitioner that has no direct financial benefit to creditors as a whole, such as compliance with professional best practice (SIPs), dealing with ROT claims, or investigatory work into director conduct do not necessarily add obvious 'value' to an appointment but are necessary to ensure that Insolvency Practitioners deal with individual creditors fairly and that the UK has a robust regulatory regime that discourages improper director conduct.

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

We welcome any steps taken to improve creditor engagement and reduce creditor apathy. It is our view that HMRC and other government bodies should be the market leaders for engaging in the process.

More should be done to improve creditor engagement such that market forces drive fee levels, rather than these being arbitrarily set by legislation. As previously stated, there is an increased use of a tendering process by directors and creditors, prior to an appointment being granted, demonstrating that the market place is capable of generating competition. Professor Kempson's report promotes the use of "limited competitive tendering in the UK" as "worthy of further consideration"[17] in relation to increasing competition.

Whilst smaller creditors may feel that they do not have the experience or knowledge to negotiate on fees, the same cannot be said for the larger, repeat, creditors such as HMRC, or credit insurers / providers.

In our view greater efforts should be made to encourage creditors to engage within the insolvency process, such that they may assist and direct the Insolvency Practitioner to undertake tasks which they value, whether they are of financial benefit or not and the government bodies (who make up 30% of creditors, according to the OFT Market Study) should set the standards for creditor engagement.

[17] Section 6, Review of Insolvency Practitioner Fees, Professor Elaine Kempson, July 2013

In our view, the increase in the debt factoring industry has also led to an increased use of credit insurance which creates a disconnect between creditor and return on their debt and effectively dis-incentivises and disengages individual creditors. Credit insurers should be encouraged to participate more in the setting of Insolvency Practitioner fees.

In addition, smaller creditors have access to credit bodies, i.e. the Institute of Credit Management who could take a more active role in managing fees, as for example, TIX did in relation to voluntary arrangements.

It is our view that the volume of information required to be provided to creditors effectively disengages them from the process. There is simply too much paperwork and information provided. We would therefore welcome the introduction of a clear information sheet in addition to a prescriptive, consistent manner of producing fee information across the profession, where the focus is on clarity, not volume. Over time, these measures should improve creditor knowledge and experience and therefore encourage engagement.

This information could easily be produced as part of the initial notices to creditors. We would discourage the need to repeatedly provide this information with each communication, which would result in an increase in costs.

Whilst understand your concerns, we consider that there are alternative, less draconian measures that could be introduced which would increase creditor engagement and control the level of fees without restricting the manner in which an Insolvency Practitioner chooses to be remunerated.

Comparative Fee Data

We do not agree with this proposal. There can be little correlation between the size of an asset and the fee drawn. 'Asset size', which one must assumes is intended to have the meaning 'Asset Value' cannot be utilised to determine the complexity, experience and training required to deal with any given asset. It may be the case that an asset of little value requires expertise and knowledge far in excess of the value of the asset, and the converse is also true. This seems to suggest a basic misunderstanding of the nature of work undertaken by an Insolvency Practitioner and their staff, , and the level of knowledge and experience required. In our view, the provision of this information, without any caveats as to the extent of work undertaken in relation to the fee drawn would serve only to confuse creditors further.

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?

Yes. We fundamentally believe that non connected creditors, subject to a simple majority, should be able to approve an Insolvency Practitioner's remuneration on a time and rate basis, if they have been made fully aware of the rates proposed and are in a position to determine and satisfy themselves as to 'value for money'. We have made suggestions for alternative measures that could be introduced to improve creditor engagement (see response to Q13 above) and fee controls (see below).

In our view, whilst the approach being proposed may be attractive in relation to straightforward asset realisation cases with few non-contentious creditors e.g. cash at bank, "consumer credit" cases (of which we consider there are few in relation to the bankruptcy market, as demonstrated by the increase in relation to "consumer credit" voluntary arrangements), further consideration must be given to the impact on 'non simple asset' cases.

We consider that the proposed measures will not only result in a significant increase in the number of bankruptcy and compulsory liquidation cases remaining with the Insolvency Service, it will also have an impact on the number of 'creditors' voluntary liquidations' being undertaken at the lower end of the scale with either no action being taken by the director or an increase in zombie companies waiting for creditor action to wind them up. This will also lead to more direct creditor, and therefore court action, and may also present a danger to the Crown as debts may well increase before action is taken against the insolvent company which may also result in dissipation of assets.

In our view there is a danger that Insolvency Practitioners will not undertake 'non simple asset cases', or cases that require investigation work to uncover assets, going forward if these measures are introduced, as there will be little incentive to do so alongside an increased risk of not being able to agree a fee commensurate with the work being done. Whilst we fundamentally disagree with the proposed measures as drafted, at the very least, Insolvency Practitioners should be given the option to obtain their release if they do not consider the level of fees agreed to be acceptable, rather than the only option being for them to incur the costs of an application to court (which may be rejected), or to be exposed to unacceptable levels of risk in relation to dealing with, say, Health & Safety aspects that a creditor may not be willing to pay for, or understand the risks behind the costs that such work may attract. An Insolvency Practitioner should not be rendered culpable or personally liable for work which creditors are unwilling to pay for.

At the very least we do not consider it appropriate to arbitrarily remove time and rate unilaterally in respect of all aspects of work required by an Insolvency Practitioner, without further consideration of the long-term ramifications that it may have on the insolvency process and the creditor distribution profile.

This wouldn't just affect investigation work, it would also impact on:

- Property realisations, as most bankrupts dispute or debate the requirement to realise value in their principal residence, which can often take years to sell or settle
- Health & Safety, Environmental issues arising (whether known or unknown at the date of appointment)
- Adjudication of disputed, contentious or contingent liabilities
- Ability and willingness to trade
- Maximisation of value, rescue of businesses and ability to save jobs
- Public and business confidence in doing business in the UK

We would comment that fees are often discounted by an Insolvency Practitioner, which is a commercial decision that does not necessarily reflect the value of the work done. The OFT Market Study at paragraph 4.32 notes that 'panel rates were 33 percent lower than normal hourly rates charged by Insolvency Practitioner firms'. In our view it is exceptional for time costs to be fully recovered, either as a result of insufficient asset realisations or because Insolvency Practitioners have chosen to undertake a 'value for money assessment' and cap their fees. It is probable that this view correlates with the experience of the insolvency profession generally.

The measures being proposed also introduce additional work, with the introduction of a 'two tier' level of approval requiring the approval of secured *and* unsecured creditors in the event of a distribution to the latter.

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?

In our view the draft rules need a considerable amount of work if they are to reflect the proposed measures. Due to the time available we have not been able to undertake a detailed review of the draft rules and would welcome the opportunity to comment further once these have been redrafted.

However, we would comments as follows:

- Rule 17.14(3)(b) seemingly suggests that time and rate can be drawn 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). Not only does this seemingly dis-incentivise the payment of a dividend, it is unclear how this will operate in practice. The rule as drafted suggests that if an Insolvency Practitioners time costs are sufficient to extinguish all asset realisations, then time and rate is an acceptable basis. It seems that this rule therefore runs contrary to the intended objectives.
- Consideration should be given to amending Rule 17.15(4)(a) such that approval of <u>each</u> secured creditor is not required. This requirement causes unnecessary expense, including applications to court, when a secured creditor is simply not interested in approving remuneration, either because they have little or no financial interest in the outcome, or, in some instances, with no debt attaching to their security. As currently drafted the legislation also seemingly requires approval of

remuneration from a fixed charge creditor in respect of another fixed charge asset in which they have no interest. For example: after realising the floating charge assets (with no surplus) the Administrator is left with two properties, with separate secured (fixed charge) creditors attaching to each property. Is it really the intention that each secured creditor is required to approve the remuneration of the Administrator for dealing with another secured creditor's asset and potentially incurring additional cost in seeking that approval to the detriment of the fixed charge creditor?

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

The proposals could reduce the returns to unsecured creditors, especially if measures are driven through that takes no account of the work required to investigate antecedent transactions, or pursue litigation. As mentioned elsewhere, assets may well be dissipated during the period when a company may have been placed into a creditors' voluntary liquidation but has not done so as a consequence of no Insolvency Practitioner being willing to act due to the financial constraints imposed by legislation.

We believe that the proposed measures would be reduce, rather than stimulate, competition in the market place: there would be less competition in the market place if all Insolvency Practitioners are required to charge the same level of fees, irrespective of the size of their firm, skill set or service offering. Few insolvency appointments are identical in nature or profile with, perhaps, the exception of 'consumer credit' voluntary arrangement. As set out elsewhere the proposed measures will have greatest impact on low asset cases, which will impact on sole, or small practitioner firms, effectively driving them out of business and reducing competition in the market place. Imposing a fixed fee structure will do little, in our view, to improve returns to creditors in the long term.
Longer term, it will result in Insolvency Practitioners only accepting those appointments that are definitely commercially viable without any further investigation work. Appointments will only be undertaken if the assets are easily ascertainable and realisable, with little or no investigation work. This will leave the more complex or difficult appointments to be dealt with by the Insolvency Service.

It may also result in an increase in fees being paid by third parties, or prior to appointment, and assets being sold prior to appointment to enable this to be done.

Whilst the consultation suggests that the measures will result in an increase in distributions to creditors, we do not agree that this necessarily follows, for the reasons set out above (and elsewhere).

There also seems to be a basic assumption that percentage, fixed, or scale rate fee will naturally result in greater returns to creditors and 'value' to the estate. We do not agree that this is necessarily the case, as a high value asset may be realised within little time being incurred, and the converse is also true. As a firm we undertake a number of investigation based cases, some of which can take many years to reach fruition or elicit a settlement. During this time we may well incur significant costs on behalf of the insolvent estate, at the risk of not being paid.

We also believe that these measures will result an increase in the outsourcing of work, either to practices aligned to Insolvency Practitioner firms, or not, but which will not be constrained by the proposed fee measures or regulatory control, for example,: debt collection, property realisations, investigation work, employee claims, creditor claims and so on. It could result in increased opacity within the market place, whereby more work is outsourced which is unregulated and which has little fee control. This will simply shift cost rather than reduce it. It seems an oddity that such constraints should be placed on Insolvency Practitioner fees, without similar constraints being introduced in respect of legal fees, agents' fees or other sub-contractors.

We also consider that it will have an impact on the skills and training of an Insolvency Practitioner, especially at the smaller end of the market place. Sole practitioners are often trained within the Big4, or a top 10 firm. These firms are likely to contract as a consequence of the proposed measures. Long term this could result in reduced competition, as well as a decrease in expertise.

The increased creation of creditors' committees will also result in an increase in cost which will need to be met by the wider creditor group due to the reporting requirements set out within the legislation, although we would welcome an increase in creditor engagement but not at an increased cost to the case.

Q17. Do you think the proposed changes to the basis for remuneration should not apply to company voluntary arrangements, members' voluntary liquidations or individual voluntary arrangements?

As set out in previous responses we consider that time and rate should be available for all insolvency appointments. That said, in relation to this specific question we agree that shareholders / members should be entitled to set remuneration as they see fit, and currently do so. In our view the Government should not interject generally in a business relationship between a client and an advisor simply because the work stream is detailed within the Insolvency Act.

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?

We do not consider that any percentage or scale rate would reflect either the cost or the value of the work done on an equitable basis and if this is introduced the scale has to be commercially viable (See response to Q19 below). We believe that percentage and scale rates are anti-competitive and would undermine the ability of the market to set fair prices for the work done for the reasons set out at Q16 above.

However, if the scale rate <u>is</u> commercially viable, there is an advantage to be had in any such scale being the default position as this would remove the necessity of fixing the basis of fees on certain appointments. To that extent, we are of the view that the default scale should only be the norm for straightforward 'simple' appointments. There should be adequate caveats to allow for uplifts for dealing with complex matters. We are of the view that if a default scale is introduced, there will be little incentive for creditors to agree any uplift (see also response to Question 19 below).

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 and how do you suggest such a scale should be set?

No. We do not agree that the statutory scale is commercially viable and believe that, if this is introduced as the default position it would render work at the lower end of the scale unviable in the professional market place. The scale rate, which was introduced in 1986 with no change to the percentage rates, doesn't reflect inflation and the cost of undertaking such work in the present day. Consideration should be given to the amendment of the percentage rates currently applicable under the existing legislation, whether this is an imposed rate or not.

If the 1986 scale is introduced, legislation must allow for Insolvency Practitioners to resign and obtain their release in the event that they do not consider that the basis or quantum of remuneration set by the approving body is appropriate or commercially viable. We do not consider it acceptable that the only option available to Insolvency Practitioners in such scenarios is for them to incur the additional costs of making an application court.

The total rate of inflation since 1986 is c.148%. Our view, therefore, is that the scale rate should reflect this within the percentages to achieve the same value of fees so, for example, rather than 20% of the first £5,000, a percentage of 50% would result in the same value being received by the Insolvency Practitioner.

To retain the same value of fees, and to make the work commercially viable in the current professional market place, the scale rate would therefore have to be:

<u>Realisation</u>	<u>Distribution</u>
50% of the first £5,000	25% of the first £5,000
37% of the next £5,000	18.5% of the next £5,000
25% of the next £90,000	17.5% of the next £5,000
12.4% of anything above	6.2% of anything above

There would also have to be a mechanism built into the legislation whereby scale rates increase in line with inflation or some other measure, to ensure that the work remains commercially viable going forward.

However, in our view consideration should also be given to allow the Insolvency Practitioner to retain a fixed amount for all realisations to account for the initial statutory work required to be done on each case, including filing of statutory notices, anti-money laundering client due diligence, ethical & conflict considerations, initial reports to stakeholders, dealing with employees as well as file set up costs etc., This will, inevitably, vary from case to case and consideration should be given to introducing a variable fixed amount to take to account the number of creditors or stakeholders, analogous to the Official Receiver's 'administration' fee. It should be clear that this fixed amount would not include dealing with matters relating to trading or dealing with employees.

We would like to be given the opportunity to consider further the financial implications of the introduction of any scale rate before agreeing a quantum or rate, or making a final comment as to the commercial viability of such a scale.

It should be borne in mind that a percentage rate, or sliding scale, will not reflect the value or cost of work done. As a mechanism it is less equitable on a case by case basis, as in some cases a premium will be achieved for little work, and in other cases, creditors may benefit from a low percentage for dealing with a complex realisation. There is little incentive for creditors to agree an increase in percentage rates, even if they fully understood the level of work involved, due to the direct impact this would have on any return to them.

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

Please see our responses above. We fundamentally believe that time and rate should be retained for all work undertaken by Insolvency Practitioners. However, at the very least, this should be retained in relation to investigation work or trading appointments. It is unlikely that complex cases which require significant investigation, or litigation work to be undertaken to realise assets will be seen as 'attractive' to Insolvency Practitioners under a percentage or fixed fee arrangement, which would leave these to be dealt with by the Insolvency Service.

Impact Assessment Questions

Q21. Do you agree with this estimation for familiarisation costs for the changes to the fee structure?

No. This excludes the cost of Insolvency Practitioner staff familiarising themselves with the changes. In 2010 there were 11,000 employed in the insolvency sector[18] (a reduction from 12,700 in 2008[19]) and 1,784 Licensed Insolvency Practitioners as at 1 January 2012. Whilst it is our view that the sector has contracted further since 2010, and assuming a 1.5 hour familiarisation cost, which we consider to be 'light', at an average rate of £250 per hour, this equate to £4.8 million, considerably in excess of the £0.8m quoted.

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?

N/A

Q23. To what extent do you expect the new fee structure to reduce the current level of overpayment?

We do not consider that there is any 'overpayment' and it is inappropriate to suggest so based on the findings of the OFT Market Study. We do not agree with the OFT Market Study's findings that the 9% increase in costs that arises once a secured creditor has been paid is evidence of less control by unsecured creditors; it may equally be attributable to the additional work required to be done as a consequence of the case remaining open which leads to ongoing statutory reporting obligations,

[18] Comres commissioned by R3, The Value of the Insolvency Industry, July 2013
[19] R3, the Value of the Insolvency Industry, July 2008

additional costs arising as a consequence of adjudicating on creditor's claims, or undertaking further asset realisation or investigation work.

In addition, it is likely that most Insolvency Practitioners would be inclined to over-estimate or provide a higher quotation at the outset, rather than risk under-recovering in the event that they identify matters that warrant investigation, or other unanticipated matters arise during the course of the appointment.

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?

We agree this is unlikely to incur an additional cost. However:

- The requirement to return to creditors to seek approval if the position changes from that originally envisaged will likely result in increased costs.
- Increased cost if forced to recourse to court frequently
- Increase cost if fee caps introduced

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?

We do not agree that the 9% referred to represents 'over-payment' for the reasons set out elsewhere in our response. Whilst data may appear to support the view that Insolvency Practitioner's fees would be significantly reduced by the ' application of the proposals, that will be due in a large part to the fact that fees will effectively be capped at a 1986 value, which will not be commercially viable. In our view, in the longer term, the proposed measures will ultimately lead to reduced returns to creditors and increased cost to the Insolvency Service, for the reasons set out elsewhere in our response. There is no evidence that the proposed measures will lead to an overall cost reduction to the economy, as opposed to a cost transfer from the private to the public sector with a greater number of appointments being undertaken within the Insolvency Service.

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?

We consider it highly unlikely that more credit will be extended as a consequence of improvements in the recovery rate in insolvencies[20]. On the contrary we consider that there may actually be a credit reduction as a result of the growth in zombie companies and improper director behaviour. We do not agree that Insolvency Practitioners have excessive market powers versus unsecured creditors[21]; creditors are fully empowered to control fees but often choose not to do so. Similarly, we consider that insufficient evidence has been adduced to support the conclusion that Insolvency Practitioner payment is over the market / competitive rate[22], on the contrary, we believe that the Insolvency Practitioner market is competitive, through panel membership and increased tendering.

Q27. Do consultees believe these measures will improve the market confidence?

Whilst in the short term it might have this effect, as there is always a negative perception attached to any body profiting from the demise or loss of another, longer term we consider that these measures will significantly undermine public confidence due to the lack of investigation work which we believe may lead to the dissipation of assets and an increase in assets being put out of the reach of Insolvency Practitioners, who will be insufficiently funded to enable a thorough and detailed investigation of the insolvent's affairs. We consider that the measures will undermine confidence in the probity of doing business in the UK both nationally and internationally in the longer term.

In addition, the implementation of a percentage or scale rates will punish those creditors who have lent conservatively and reward those that have not, by enabling a premium to be drawn when the assets are easily ascertainable and realisable to off-set the costs which cannot be recovered on those appointments where the business is over-leveraged, assets are less easily ascertainable and/or have

[20] Paragraph 56, Impact Assessment Insolvency Practitioner Fee Regime, 2014
[21] Paragraph 57, Impact Assessment Insolvency Practitioner Fee Regime, 2014
[22] Paragraph 55, Impact Assessment Insolvency Practitioner Fee Regime, 2014

been put out of the reach of creditors. In our view this will undermine market confidence in the long term.

We do not agree that the measures will result in businesses seeking assistance at an earlier stage. Insolvency Practitioner advisory services are often given free of charge, particularly at the lower end of the scale, it is unlikely that the proposed measures will see a change in this position.

Q28. Do consultees believe these measures will improve the reputation of the insolvency profession?

No. Whilst fees may be reduced in the short term, as we have stated elsewhere it is our view that the insolvency market will contract as a consequence of these measures. Appointments will only be accepted if they are definitely commercially viable and there will be insufficient security of financing to encourage speculative or investigatory work. The reputation of the insolvency profession may also be diminished as appointments are dealt with by less skilled work-forces.

The measures, as drafted, may also lead to improper director / debtor behaviour which may well lead to distortions in the market place if they are aware that Insolvency Practitioners have only finite sums with which to pursue asset realisations or undertake investigations. As the consultation also seems to suggest that certain Insolvency Practitioners do not act in the best interest of unsecured creditors, there is a danger that the measures proposed will encourage, rather than discourage, improper behaviour, as there is a disincentive to realise assets in excess of what is required to extinguish the secured debt, or to pay a dividend to unsecured creditors, as this will result in the removal of time and rate. The measures could lead to a dumbing down of the profession and the contracting out of work to unregulated providers.

Longer term we therefore consider there will be minimal impact on the reputation of the insolvency profession which, we would reiterate, performs strongly when compared to other significant leading economies, such as America, Germany, Australia and France (for example) in terms of returns to creditors, cost to the estate (UK (6%), USA (7%), Germany (8%), Australia (8%) France (9%)) and speed of process (UK and Australia both assessed as 1 year, with America, Germany and France trailing at 1.5, 1.2, 1.9)[23]

We consider that impact of the introduction of the Creditor Complaints Gateway should be measured prior to introducing additional measures seen as addressing an issue that may not exist.

[23] Doing Business 2013, The World Bank and The International Finance Corporation

Strengthening the regulatory regime and fee structure for Insolvency Practitioners
Response to a BIS consultation: R3, the insolvency trade body, March 2014

Contents

1. Introduction

R3, the insolvency trade body, is the leading trade body for the UK's insolvency profession. We represent 97% of the UK's Insolvency Practitioners (IPs) and another 1,500 insolvency professionals and students. R3 represents IPs working in firms of all sizes, from the 'Big 4' to small local firms. R3 promotes best practice and provides a detailed programme of insolvency courses, conferences and technical information.

R3 broadly supports the regulatory proposals and two of the three proposals for IP fees but has serious concerns that there are elements of the consultation – namely the restriction of charging fees on a 'time-cost' basis where there is no secured creditor or creditor committee – that will have a negative impact on creditors and the insolvency profession.

The UK has a world leading insolvency regime, which is certainly not 'broken' nor in need of wholesale reform, as suggested in much of the consultation:

- The **UK's insolvency regime is the 7th best in the world** (according to World Bank data[1], which measure the speed of the insolvency process, the likelihood of business rescue, and the returns and costs to creditors).

- **The cost of insolvency in the UK is 6% of the estate,** with a recovery rate at 88.6 cents in the dollar, according to the World Bank. Japan is the only G8 or G20 economy that ranks above the UK in terms of 'resolving insolvency' – **the UK outperforms the United States, Germany and France**.

- Furthermore, in 2012 the **UK insolvency industry saved more than 750,000 jobs and 6,100 businesses and the total financial contribution of the insolvency industry to the UK economy in 2010 was £739m**[2].

- There are approximately **1,700 IPs in the UK, most are accountants or solicitors – all are qualified and highly regulated**. They are officers of the court and have a statutory objective to maximise returns to all creditors.

Given the nature of the consultation, which, if implemented as proposed (specifically with regard to the restriction of charging fees on a time-cost basis), would cause significant harm to creditors and UK insolvency regime, we are very disappointed that the consultation period is so short. We believe that the insolvency profession should have been given a 12 week response period – particularly when the regulation Impact Assessment was finalised in May 2013 and the fees Impact Assessment in December 2013.

R3 is concerned that the fees proposal, and a number of the proposals regarding changes to the regulation of IPs, are ill-considered. The consultation lacks evidence (or is based on out-of-date or flawed information), the proposals are wholly disproportionate to the 'problem' and will not achieve the Government's objectives.

We are also concerned at the lack of understanding from the Insolvency Service about the implications of the proposals on the profession it regulates. Given the significant redundancies and

[1] All references for the statistics used in the Introduction and Executive Summary are contained in the main body of the report

[2] http://www.r3.org.uk/media/documents/policy/policy_papers/insolvency_industry/R3_Value_of_Industry_FINAL_VERSION_01May2013.pdf

cost-cutting over the last few years in the Insolvency Service (including an approximate 40% cut in staff numbers), we are concerned that there is a ‘knowledge-gap’ in the department and so recommend that all relevant officials should work in an IP firm for a minimum of two weeks per year as ‘on the job/CPD training’; R3 offers key staff no-cost places on its courses. We would be happy to propose other solutions in order to address the ‘knowledge gap’.

Given our concerns outlined above, R3 believes that a review of the performance of the Insolvency Service as the ‘regulator of regulators’, as well as a wider review of its performance in its other areas, should take place in the context of this consultation. Such a review should be properly undertaken and resourced, with its findings made fully transparent.

Given the importance of insolvency to the economy, it is unquestionably right that Parliament and Government (present and future) give the Insolvency Service the resource and support required to function effectively.

2. Executive Summary

a. Regulation of Insolvency Practitioners

The consultation sets out proposals to:

- strengthen the regulatory framework through the introduction of clear regulatory objectives;
- give the oversight regulator (the Insolvency Service) more appropriate powers to deal with poor performance, misconduct and abuse;
- reserve a 'backstop' power to introduce a single regulator for the insolvency profession.

- R3 broadly supports the aims of the first two objectives listed above; however, based on feedback from our members and our own concerns, we believe the Insolvency Service would be better served by focusing on introducing a 'Single Regulatory Process' rather than working towards introducing a 'Single Regulator'.

- Although R3 is supportive of the objectives set out by the Insolvency Service with regard to the role of an 'oversight regulator' and the aims of the regulatory system, we have serious concerns about the ability of the Insolvency Service, as currently structured and resourced, to fulfil this role.

- While R3 supports proposals that would improve the performance, transparency and efficiency of the regulatory process, we are concerned that there is a lack of data against which performance can be judged to assess failure or success.

- R3 is concerned that there is a lack of clarity with regard to the criteria against which the performance of the regulatory regime and IPs will be judged. References to vague terms such as 'public interest' and 'value for money' in the consultation, without explicit definition, are unhelpful and potentially misleading.

- R3 believes the Insolvency Service should pay careful attention to existing legislation and guidance which may help achieve the Insolvency Service's objectives. The Insolvency Service should ensure that its latest proposals do not conflict with existing legislation and guidance.

- R3 is supportive of an 'oversight regulator' being given greater powers over the Recognised Professional Bodies (RPBs). However, it is important that the circumstances in which, and for what purpose, these new powers may be used are set out properly.

- The 'oversight regulator' should take care to avoid 'micro-managing' RPBs and their disciplinary processes. Effectively running a 'shadow' regulatory system on top of the existing, established processes would be confusing and damaging for the insolvency profession and those it serves.

b. Insolvency Practitioner fee regime

R3 broadly supports the proposals to enhance regulators' monitoring of fee complaints and increasing creditor engagement, **but firmly rejects the proposal to 'simplify' the fees structure as:**

- we have evidence to suggest that this proposal would not achieve the government's goal (to 'improve returns to unsecured creditors; and improve the reputation of the insolvency profession');
- instead, it would cause a significant amount of 'harm' to creditors, small insolvency firms and the UK's globally-renowned insolvency regime which is currently ranked 7th best in the world;
- it will not reduce or eliminate the reported 'noise' surrounding IPs' fees;
- and the proposed 'solution' is a disproportionate response.

We therefore urge Government to drop this proposal and review alternative recommendations (as proposed in previous government reports and by the insolvency profession) that address its goal of reforming IP fees and improving unsecured creditor engagement.

1. **R3 questions the government's assessment of £15m of 'over-charging' causing 'harm'; these are terms used throughout the consultation – both terms are inaccurate and misleading:**

- The government suggests that an IP has a duty to treat all creditors equally and that charging different rates for secured and unsecured creditors would constitute 'harm'. However the government's statutory 'order of priority' dictates that creditors cannot be treated equally.
- We are advised that the estimated £15m figure has been calculated on IPs' 'charge out' 'headline rates' rather than 'actual' rates. There is a huge difference between the headline rate and the fees that are actually charged, and therefore we question that estimate.
- The £15m figure is not just IPs' fees but is the total cost of insolvency (which includes everything from paying for lawyers to paying for heating and lighting if an insolvent business is 'traded'). The report estimates the total cost of insolvency to be £1bn, so even with a 'problem' claimed to amount to £15m: this is just 1.5% of the total cost of insolvency.
- The concept of 'over-charging' is predicated on the notion that there is a 'correct' level. It could be equally claimed that secured creditors are 'under-charged' – a more accurate assessment given that secured creditors are often able to negotiate discounts due to repeat work.
- Far from over-charging, where realisations are relatively low, IPs often do not receive enough money to cover the costs of the work they carry out. This is particularly evident in smaller practices (who would be hit hardest by these reforms) where 57% of R3's Smaller Practices Group ('SPG' – five or fewer appointment takers) received less in fee income than would have been warranted for work carried out in more than half of the completed insolvency cases that they worked on in the last 12 months.

2. **R3 believes that the proposal is disproportionate to the problem and would not reduce 'noise' around fees: the real challenge is unsecured creditor engagement:**

- R3 is concerned that the consultation is based on perception rather than fact. IPs' fees comprised just 2% of all complaints to government about IPs in 2013 (down from 7% in 2010). To put this in perspective, in 2013, there were approximately 120,000 new insolvency cases and there were just 13 complaints to the government about insolvency fees (0.01%). Even accounting for the fact that many of these 120,000 cases would have been handled by the Official Receivers – about whose fees there have also been complaints – the proportion of cases that are attracting formal complaints about fees is negligible.

- The proposal would not address the 'problem' of a lack of engagement by unsecured creditors.
- R3 believes that the position of unsecured creditors in the priority order, as set out by government, is the main reason behind concerns about fees. No amount of regulatory change to IP remuneration would remedy that. It would require a change to the law and that could have an enormously detrimental effect on lending in the UK were banks and other secured lenders to find themselves fall down the priority order.
- IPs and business organisations have told R3 that fees are not generally the top concern for creditors. R3 asked members what they believe unsecured creditors' top three concerns to be: 93% of R3 members believe that the amount of money returned to creditors is one of the top three concerns; 86% think that taking action against directors responsible for misconduct is a top three concern; and 55% that transparency in terms of IPs work to justify fee levels (rather than the fee level itself) as a top-three concern.

3. R3's concerns with the proposed new method of remuneration:

- R3 supports a number of the fee proposals set out in previous government reports. However, this latest proposal to simplify the fee structure through prohibiting the use of charging by the hour ('time-costs') was not recommended in previous reviews. R3 is unaware of the proposed restricted method of remuneration being used anywhere else in the world. Therefore it is not 'tried and tested'.
- Either businesses or the IP will lose out in future insolvencies under the proposals: although IPs can provide a rough up-front 'guesstimate' of the cost of work up-front, this guesstimate would be an inappropriate basis for a final level of remuneration – IPs do not know until later in the case exactly what is involved and how long it will take to resolve. Fees may end up either significantly higher or lower than the 'guesstimate'. Relying on a fixed-fee or percentage of realisations as a method of remuneration without an option to review with creditors, would thus see either creditors or IPs short-changed. In either case, at least 40% of R3 members believe returns to creditors would decrease and at least 60% believe company rescues would decrease.
- IPs may err on the side of caution and provide a higher quotation than might be warranted to ensure that costs are recovered. Should the case be straight-forward without any 'surprises' it may mean that an IP's fee is higher than it would be if charged on a time-cost basis – resulting in less money returned to creditors.
- Many cases would not be taken on by IPs at all because the fixed/percentage of realisations fee would be too small to be economical. As a result, the number of cases that the Insolvency Service will be required to take on will rise, increasing cost to the taxpayer.
- The proposals will impact the small asset cases (where there is often no secured creditor or committee) and could lead to smaller insolvency practices leaving the market – and therefore leaving creditors in those cases without an IP to turn to when trying to recover debts.
- Because IPs cannot resign from a case, once they have reached their fixed-fee level, they will almost certainly not optimise additional recoveries as there is no incentive to do so. This would lead to lower returns for creditors.

- If IPs are unpaid, they would be disincentivised to take action against delinquent or fraudulent directors who can then go on (due to lack of evidence) to 'rip off' creditors and members of the public.
  A fixed-fee could lead to outsourcing of specific insolvency procedures to unregulated individuals. This would shift the cost rather than reduce it and bring less transparency to the fee setting process.

4. R3's recommendations to achieve Government's goals

R3 would like to see the government review alternative proposals which are proportionate to the 'problem' that it seeks to address, and achieve Government's goal of improving returns to unsecured creditors:

- The Government should drop its proposal (in the Red Tape Challenge) to remove the requirement for IPs to hold a creditors' meeting. This contradicts Government's objective of improving unsecured creditor engagement.
- Better and more information for unsecured creditors: the Insolvency Service could better direct useful information to creditors. The profession is also proactively working on solutions to improve engagement.
- The Insolvency Service should be more transparent about the fees and levies it exacts on insolvency cases. We know that many creditors and debtors are often unaware of these charges and wrongfully assume that fees and levies charged by the Insolvency Service are IPs' fees.
- Increased unsecured creditor engagement by HMRC (to which 24% of all unsecured debt is owed) would help set fee levels for all unsecured creditors.
- Creditors to be given an estimate of IPs' costs at the outset: this was recommended in a previous government report but has not been taken forward. This time-cost resolution would act as an initial 'cap' on fees. An IP would work to this figure, keeping detailed assessments on time. The IP could seek additional fees if the case demanded further work at a later date.
- Greater promotion of the cost-saving and hence fee-reducing options of the 2010 Insolvency Rules: some statutory work (e.g. sending progress reports to creditors) could be quoted on a fixed-fee basis. IPs should also be required to report work with more transparency e.g. break down time-use clearly into constituent parts such as 'communicating with x number of creditors to establish a meeting'.

R3 has already demonstrated its commitment to working with the government to ensure IPs and creditors get a fair deal on IP fees:

- R3's 2013 proposal to reduce the expense involved in paying very small dividends was adopted by the Government's Red Tape Challenge. This will reduce IPs' fees.

3. Regulation of Insolvency Practitioners: response to the consultation questions

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

1. R3 is fully supportive of the government's desire for an effective and robust regulatory regime and we naturally support proposals that improve the standard of regulation, improve the reputation of the insolvency profession and were beneficial to creditors.

2. The proposals contained within this consultation prompt us to suggest that now is the time to look at, in a fundamental way, the role of the Insolvency Service, as presently structured, funded, resourced and whether it is the most appropriate body to direct and oversee as important a part of the UK's financial support service sector as the insolvency profession (see paragraphs 3, 11, 21, 38, 39, 40, and section 4).

3. R3 believes that further detail about the proposals outlined by the Insolvency Service must be provided. We do not believe that sufficient, reliable and informative data are currently available to prove or disprove the Insolvency Service's concerns about the regulation of the profession in all respects. There are, for example, no publicly available data on stakeholder 'approval' of the system.

4. Notwithstanding the lack of data[3], R3 has previously expressed concern about aspects of the existing regulatory process. Indeed, R3's members' views on the existing regulatory framework are mixed. While in some cases R3 members believe the framework works well, particularly in terms of meeting creditors' interests, members are less convinced by the consistency and speed of the process. In terms of the current regulatory framework, our members believe that:

% of R3 members that believe the existing regulatory system works well/poorly with regard to…	**Performs Well**	**Performs Poorly**
Acting in creditors' interests	81%	12%
Transparency of how to make an initial complaint	74%	11%
Transparency of the outcome of a complaint/disciplinary action	73%	14%
Transparency in keeping track of a complaint/disciplinary action	64%	17%
Effectiveness of sanctions in deterring future 'bad' behaviour by IPs	63%	26%
Fairness to IPs subject to disciplinary hearings	63%	17%
Effectiveness of sanctions in preventing 'bad' IPs from operating	55%	36%
Speed of disciplinary process	48%	32%
Consistency of the regulatory processes between regulators	48%	27%
Consistency of regulators' sanctions	43%	30%

[3] R3 has based concerns on comments from R3 membership surveys, as outlined in R3's response to the Government's 2011 'Consultation on reforms to the regulation of insolvency practitioners'
http://www.bis.gov.uk/insolvency/Consultations/IPConsultation?cat=closedwithresponse

5. A number of the Insolvency Service's proposals would appear to be already contained within the existing Memorandum of Understanding[4] (MOU) between the Insolvency Service and the RPBs.

6. While the broad aims of the proposals are acceptable and could enhance the credibility of the profession, R3 is concerned that key concepts in the proposals – particularly references to 'value for money' and the 'public interest' – upon which the Insolvency Service's justification for action relies, require clarification as to meaning and application.

7. 'Public interest' is a vague and subjective term that is open to multiple interpretations, the objection being that (a) no one can know in advance what it may subsequently be held to mean, and (b) its meaning may change over time, leading to risk of serious uncertainty and inconsistency. Therefore, we are unsure how 'public interest' could be clearly defined but there must be a consistent definition as any conflict between the interpretations would cause problems for the Recognised Professional Bodies (RPBs), wider stakeholders and IPs expected to meet competing objectives. Reference is made to 'public interest' in the Insolvency Rules and the Act, although a clear definition is not provided. Indeed, the only references we can find in the Act are to winding-up petitions on public interest grounds (which have been around for a long time and are well understood), the role of the official petitioner in criminal bankruptcy cases, and debt relief and bankruptcy restrictions orders. Presumably the term has to be left flexible in these cases to allow necessary discretion on the part of the relevant officials. However, this is not really comparable to what is being proposed in this consultation.

8. In Paragraph 50, point 2, section (ii), the consultation says the regulatory system should "*reflect 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*." This latter reference to 'any other principle' is concerning as it could have multiple interpretations. Unless the Insolvency Service can specify which other principles to which it would refer, the reference to 'any other principle' should be dropped.

9. In Paragraph 50, point 3, section (ii), the consultation document says the regulatory system should *"encourage an independent and competitive IP profession whose members consider the interests of all creditors in any particular case."* This objective is already a statutory duty[5] for IPs and further reference to it is unnecessary.

2. <u>Do you have any comments on the proposed procedure for revoking the recognition of an RPB?</u>

10. R3 supports the principle behind the Insolvency Service revoking an RPB's recognition, but believes further detail is required about how it would go about doing so.

11. In particular, the Insolvency Service's criteria upon which revocation decisions would be based need clarifying, as does the nature of evidence sought by the Insolvency Service and the time period over which an RPB's performance would be judged. It would be useful to have information from the Insolvency Service on the degree of compliance/non-compliance with the existing MOU by the RPBs over the last ten years, and the consequent actions that the Insolvency Service has taken.

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[4] http://www.bis.gov.uk/insolvency/insolvency-profession/Professional%20conduct/memos-of-understanding/mou-consistency-in-authorisation-of-IPs

[5] Although only an express statutory duty in Administrations

12. RPBs will need to be given 'fair'[6] warning by the Insolvency Service ahead of the removal of recognition, together with the opportunity for RPBs to rectify alleged wrongdoing.

13. Were such a power to be given, it would be essential for the Insolvency Service to consider the nature by which the wider community is informed of shortcomings of the RPBs in advance of removing authorisation. For example, IPs could themselves apply upward pressure on their RPB to improve or move to a more compliant RPB. It is therefore important for the Insolvency Service to outline the nature of the publicity associated with the process of (and period up to) removing recognition.

14. Removal of recognition should be an option of last resort only. It should only be used once the Insolvency Service has worked closely with the RPB in question to identify areas of its performance where improvement is needed and the RPB has been given sufficient opportunity to improve.

3. <u>Do you have any comments on the proposed scope and procedures for the Secretary of State to issue a direction to an RPB?</u>

15. While R3 supports the power of the Insolvency Service to issue a direction to an RPB, such directions need to be limited to disciplinary 'processes' rather than specific outcomes or instructions to commence proceedings, and should be clearly defined in scope. R3 does not support the power for the Insolvency Service to provide a direction to RPBs to discipline one of their members: just 38% of R3 members believe the Insolvency Service should have the power to do this; 59% say the Insolvency Service should not have this power.

16. R3 believes that more detail needs to be provided to RPBs by the Insolvency Service that would specify the circumstances in which it would issue a direction.

17. The Insolvency Service also needs to detail the type of direction it would issue to an RPB. Using the Common Sanctions Guidelines as an example, the Insolvency Service have not given sufficient thought to the nature and sanctions that should be applied, particularly in regards to whether the sanctions should act as a deterrent, punishment or both.

18. The Insolvency Service should not adopt a 'heavy-handed' approach to issuing a direction to RPBs. The Insolvency Service has delegated responsibility for regulating the profession to the RPBs and should, in the vast majority of cases, leave RPBs to get on with the job. A parallel regulatory structure, based on directions given by the Insolvency Service, would be confusing for IPs, RPBs, and other stakeholders alike.

19. Were the Secretary of State to direct RPBs to issue further sanctions against an IP, beyond those already applied (or to take action in the first place), it would not address the underlying problem in such a situation: the failure of an RPB to regulate its members 'correctly'[7]. Issuing directions to RPBs on the regulatory processes and standards they use, on the other hand, would address this problem where it arises.

20. It is important that the decisions reached by the RPB are respected by the Secretary of State. Having been through an RPB's disciplinary process, an IP should not then be subject to

[6] 'Fair' to be defined in terms of timeliness and manner of warning
[7] There must be a clear definition of what constitutes 'correctly'

further discipline by the Secretary of State. As detailed below in Question 7, there are several proposals within the consultation that would see IPs potentially punished twice for the same transgression. It is both inequitable and a position that few other professionals could find themselves in.

21. R3 also has concerns about how the Secretary of State's decisions would be reached regarding further sanction. Whereas RPBs' disciplinary processes are relatively open – and those subject to disciplinary proceedings are allowed to attend and respond to allegations – it is not clear if the Secretary of State's decision-making regarding IP sanctions would be similarly transparent. Arbitrary additional sanctions must be avoided. The Insolvency Service also has no experience in such matters; or if it has, it has not provided transparency in its own limited use of powers it presently has. The only sanction available to the Insolvency Service is the removal of a licence[8]. We understand that the Insolvency Service puts in place an 'Action Plan' which is then monitored, when the IPs it monitors fall short. However, the outcomes from this process have not been published. This is unhelpful given that the IPs monitored by the Insolvency Service generally tend to perform less well as compared with IPs from other RPBs (compliance with SIP16 reporting as an example)[9].

22. There is already a degree of inconsistency in the fines and sanctions imposed by RPBs for similar transgressions (see member survey results in Appendix A). Ad hoc directions regarding sanctions given by the Secretary of State would add to this inconsistency.

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

23. While R3 supports the idea that the Insolvency Service should be clearer with RPBs when it is concerned with their performance, R3 is worried that financial penalties imposed on RPBs would most likely result in higher subscriptions for those 'compliant' IPs and will not be borne by the RPBs themselves.

24. The Insolvency Service should limit its reprimands or guidance to those options that would not have an untoward effect on compliant IPs or RPBs' other members; ordinary members should not be made to pay for the failures of their regulator.

25. A public reprimand (as proposed in Question 5) for an RPB by the Secretary of State would be a satisfactory alternative to a financial penalty.

26. A public reprimand would not see costs passed onto an RPBs' IPs and other members. The reputational impact of a public reprimand may though lead IPs and other members to reconsider their membership of the RPB, which would itself have a financial impact on that RPB.

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

27. As detailed in our answer to Question 4, R3 supports the proposal for the Secretary of State to publicly reprimand an RPB.

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[8] Section 303, IA86

[9] http://www.bis.gov.uk/insolvency/insolvency-profession/Regulation/statements-of-insolvency-practice/SIP-16-Reports-pre-packs 'Report on the Operation of Statement of Insolvency Practice 16, 1 January to 31 December 2011', page 6

6. Do you agree with the proposed arrangements for RPBs making representations?

28. R3 has no comments on the arrangements.

7. 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?

29. Although 60% of R3 members support the idea behind this proposal (37% are against), R3 has several concerns about how this proposal would be implemented in practice.

30. As with other parts of the consultation, key terms require further definition for the proposal to be workable.

31. The 'public interest' in which the power would be used requires clarification, as do the exact 'exceptional circumstances' when this power would be used. Clarification would be required by both IPs and RPBs expected to operate under the proposed system.

32. R3 is very concerned that allowing the Secretary of State to sanction an IP directly would undermine the existing regulatory structure.

33. IPs would face the possibility that they could face multiple disciplinary proceedings regarding the same allegation (see concerns detailed in paragraph 20).

34. RPBs would face having their decisions second-guessed by the Secretary of State. This may see the length of time taken by RPBs to complete a case increase as RPBs seek to make sure their procedures and decisions are watertight. This would not improve the speed of the regulatory process.

35. The consultation document makes reference to the power being used where an RPB's 'procedures have been slow'. The 'correct' length of time that a disciplinary case should take is a matter that is open to debate. While R3 sympathises with the Insolvency Service's position, the Insolvency Service should provide more information about the speed of the regulatory process it believes are acceptable, suitably explaining its rationale.

36. One of the reasons that RPBs have taken a cautious approach to prosecuting disciplinary cases (in terms of the length of time it takes to process a case) is because of concerns over the potential for judicial review of proceedings; errors in past cases have led to judicial reviews. Pressure – in the form of a threat to use direct sanctions – from the Secretary of State to hurry cases could risk further judicial reviews of RPBs' procedures.

37. The power for the Secretary of State to sanction an IP directly calls into question the point of the regulation of the profession being delegated to RPBs in the first place. As with Question 4, the aim of this proposal would be better met by other parts of the consultation (specifically, improving the quality of the RPBs' own procedures in the first place).

38. The consultation makes reference to the fact that Secretary of State action could be taken against an IP if an RPB "felt they were unable to bring disciplinary proceedings against an IP that they authorise." R3 can see only two situations where this might be the case: the RPB may not have the resources (in terms of budget or staff) to conduct the disciplinary case; or the RPB's rules and regulations may not cover the alleged 'offence'. In the first case, the question is not whether the Secretary of State should be allowed to step in, but whether or

not an under-resourced RPB should be allowed to act as an RPB at all. In the second case, it would be unfair to discipline an IP if they had not breached the rules of their RPB (and it is not clear by what other standards they should be judged); the main issue in this case would be to improve the rules and regulations of the RPB in question. It may be necessary for RPBs to undergo a 'health check' to establish whether they currently meet minimum criteria and financial standing expected by the Insolvency Service.

39. The proposal suggests the Insolvency Service takes on the responsibility for the investigations that would lead to direct sanctions. R3 would like clarification of the extra resources, in terms of budget and staff with relevant experience, would be made available to the Insolvency Service to enable it to fulfil this additional role.

8. ***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?***

40. R3 understands that the Insolvency Service already has the power to request information from RPBs and IPs. If this is the case, we do not feel the existing regime needs further additional legislation on this matter. It is far more appropriate instead for the Insolvency Service to implement and enforce the existing regulatory framework properly.

41. Despite this, R3 is generally supportive of the thinking behind this proposal. This support is contingent on a number of our concerns outlined below being sufficiently addressed and more information being provided from the Insolvency Service.

42. Just over half (55%) of R3 members agree with the proposal that the Insolvency Service should be able to require RPBs, IPs, IPs' employers, or IPs' employees to provide information on request relating to disciplinary procedures, monitoring or IPs' work.

43. As with many other parts of the consultation, key terms need to be properly defined.

44. The 'reasonable time' in which the information required must be given needs to be properly defined as this is a subjective term. What may be considered reasonable time for a small practice, with fewer resources, may not be the same definition for a larger practice which has a greater number of staff. In order to mitigate against any negative, disproportionate impact on smaller practices, the definition of 'reasonable time' should take into account small practices' constraints.

45. Similarly, the requirement that information will need to be 'verified in a specified manner' needs much greater clarity on what that would look like before we can ascertain the time/cost impact this will have an all parties who are requested to give information.

46. To avoid undermining the role of the RPBs, were the above proposal to be adopted, it would be appropriate to empower RPBs to require more information also. One example is on the issue of monitoring office accounts; currently, we understand that RPBs do not generally monitor office accounts where questionable payments could (most likely) be hidden. Rather than giving the Insolvency Service the power to request information on these accounts, which could increase costs and decrease transparency for all parties, it would be more beneficial and cost effective to empower RPBs to request this information and ensure they have the resources to do so.

47. More information is required from the Insolvency Service on what situations would require more information and how it would become aware of issues that were in need of further information. For example, RPBs currently provide a report to the Insolvency Service on cases which are under review; it is not clear whether evidence would come from these reports, or whether the Insolvency Service would require more systematic, detailed information from RPBs.

48. Consequently, R3 is concerned that any additional costs as a result of this proposal will be passed on to IPs, and will disproportionally impact smaller insolvency practices.

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

49. R3 agrees that further homogenisation of regulation in the insolvency profession is desirable, but doubts whether switching to a single regulatory body would be the best way to achieve this goal.

50. Just 39% of R3 members agree that the Insolvency Service should have the power to designate a single insolvency regulator; 56% disagree.

51. R3 agrees with the concerns outlined by paragraph 85 of the Insolvency Service's consultation, specifically: "moving to [a single regulator] would involve significant change, time and cost." R3 also believes that in the event that the Insolvency Service decided to create a single regulatory body, it would take some time before this body would reach an acceptable level of performance. This would result in a 'regulation gap' from the time the existing RPBs ceased to regulate the profession until the new regulator was able to get up to speed. Recent history, using the FSA (as was) as an example, demonstrates that bringing regulators together doesn't necessarily 'solve' as many problems as it creates.

52. R3 believes that the Insolvency Service's focus should be on promoting a 'Single Regulatory Process'. This, in addition to other proposals outlined within the consultation, would remove the need for a single regulatory body. 50% of R3 members believe a single regulatory process would work best for the profession; only 21% back a single regulator, 14% back the current multi-regulator framework; and 14% think that fewer regulators would work best for the profession.

53. A single regulatory process would reduce significantly the inconsistencies that currently exist in the insolvency profession's regulation. The creation of a single regulatory process would also be a chance to take a fresh look at the profession's regulatory processes and standards.

54. Pursuing a single regulatory process rather than a single regulatory body would avoid any potential 'regulation gap'. Existing RPBs would be able to introduce a new regulatory process much more quickly than it would an entirely new organisation to do so.

55. R3 would be happy to work with the Insolvency Service and RPBs to explore how a single regulatory process could function (and whether it would involve the pooling of resources etc.)

56. The basic principles behind a single regulatory process are already enshrined in the existing Memorandum of Understanding between the Insolvency Service and the RPBs:

a. From the foreword: "To underpin the insolvency regime, the Secretary of State has agreed a set of principles with those Bodies for the purposes of achieving consistency in the authorisation and regulation of insolvency practitioners.

b. Section introductions: "The purpose of this section… is to ensure that the Bodies work to common standards".

57. In conclusion, we are not in favour of a reserve power to enable the Insolvency Service to designate a single regulator.

4. Insolvency Practitioner fee regime

a. *Questioning the proposal to introduce a new basis for remuneration*

58. R3 is very concerned about the proposal to enforce a new basis for remuneration that would restrict choice for an IP or creditor other than to calculate fees on an upfront fixed-fee basis or as a percentage of realisations where there is no secured creditor or creditors' committee (which will henceforth be referred to in this response as 'the proposal'). 76% of R3 members believe that the most appropriate policy option for IPs' fees, which would secure the best return to unsecured creditors, would be to keep the current fee-setting mechanisms – only 6% believe the government's proposals of a combination of fixed-fee and percentage of realisations are the most appropriate way to achieve that goal.

a. There is no evidence base for the fixed-fee/percentage of realisations proposal

59. The Insolvency Service commissioned an independent review to examine IPs' fees, which reported in July 2013: the 'Kempson' review. Kempson outlines thirteen recommendations/proposals (many of which R3 supports) which might improve creditor engagement and the fees regime.

60. However, the recommendation to restrict the use of time-costs as a basis for setting fees, where there is no secured creditor or creditor committee, was not proposed by that review; R3 questions why such a significant proposal has subsequently been proposed without any evidence-based research. The Insolvency Service has disclosed the rationale behind this decision is solely 'because two methods of remuneration are simpler than three'; there has been no further reference to undertaking research and analysis to ascertain the costs and benefits of the proposal before it was put out to consultation.

61. R3 has commissioned Professor Peter Walton and Chris Umfreville, both of the University of Wolverhampton, to examine the basis for IP remuneration in the World Bank's 20 most effective insolvency regimes (and additionally to consider the regimes in Spain, Italy, France and South Africa). Given the 6 week consultation period, it has not been possible to undertake a complete analysis of all these jurisdictions, but the analysis outlined in Appendix B demonstrates that from the 12 insolvency regimes examined, not one uses the method of fixing the basis of IP remuneration as proposed by the Insolvency Service. Indeed, R3 is not aware of anywhere else in the world where fee restrictions as outlined in the consultation are in operation. In effect, the Insolvency Service proposes to introduce an untested system of IP remuneration in the UK.

b. The proposal to introduce a new method of remuneration is disproportionate to the 'problem' and based on perception rather than evidence

62. The concept of IP 'over-charging' was identified in the OFT report and confirmed by Kempson as approximately £15m per year[10]. This figure was arrived at by extrapolation and should be considered in the context of the £1bn per year charged in administering insolvent estates: it represents **1.5% of those costs (which includes fees charged by IPs) – and just 0.4% of the £4bn returned to creditors each year**. R3 firmly believes that changes that improve the insolvency process should be made (see (4b) and (4f) in this response for further detail in this regard) but such changes should be proportionate and not cause more harm than they aim to remedy.

[10] As outlined in 4d) from Page 19, R3 strongly challenges this figure.

63. Given that individuals and companies lose money at the same time as an IP is paid for dealing with the insolvent estate, it is inevitable that there will be complaints about IPs' fees. R3 accepts there will be complaints about IPs' fees – as there are complaints about the fees charged by other professions – and has been informed on a number of occasions by the Insolvency Service that the government has evidence from 'the ministerial post-bag' that insolvency fees are seen as too high by stakeholders.

64. However, according to a recent ministerial response to a parliamentary question, it has been shown that the number of complaints about IPs fees' is low and falling, and therefore we are concerned that complaints about IPs' fees are more of a perception than reality. In response to a parliamentary question, the Minister stated that complaints about **IPs' fees comprised just 2%** of all complaints about IPs in in 2013 (down from 7% in 2010)[11]. To put this in perspective, in 2013, there were approximately 120,000 new insolvency cases, and there were just 13 complaints to the government about insolvency fees (0.01%). Even accounting for the fact that many of these 120,000 cases would have been handled by the Official Receivers – about whose fees there have also been complaints[12] – the proportion of cases that are attracting formal complaints about fees is negligible.

65. R3's members' survey provides further evidence about the *low* number of complaints that fees attract. The March 2014[13] members' survey found that the majority of R3 members said they received no complaints about their fee levels in a typical 12 month period. Interestingly, those working for the firms that would feel the most severe negative impact from the proposals – the smaller firms – receive the least complaints about their fees. On the other hand, those working for the firms who would be least affected by the proposals – the larger firms - receive the most complaints about their fees. 90% of members working for a firm which employs four or fewer employees say they receive no complaints regarding fees in a typical 12 month period, whereas only firms employing more than 49 people say they receive more than three complaints in a typical 12 month period.

66. The nature of the complaints is worthy of further investigation. Kempson acknowledges[14] that a large proportion of complaints that reach MPs and Ministers relate to issues from 'debtors' – those individuals who have lost their family home where the original debt was for a small sum; and directors of companies who have given a guarantee to a secured creditor – both issues are about the inability to 'control' IPs fees from a debtor's, rather than a creditor's perspective, but still may be considered as a complaint about IPs fees. Such conflation is unhelpful and misleading.

67. The UK has a world-leading insolvency regime. The World Bank's *Doing Business* project provides objective measures of business regulations and their enforcement across 189 economies. As part of this study, *Doing Business* assesses the time, cost and outcome of insolvency proceedings involving domestic entities. The ranking on the ease of resolving insolvency is based, in part, on the recovery rate for creditors. The cost of the proceedings is recorded as a percentage of the estate's value.

[11] In response to a Parliamentary Question by Toby Perkins MP: To ask the Secretary of State for Business, Innovation and Skills how many complaints about the Insolvency Service were received in each year from 2010 to 2014. [190803] response 11 March 2014

[12] In response to a Parliamentary Question asked by Toby Perkins MP: To ask the Secretary of State for Business, Innovation and Skills how many complaints about official receiver fees were received in each year between 2010 and 2014. [190893] response 13 March 2014

[13] ComRes interviewed 444 R3 members online between 7th and 12th March 2014

[14] Review of Insolvency Practitioner Fees, Report to the Insolvency Service, Elaine Kempson July 2013, Page 41 http://bis.gov.uk/insolvency/insolvency-profession/review-of-ip-fees

68. The following table replicates the World Bank's top 20 world economies in terms of insolvency resolution (and additionally shows the respective rankings of Spain, Italy, France and South Africa).

Economy Name	Rank	Time (years)	Cost (% of estate)	Outcome (0 as piecemeal sale and 1 as going concern)	Recovery rate (cents on the dollar)
Japan	1	0.6	4	1	92.8
Norway	2	0.9	1	1	91.3
Finland	3	0.9	4	1	90.2
Singapore	4	0.8	3	1	89.4
Netherlands	5	1.1	4	1	89.2
Belgium	6	0.9	4	1	89
United Kingdom	7	1	6	1	88.6
Ireland	8	0.4	9	1	87.6
Canada	9	0.8	7	1	87.3
Denmark	10	1	4	1	87
Iceland	11	1	4	1	84.5
New Zealand	12	1.3	4	1	83.3
Germany	13	1.2	8	1	82.9
Austria	14	1.1	10	1	82.4
Korea, Rep.	15	1.5	4	1	82.3
Taiwan, China	16	1.9	4	1	81.8
United States	17	1.5	7	1	81.5
Australia	18	1	8	1	81.3
Hong Kong SAR, China	19	1.1	9	1	81.2
Sweden	20	2	9	1	75.5
Spain	22	1.5	11	1	72.3
Italy	33	1.8	22	1	62.7
France	46	1.9	9	0	48.3
South Africa	82	2	18	0	35.5

69. As is clearly outlined in the table, **the UK's insolvency regime ranks 7th best in the world**. The cost of insolvency is 6% of the estate; with the recovery rate at 88.6 cents in the dollar. Japan is the only G8 or G20 economy that ranks above the UK in terms of 'resolving insolvency'. The UK's insolvency regime ranks far above those of the USA, Germany and France. This does not suggest a 'broken' system, which requires wholesale reform. Far from it, the UK's regime is world class. R3 believes that should the proposal to introduce a new system of IP remuneration be implemented, our current world ranking would be undermined, as the amount and speed of returns to creditors would be compromised significantly (to be outlined in further detail in the remainder of this response).

c. The proposal would not address the problem of a lack of engagement by unsecured creditors

70. R3 believes that the position of unsecured creditors in the priority order (as set down by statute) is the main reason behind complaints about fees the insolvency process. Unsecured

creditors' claims are placed low down the priority order when an insolvent business's assets are distributed – government itself has set this priority order, not the insolvency profession. In the majority of cases, there is simply not enough money to provide unsecured creditors with a return at all (because in an insolvency, there is inevitably rarely enough money to go around) and certainly not enough to provide them with the level of returns that creditors higher up in the priority order would receive. No amount of regulatory change or a change of the basis of IPs' remuneration is capable of remedying this: it would require a change to the law, which might have an enormously detrimental effect on lending in the UK were banks and other secured lenders to find themselves falling down the priority order.

71. As the Kempson report – and the government's own consultation – states, fee-setting works well when creditors are engaged. As such, the key variable with insolvency fees appears to be the engagement of creditors, not the basic fee-setting mechanisms.

72. It is also the case that when creditors are engaged with or interested in the process, it is not the IP's fees that they are concerned with. This is supported by results from the R3 members' survey. When asked what they think an unsecured creditor's top three concerns are:

- 93% of R3 members believe one of these is the amount of money returned to creditors;
- 86% state that one of these concerns is that action is taken against directors responsible for misconduct or fraudulent transactions;
- 55% of members state that transparency in terms of IPs work to justify fee levels) as a top-three concern.

73. Other concerns, such as the fee structure used, are generally not areas of concern. Business organisations have also told R3 that IPs' fees are not an important issue for their members who are dealing with insolvencies. This suggests that the government's proposed reform to the fee structures does not address the issues that are most important to unsecured creditors.

74. There are a number of ideas suggested in the Kempson report to address unsecured creditor engagement, which R3 encourages the government to look at again. R3 is firmly of the view that all of the ideas and proposals should be properly explored. In particular, creditor apathy is the crux of the 'problem' with IPs' fees, and unless this addressed, the same debate will continue for many years to come – the remuneration proposals within this consultation will do nothing to address that debate.

d. Challenging the issue and calculation of £15m 'over-charging' and 'harm

75. R3 questions the basis on which the terms 'harm' and 'over-charge' are made and consider the use of these terms within the consultation document to be both inaccurate and misleading. We note that the term 'over-payment' was not used within the OFT report.

76. We understand that £15m estimated figure on the total cost of insolvency, which includes IPs' fees, has been calculated on IPs' 'charge out'/'headline' rates rather than 'actual' rates. There is a huge difference between the headline rate as stated by IPs' firms and the fees that are charged, which has been recognised and appreciated by Kempson. Therefore, R3 questions the calculation for the estimated figure.

77. In addition, R3 is concerned that the OFT used a relatively old dataset (2006) for the basis of its 2010 research, which although re-examined by Kempson and found to be 'robust', gives us considerable concern that using such an old dataset will lead the government in 2014 to reach out-dated conclusions.

78. As a result of the 'Prescribed Part' reform introduced in 2003 by the Enterprise Act 2002, a portion of realisations that would previously have been paid to the floating charge holder is now paid to the unsecured creditors. The reform effectively boosts returns to unsecured creditors. However, the sample used by the OFT is not up-to-date enough to take its effects into account because a change like this takes time to have an impact. In fact, only 23 of the 500 cases looked at by the OFT involved the 'Prescribed Part'. The carve-out of funds for creditors created by the 'Prescribed Part' only applies where floating charges were created after the 15th September 2003, and it therefore takes time for cases affected by the Prescribed Part to 'trickle through' the system. This means that the OFT report is likely to have found that unsecured creditors received smaller returns than they actually receive today.

79. The older sample used by the OFT albeit 'verified' by Kempson is therefore likely to result in the analysis not being reflective of the up to date position - and the resultant conclusions are likely to suggest that there is greater 'harm' than there actually is.

80. The economy has gone through a significant change since 2006 which has impacted on the number of insolvencies and level of assets in cases. The insolvency sector (which includes the Insolvency Service itself) has experienced a great deal of contraction over the last few years, with redundancies commonplace. For example, insolvency firm Begbies Traynor cut 11% of its workforce between the summer of 2012 and the summer of 2013 in response to fewer insolvency cases.

81. In R3's response to the fees consultation in 2011, we also pointed out that changes introduced in April 2010 whereby IPs are required to give creditors eight weeks to challenge fees before they close a case, should be given time to take effect. The reduction in complaints to the government about IPs' fees from 7% in 2010 to 2% in 2013[15] suggest that the 2010 reforms may be making a substantial difference and we therefore question the need to radically overhaul the basis for remuneration in cases without an engaged secured creditor or creditors' committee.

82. The concept of 'over-charging' is predicated on the notion that there is a 'correct' fee level. It could equally be claimed that secured creditors are 'under-charged' (or simply charged less), rather than unsecured creditors being 'over-charged'. In fact, this might be a more accurate view, given that secured creditors are often able - because of repeat work - to negotiate discounts from IPs. Such discounting is clearly standard practice in many business sectors. The government itself has a procurement policy that, like most enterprises, seeks to obtain discounts from 'market price' because of its perceived 'buying power'; that doesn't mean other buyers of the goods and services are automatically being 'over-charged'.

83. It may also be the case that land and buildings (which are often subject to charges i.e. a secured creditor is involved) are generally far cheaper to realise per pound of realisation than other assets such as book debts or claims in respect of antecedent transactions. Cases

[15] In response to a Parliamentary Question by Toby Perkins MP: To ask the Secretary of State for Business, Innovation and Skills how many complaints about the Insolvency Service were received in each year from 2010 to 2014. [190803] response 11 March 2014

involving real estate are therefore likely to incur proportionately less cost than cases where there is no real estate and, since real estate is often subject to a charge, it would be easy to reach the erroneous conclusion that cases involving secured creditors are relatively cheaper. There is no indication that the OFT considered this point in its 2010 report but it might be worthy of further consideration.

84. The government suggests that an IP has a duty to treat all creditors equally and that charging different rates for secured and unsecured creditors would constitute ‘harm’. However, an IP’s duty is to work in the interests of the *body of creditors as a whole*; their duty is not to treat creditors equally. In fact, in certain instances - and in full accordance with their over-arching duty - an IP may pursue a course of action that is in the interests of all the creditors, but that harms an individual creditor. In addition, the statutory ‘order of priority’ also dictates that creditors are not treated equally - the law gives priority to certain creditor classes over others. Treating all creditors equally is not part of an IPs’ role and function so this should not be used as part of an argument that claims that different treatment of various creditor classes is wrong – it may just be ‘different’.

85. Far from over-charging, it is worth noting that in many cases - where realisations are relatively low - IPs do not receive enough money to cover the costs of the work they carry out. In certain instances - where realisations are very low - they remain entirely unpaid. The Companies House data used by the OFT shows that in around 80% of cases, IPs were not paid in full; and in 7% of cases, IPs did not receive any fee at all. The March 2014 R3 members’ survey found that, on average, R3 members received less in fee income than would have been warranted for the hours they worked in 41% of cases in the last 12 months, whilst receiving no fee for their work on 12% of cases in the last year.

86. The results from the R3 members’ survey demonstrate that the firms who would be impacted by the new fee proposals are consistently unpaid for their work (compared with the charge out rates) more often than their counterparts in large firms. For example, while 26% of members stated that they did not receive a fee in 1-5% of cases that they worked on in the last year, this impacted 30% of R3’s SPG members. Likewise, while 51% of members received less in fee income than would have been warranted for the hours worked in more than half of cases that they worked on in the last year, this figure increases to 57% of SPG members.

87. Just 14% of R3 members say that they have always received a full fee for the cases that they worked on in the last 12 months. This situation is highly anomalous - in almost no other industry or profession is it accepted practice for professionals not to be paid for work they have completed. Therefore, the government’s recommendations are inequitable: the consultation focuses on ‘fairness’ but does not appreciate that firms already suffer from non-payment and underpayment and their proposals do not refer to cases where IPs do not get paid and make any proposals for reform in this respect.

b. Changes since the Government's 2011 consultation on fees

88. The consultation document and Impact Assessment state a number of times that 'despite discussions with the profession and the regulators, little has changed to address this market failure'. This is misleading as changes have been made. The Complaints Gateway[16] was established June 2013 and there is on-going work to see how fees can be better regulated are as a result of the 2011 consultation. This work reflects the government response to the consultation[17], which called for these measures. It is worth noting that the government did not propose that any other measures contained within the 2011 consultation on IP fees should be taken forward. This includes proposals to modify court processes on challenges to fees and allowing unsecured creditors to exercise greater influence over insolvency – it was appreciated that both these measures would increase costs.

89. Whilst R3 raised concerns on a number of proposals in the 2011 consultation[18], we supported the proposal for IPs to be required to provide an estimate of the duration and cost of the insolvency process at the outset and publish the amount to which these estimates were exceeded, in order to increase transparency and provide creditors with as much information as possible. In our response we stated that we thought it reasonable for IPs to provide the best indication possible of the duration of the insolvency at the outset. We went on to say that it is important that IPs are not inflexibly tied to these indicative cost estimates because of the flexible and unpredictable nature of insolvency. R3 is unaware of any objections made to this proposal and we are unaware of any subsequent invitation from Government to take this proposal forward.

90. R3 made a significant proposal which has been adopted by Government as part of the 'Red Tape Challenge' consultation on the issue of **'uneconomic dividends'**/setting a minimum dividend level. R3 undertook research in August 2012 and itself proposed that the expense involved in paying very small dividends is disproportionate to any benefit for the creditor; more than three in five of all R3 members (63%) agreed that a minimum payment level should be introduced, in order to reduce the administrative burden on IPs and therefore **reduce the IPs fees charged in these cases**. This proposal generated solely by the insolvency profession is clear evidence that the profession is 'alive' to the issue of fees and is pro-active in proposing sensible changes.

91. However, we are concerned that there are a number of proposals within the **Red Tape Challenge** suggested by government, namely the proposal to remove the requirement to hold a Section 98 meeting and the proposal to remove the requirement to maintain time records when remuneration is taken on a basis other than time and rate. These proposals are contradictory to and inconsistent with the findings and recommendations of the Kempson report and the government's own consultation on fees, which aims to increase transparency and unsecured creditor engagement. We are aware that, like R3, other business representative groups are concerned by these proposals.

92. It would be helpful if the Insolvency Service were more transparent about the fees and levies it exacts on insolvency cases. We are aware that creditors and debtors are unaware of these charges and who receives the benefit of them, wrongfully assuming that fees and levies charged by the Insolvency Service are IPs' fees.

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[16] http://www.bis.gov.uk/insolvency/contact-us/IP-complaints-gateway
[17] http://www.bis.gov.uk/insolvency/Consultations/IPConsultation?cat=closedwithresponse - see Ed DAVEY MP Ministerial response issued on 20 December 2011
[18] http://www.bis.gov.uk/assets/insolvency/docs/insolvency%20profession/consultations/ipregulation/responses/44%20%20r3.pdf

c. Changing the basis for remuneration – summary of objections with case study

- R3 supports a number of the fee proposals set out in previous government reports. However, this latest proposal to simplify the fee structure through prohibiting the use of charging by the hour ('time-costs') was not recommended in previous reviews. R3 is unaware of the proposed restricted method of remuneration being used anywhere else in the world. Therefore it is not 'tried and tested'.
- Either businesses or the IP will lose out in future insolvencies under the proposals: although IPs can provide a rough up-front 'guesstimate' of the cost of work up-front, this guesstimate would be an inappropriate basis for a final level of remuneration – IPs do not know until later in the case exactly what is involved and how long it will take to resolve. Fees may end up either significantly higher or lower than the 'guesstimate'. Relying on a fixed-fee or percentage of realisations as a method of remuneration without an option to review with creditors, would thus see either creditors or IPs short-changed. In either case, at least 40% of R3 members believe returns to creditors would decrease and at least 60% believe company rescues would decrease.
- IPs may err on the side of caution and provide a higher quotation than might be warranted to ensure that costs are recovered. Should the case be straight-forward without any 'surprises' it may mean that an IP's fee is higher than it would be if charged on a time-cost basis – resulting in less money returned to creditors.
- Many cases would not be taken on by IPs at all because the fixed/percentage of realisations fee would be too small to be economical. As a result, the number of cases that the Insolvency Service will be required to take on will rise, increasing cost to the tax-payer.
- The proposals will impact the small asset cases (where there is often no secured creditor or committee) and could lead to smaller insolvency practices leaving the market – and therefore leaving creditors in those cases without an IP to turn to when trying to recover debts.
- Because IPs cannot resign from a case, once they have reached their fixed-fee level, they will almost certainly not optimise additional recoveries as there is no incentive to do so. This would lead to lower returns for creditors.
- If IPs are unpaid, they would be disincentivised to take action against delinquent or fraudulent directors who can then go on (due to lack of evidence) to 'rip off' creditors and members of the public.
- A fixed-fee could lead to outsourcing of specific insolvency procedures to unregulated individuals. This would shift the cost rather than reduce it and bring less transparency to the fee setting process. It is not appropriate in a free market for fees to be driven by legislation rather than market forces.
- On face value, it is attractive to 'simplify' the fee setting mechanism as a way to deal with the so-called 'problem' but it is simplistic to think that changes introduced in the personal insolvency market can be imported into the corporate sector; this view demonstrates a complete lack of understanding of corporate insolvency[19]. This market cannot be 'commoditised' in the same way. The following case studies provided by a small firm (the IP is the same in both case study scenarios) is illustrative of a significant number of case studies provided by R3's Smaller Practices Group (SPG) community:

[19] As illustrated by comments made by the Insolvency Service in the attached article ehttp://www.accountancyage.com/aa/analysis/2330043/fee-regulatory-reform-insolvency-service-takes-inspiration-from-frc

Both cases are small asset cases and on first examination seemed very similar. The case studies below illustrate the difficultly of setting an up-front, fixed-fee. The IP concerned stated that on first examination (and assuming that the new system of remuneration was in place), he would quote a fixed-fee price of £15,000 for both cases. The fixed-fee sum of £15,000 given the size of the case would be a 'reasonable' fee to undertake the work required. Setting fee levels using a percentage of realisations basis is recognised as a problem for small asset cases.

Case 1:

- The Director owed £38,000.
- The Director agreed to repay what she could from the sale of her home.
- £34,000 was repaid and the balance written off.
- There were other assets of £23,000.
- IP total fees, based on time costs, were £11,000.
- Costs and disbursements were £5,000.
- Creditors received £41,000 in dividends.
- **IP fees under the proposed system:**
    - **Fixed-fee £15,000; Creditors overpay by £4,000**
    - **Percentage of realisations at 20%: £10,200; IP underpaid by £800**

Case 2:

- The Directors owed £54,000.
- In the face of compelling evidence the directors disputed the claim and eventually it was necessary to go to court. The IP won the case roughly 2.5 years after being appointed.
- IP costs were £40,000 most of which was due to pursuing the claim.
- The IP's firm will not recover all costs, but still paid a dividend to creditors.
- **IP fees under the proposed system:**
    - **Fixed-fee £15,000; IP underpaid by £25,000**
    - **Percentage of realisations at 20%: £11,000; IP underpaid by £29,000.**

Summary and explanation of both cases:

The IP had no idea at the start of the case 1 that the director would be so unusually compliant (which is very rare). Assuming the proposed restricted method of remuneration is in place, the IP would have proposed a fixed-fee and over-charged in this case by £4,000, impacting on returns to creditors.

The IP in case 2 had no idea at the start of the case that the directors would have caused such a problem. Given that the case went on for 2.5 years, and working to a fixed-fee or percentage of realisations method of payment, the IP would have been significantly under-paid and would have been unlikely to pursue additional assets, impacting on returns to creditors.

d. ***Charging remuneration on a fixed-fee basis: evidence against the proposal***

93. R3 does not believe that IPs should be restricted to charging their fees on a fixed-fee basis in cases where there is no engaged secured creditor or creditors' committee, given the negative impact that this will have on the small business community, returns to creditors and small insolvency practices.

94. As the government recognises, insolvency is a unique sector, involving a unique set of circumstances in each individual case. Therefore, it is simply not possible to set a fixed-fee and thus 'commoditise' a service which is so unpredictable. Using a car servicing analogy: before a car is serviced a fixed price menu is often quoted but once the 'bonnet is opened' and the problems are identified, a revised price is often discussed and agreed – cars are rarely serviced 'unseen' for a fixed price. The same is true in the building industry. Similarly in an insolvent situation, it will be almost impossible for an experienced IP to accurately predict what might eventually be involved in resolving a case as there are so many variables including co-operation and engagement from debtors and creditors, which can vary widely. Relying on an up-front fixed-fee, without an option to review the fee later, would see IPs and creditors routinely (but inadvertently) short-changed.

95. There are many potential problems with setting remuneration on a fixed-fee basis. R3 believes that the most detrimental impact will be on returns to creditors. According to the R3 members' survey in March 2014:

- 40% of respondents believe that returns to creditors would decrease;
- 64% believe that company rescues would decrease;
- 48% believe that competition in the market would decrease.

96. Should IPs' fees be limited to a fixed-fee, R3 believes that IPs may err on the side of caution and provide a higher quotation than might be warranted to ensure that costs are covered and not put their own finances in peril. Should the case be straight-forward without any 'surprises' it may mean that an IP's fee is higher than it should be if charging on a time-cost basis, resulting in fewer returns to creditors.

97. R3 believes that a more common scenario would be cases where the IP has reached the limit of the 'fixed-fee' in terms of hours spent on a case, but due to their inability to resign from a case they are compelled to continue. IPs may, in those circumstances, not optimise recoveries by pursuing more speculative or complex potential assets as there is no incentive to do so: they would be dis-incentivised to do anything other than the bare minimum if they have reached the end of the fixed-fee amount set, as they would be effectively working for free. The non-realisation of potential assets would lead to lower returns to creditors.

98. In the two scenarios outlined above, this may put the IP in a precarious situation with their regulator (in terms of claims of over-charging or failure to perform their statutory duty and return the most monies to creditors as possible). This would be not as a result of 'fault' with the IP, but the imposition of an artificial and inflexible fee structure, which negatively changes behaviour. Furthermore, IPs who are accountants specifically are left with an ethical problem: the IFAC code of ethics makes clear that a threat to an accountant's compliance with the code is created where the fees being received are so low that it may be difficult to perform the engagement in accordance with applicable technical and professional standards.

99. Crucially, the most common scenario as identified by R3 members is that many cases would not be taken on by IPs at all because the fixed-fee would be too small to be economical. According to the R3 members' survey in March 2014, 77% of respondents believe that if rates were to be fixed, the number of cases taken on by IPs would decrease. This would leave directors in the difficult position of having to wait for a creditor petition to wind up the company therefore greatly extending the time for employees to get redundancy payments and this in turn will have a negative impact on returns to creditors. If IPs do not take on a case, they will fall to the Official Receivers, with their more limited resources and relative lack of experience in dealing with realisation of assets. 70% of R3 members believe fixed-fees will result in more work being taken by the Official Receiver.

100. R3 is also concerned that introducing a fixed-fee could lead to outsourcing of specific insolvency procedures to unregulated individuals. For example, debt collection work, rather than being undertaken by the IP would be outsourced to solicitors. Therefore, costs would be shifted rather than being reduced and would lead to less transparency in the fee setting process.

101. Most R3 members are of the opinion that requiring IPs to work for a pre-arranged fixed-fee would not work in any case since every insolvency case is different and it is impossible to accurately set a fee for the work up-front.

- Only 1% of R3 members think that in the absence of an engaged secured creditor or creditors committee in insolvency, this would be an appropriate way of agreeing fee levels in every such case;
- Furthermore, one in five (20%) are of the opinion that this would only work if IPs were able to go back to creditors and obtain approval for a higher fee;
- A similar proportion (19%) are of the opinion that pre-arranged fixed-fees would work if statutory work was charged on a fixed-fee basis but all other work paid on a time-cost basis. The latter two findings are discussed in further detail in the remainder of the consultation response.

102. Despite large firms and big cases dominating the headlines, small firms comprise a significant proportion of insolvency firms, and it is the smaller firms who would be affected by the proposed new basis of remuneration, as the smaller asset cases tend not to have involvement from a secured creditor or a creditors' committee. R3 believes that the 'proposal' risks disproportionately squeezing small firms; in some cases, pushing them out of the insolvency market altogether. This will impact on the small business community sector they serve, which would inevitably lead to reduced returns to creditors

103. As outlined, many IPs would question the economic wisdom of taking on smaller asset cases; this would have serious ramifications for creditors and how errant directors are pursued and brought to justice. The impact on the ability of an IP to undertake investigative work into the behaviour of errant directors comes at the same time as the Insolvency Service are proposing to make improvements to the reporting system, to achieve higher disqualification rates.

104. It is important to note that the proposed new system of remuneration on a fixed-fee basis would be unlikely to impact on creditor engagement/reduce the number of complaints about IPs' fees. Both the consultation document and the Impact Assessment argue that creditors are unable to exercise control when IPs take remuneration on a time

and rate basis because it “requires considerable knowledge and understanding of the process in order to question the amount of time spent”. We are firmly of the opinion that the introduction of a fixed-fee basis for remuneration would require the same, if not greater, levels of knowledge and understanding for the creditors to determine whether the fee is offering ‘value for money’. Indeed, creditor stress and emotion would make it very difficult to set and agree a fixed-fee at the beginning of a case. In the survey of R3 members, 56% predict that a new system based on a fixed-fee basis would have no effect on the number of complaints regarding IPs’ fees charged.

e. Charging remuneration on a percentage of realisations basis: evidence against the proposal

105. To quote Kempson: *"In some jurisdictions the main or only method of setting an IP's remuneration is as a percentage of realisations (and this was also much more common in the UK in the past). Moving to this as the presumed method for setting remuneration in the UK would, however, be problematic as creditors currently have a responsibility for setting the percentage and they lack the knowledge and skills to determine the rate that would be appropriate in a particular case. Change in this area would almost certainly require a more nuanced approach, with a statutory scale that links the percentage to the level of assets realised to ensure that IPs would be prepared to take on cases where realisations are likely to be low. And, as in Austria, there would need to be separate scales for the secured and unsecured assets."*

106. So, whilst suggesting that percentage of realisations could be an area worthy of further investigation, Kempson has identified the major challenges and drawbacks of the proposal.

107. First, Kempson outlines that percentage of realisations was the main method for setting fees in the UK 'in the past'. This method was largely dropped in the 1980s as it was viewed as unfair and inequitable to creditors. In fact, there has been a significant amount of work by Sir Kenneth Cork and others to challenge the setting of IPs' fees on a percentage of realisations:

108. Cork (author of the 1982 Cork Report on insolvency law) stated, inter alia, *"The various rules* [for having different bases of fees in different circumstances] *are unnecessarily complicated and seldom have any connection with the actual work done in a specific administration. There are occasions where the rules provide poor recompense for the liquidator or trustee in relation to the amount of work involved in a complex case; there are also occasions when the rules are over-generous as, for example, where the estate comprises little more than a bank account." (para 889).*

"We are firmly of the view that there should be uniformity in this matter and that there should be one set of rules or guidelines to be used in computing the remuneration of trustees, liquidators and administrators." (Para 890)

"The Consultative Committee of Accountancy Bodies informed us that the ethical rules of their constituent members expressly forbid the charging of fees for audit, taxation, and virtually all other work on a percentage-related basis. They said that it would be desirable if liquidators' fees took account of the time occupied, the difficulties or ease of the case, the specialist knowledge and experience of the liquidator, the effectiveness of his actions, and lastly the amount of cash passing through his hands." (para 892).

109. It is not just the Cork Report which considered scale rates to be inappropriate:

Rimer J in Upton v Taylor & Colley 1999 BPIR 168 at page 183A. *"As to the mechanics of fixing the remuneration, Mr Taylor asks that the remuneration be fixed in accordance with the scale fees charged by the Official Receiver. I do not think that that scale is an appropriate one ….. "*

Using the example as identified by Kempson, Austria sets IPs' remuneration on a percentage of realisations basis. According to the World Bank[20], Austria ranks behind the UK in terms of the amount returned to creditors and the speed of the process (14th in Austria compared to 7th in the UK), with the cost of insolvency being 10% of the estate compared with 6% in the UK. It is therefore curious to propose a method remuneration, which is proven in this case to be less effective at returning money to creditors than the existing system. We are aware that Singapore (which ranks 4th ahead of the UK) does use a percentage of realisations to calculate fees but this is not at the exclusion of time costs, which are also used.

110. Percentage fees are currently very much 'out of favour' in Germany, given that the German liquidator of Lehman Brothers has now claimed some €800m as a result of an ad valorem fee basis, to general outrage and subsequent discussions that the law should be changed[21].

111. The fundamental problem of percentage of realisations as the sole method of remuneration is that either the IP or the creditor would 'lose out'. Large returns might not reflect the amount of time that an IP is required to dedicate to a case (as outlined above); smaller cases with smaller returns often involve greater investment in terms of hours and resources than would be reflected in the final settlement. Given that the so-called 'problem' with fees is not the large cases, but the small cases, it is likely that IPs will be required to dedicate more hours than the fee represents. As a consequence, 75% of R3 members feel that the number of cases taken by IPs would decrease, with 60% predicting a decrease in the number of business and company rescues, which would have a significant impact on the UK's rescue culture and returns to creditors. Importantly, half (47%) believe it would reduce competition in the market. Two thirds (65%) of R3 members believe that in this eventuality, the number of cases which will fall to the state will increase, leading to increased costs for the taxpayer; lower returns to creditors, and an inevitable fall in the UK's world ranking for insolvency.

112. As per the points made regarding fees restricted to a fixed-fee basis, it is important to note that a proposed new system of remuneration on a percentage of realisations fee basis would be unlikely to impact on creditor engagement/reduce the number of complaints about IPs' fees. We are firmly of the opinion, which we share with Kempson, that a fee on a percentage of realisations basis would require the same, if not greater, levels of knowledge and understanding for the creditors to determine whether the fee is offering 'value for money'. In the survey of R3 members, 52% predict that a new system based on percentage of realisations would have no effect on the number of complaints regarding fees charged.

[20] http://www.doingbusiness.org/data/exploretopics/resolving-insolvency
[21] http://www.spiegel.de/wirtschaft/unternehmen/lehman-zoff-um-das-mega-honorar-fuer-insolvenzverwalter-frege-a-868939.

f. *Alternative recommendations to reform IPs' fees and improve unsecured creditor engagement*

113. Whilst R3 does not believe that IPs should be restricted to charging their fees on a fixed-fee or percentage of realisations basis (in cases where there is no engaged secured creditor or creditors committee), we do believe that changes should be introduced to bring a greater amount of transparency and accountability to the process.

114. R3 has examined the ideas suggested by Kempson and believe that the key changes that should be introduced are:

- Creditors be given an estimate of IPs' costs at the outset
- Introduce elements of a Code of Practice for IPs based on the Australian model
- Greater exposure of the 2010 Insolvency Rules.

These changes would generally be supported by:

- Better and more information for unsecured creditors
- Increasing unsecured creditor engagement, with a focus on HMRC involvement.

a. Recommendation: Creditors given an estimate of IPs cost at the outset/ a Code of Practice/ making more of the 2010 Insolvency Rules

115. R3 supports the recommendation in the Kempson report that IPs should give creditors an **estimate of costs at the outset of the case**, as in Australia. We believe that a time-cost resolution could act as an initial 'cap' on fees. The IP would then work to this figure, keeping full(er) records on time costs and work done. The 'cap' would act as an interim 'quote' or 'budget' and the IP could then seek additional fees if the case demanded further work, at a later date.

116. As provided for in the **2010 Insolvency Rules**, R3 believes that there is scope for some statutory work to be quoted on a fixed-fee basis, and this should be encouraged. Reporting/ statutory work could be usefully charged on a fixed-fee basis, with other more 'variable' activities on a time cost basis. Statutory work includes placing statutory notices in the Gazette, sending progress reports to creditors and filing of statutory notices.

117. R3 believes that IPs should be required to report the work done on a case with much more transparency and accountability. As an example, IPs may currently state nine hours of their work as 'creditors meetings' but it would be much more useful to break this time down into the constituent parts such as 'communicating with X number of creditors to establish a meeting', 'attending the meeting'; and record in a sentence or two the benefit/any outcomes of this work.

118. In addition, introducing elements of **a Code of Practice for IPs** (based on the model in Australia) plus changes to SIP9 could be introduced to ensure that IPs' records of time spent (and corresponding fees on a case) are transparent and accountable. R3 has spoken to colleagues in Australia and understand that the system in Australia works well and this

can be evidenced by a report in the Australian part of the MF Global case report[22], which could be used as a basis for reporting in the UK. However, it is important to note that there are certain aspects of the system in Australia that are still wanting[23] and so aspects should be *adapted* into the UK, rather than wholesale *adoption*. Once again, quoting World Bank figures, Australia falls some way behind the UK in terms of the amount returned to creditors and the speed of the process (Australia ranks 18th in the world as compared with the UK which ranks 7th best in the world), so changes made to the UK system should be sensitive.

119. The benefits of R3's proposals if implemented would be:

- 'Time-cost' system can be used, which would be fair for both the creditors and IPs alike;
- Greater communication between the IP and creditors as a result of the IP explaining the work done in more detail, and explaining what more work may be required if the 'estimate' is reached. This should, in turn, lead to greater understanding and engagement;
- Reporting would be clearer and should result in more unsecured creditors able to engage in the insolvency process;
- The changes could be introduced quickly and easily into the UK system without changes to the Rules;
- The Courts assess IPs' fees using a time-cost system and so this method of remuneration and reporting would be easily adopted, rather than drafting new defined rules for the courts to assess IPs' fees.

120. R3 members overwhelmingly felt that the most appropriate policy option for IPs' fees in securing the best return to unsecured creditors would be to keep the current structure (76% of members). One in eight chose a requirement to use a combination of time-cost, fixed rate and percentage of realisations (13%), while only small proportions chose a combination of fixed rate and percentage of realisations (6%) or a percentage of realisations only (1%). Just two of the 444 respondents (0.5%) surveyed said that the best option would be fixed-fee only, reflecting strong negative opinion expressed towards this option as outlined in (4d) of this response.

b. Recommendation: Better and more information for unsecured creditors to engage

121. R3 firmly believes that more and better information should be made available for unsecured creditors, which would encourage increased engagement in the insolvency process (noting that there will always be creditor apathy). The Insolvency Service has a responsibility to provide information to address the acknowledged 'shortfall' in understanding by individuals and businesses in insolvency. However, the Insolvency Service acknowledges that the information they provide to creditors in not easily accessible or engaging.

122. According to the R3 survey of members in March 2014, R3 members believe that more and better information would be useful in assisting unsecured creditors negotiate competitive fee rates. IPs felt that the most useful types of information for unsecured

[22] http://www.deloitte.com/assets/Dcom-Australia/Local%20Assets/Documents/Services/CRG/Bus%20under%20admin/MF%20Global/Deloitte_MF_Global_Group_Circular_to_Creditors_3_Nov_11.pdf

[23]https://mail.r3.org.uk/owa/redir.aspx?C=251a7b953bb74068b6535b4fac9ccf71&URL=http%3a%2f%2fwhoswholegal.com%2fnews%2ffeatures%2farticle%2f29821%2fcurrent-trends-insolvency-australia

creditors are those that would help them deal with their fees (81%); information on approving fees and information on how to challenge fees (73%).

c. **Recommendation: Increasing unsecured creditor engagement**

123. As stated in R3's response to the 2011 consultation, R3 firmly believes that government departments should take the lead as unsecured creditors in insolvent cases. The issue was picked up and raised as a recommendation by Kempson but no proposals to see greater government involvement are outlined within the consultation document.

124. Unsecured creditors often claim that there is no point in getting involved in the insolvency process because the level of debt they are owed is relatively small and they are often not 'repeat' creditors so they are unfamiliar with the process. However, HMRC debt accounts for 24% of total unsecured debt and the department is often the main unsecured creditor in an insolvency case. Another significant unsecured creditor is the Redundancy Payments Office (RPO) – again part of a government department, the Insolvency Service itself. While we understand that certain unsecured creditors may find it difficult to engage in insolvency - due to lack of experience, size of debt or lack of familiarity with the process – the same arguments cannot be used by government departments. Government is in a position to influence fees and R3 calls for their involvement on a routine basis, which should in turn, encourage other unsecured creditors to be involved.

g. ***Insolvency Practitioner fee regime: response to the fee consultation questions***

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

125. It is not for R3 to give a comprehensive answer to this question, but the RPBs themselves.

126. RPBs may have existing panels but will clearly need a lot more resource to carry out this new measure. The existing RPB complaint panels are unlikely to have the required skills to assess whether a complaint about fees is made with or without merit.

127. In terms of enhanced monitoring by the RPBs, in principle R3 supports the proposal. However, the proposal needs further examination. Clear guidelines regarding what the RPBs are expected to monitor should be outlined. Monitoring should not include a review of IPs' fees (as the level of fees set is a commercial decision); however, it would be reasonable to include a requirement to monitor the clarity and transparency of reports to creditors.

128. It should be recognised that the RPBs do have a responsibility to monitor 'ethical' aspects of IPs' work which does capture issues of 'over-charging': namely cases where an IP may duplicate work or charge time for senior staff to do more junior work.

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

129. 'Value for money' is subjective. Clear criteria must be compiled, which address the specific challenges in insolvency i.e. the fact that creditors are not guaranteed to retrieve all debts owed, regardless of the IP's fee. The Insolvency Service itself must be seen to 'play by the same rules' and be transparent on their costs, fees and their 'value for money'. In order for this to work the term 'value for money' needs to be clearly defined.

13. 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?

130. See comments in (4f) of this response 'better and more information for unsecured creditors'.

14. Do you think that any further exceptions should apply? For example, if one of two unsecured creditors make up a simple majority by value?

131. As outlined, R3 does not believe that the proposal to introduce a fixed-fee/percentage of realisations on which to charge fees would work in any insolvency case.

15. Do you have any comments on the proposal as 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?

132. See comments in (4c), (4d) and (4e) of this response.

16. <u>What impact do you think the proposed changes to the fee structure will have on IPs' fees and returns to unsecured creditors?</u>

133. See comments in (4c), (4d) and (4e) of this response.

17. <u>Do you agree that the proposed changes to basis for remuneration should not apply to CVLs, MVLs or IVAs?</u>

134. As outlined, R3 does not believe that the proposal to introduce a fixed-fee/percentage of realisations on which to charge fees would work in any insolvency case.

18. <u>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?</u>

135. As outlined, R3 does not believe that the proposal to introduce a fixed-fee/percentage of realisations on which to charge fees would work in any insolvency case.

19. <u>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?</u>

136. As outlined, R3 does not believe that the proposal to introduce a fixed-fee/percentage of realisations on which to charge fees would work in any insolvency case.

137. R3 would like to see more information on the Official Receiver scale and total fees the Insolvency Service collects in this regard on an annual basis.

20. <u>Do you think there are further circumstances in which time and rate should be able to be charged?</u>

138. As outlined, R3 does not believe that the proposal to introduce a fixed-fee/percentage of realisations on which to charge fees would work in any insolvency case. R3 believes that time and rate should be able to be charged in all circumstances, but estimated at the outset with the ability to revise the estimated cost, subject to communication with creditors.

h. Impact Assessment: response to the consultation questions

21. Do you agree with this estimation for familiarisation costs for the changes to the fee structure?

139. As outlined, R3 does not believe that the proposal to introduce a fixed-fee/percentage of realisations on which to charge fees would work in any insolvency case.

140. However, it is worth highlighting that the familiarisation costs on page 10 of the Impact Assessment are far too low and that this figure does not take into account staff who work in IPs' offices (just IPs themselves).

22. 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?

141. Not applicable.

23. To what extent do you expect the new fee structure to reduce the current level of over-payment?

142. As outlined, R3 does not believe that the proposal to introduce a fixed-fee/percentage of realisations on which to charge fees would work in any insolvency case.

143. R3 does not accept the term 'over-payment' as outlined in detail in (4a) of this response.

24. 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?

144. As outlined, R3 does not believe that the proposal to introduce a fixed fee/percentage of realisations on which to charge fees would work in any insolvency case.

25. 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?

145. As outlined, R3 does not agree with the assumptions made in the consultation document or Impact Assessment. Please see (4c), (4d) and (4e) in this response for the negative impact of the proposals on returns to creditors.

26. 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?

146. R3 consider that the analysis of the benefits is misconceived for the reasons stated above and adding a weight would therefore be irrelevant.

27. Do consultees believe these measures will improve the market confidence?

147. No. As outlined, R3 believes that there will be a detrimental impact should the proposals be introduced, which are outlined in full in section (4c). These proposals, if implemented, would decrease market confidence as:

- unsecured creditors would lose out as there would be less returns to creditors;

- many cases would not be taken on by the IP and would fall to the Insolvency Service increasing cost to the taxpayer;
- more fraudulent and delinquent directors would operate unchallenged, which would have a negative impact on the business community and the public in general;
- the proposed changes will result in more work being outsourced which will decrease transparency and not decrease costs.

28. Do consultees believe these measures will improve the reputation of the insolvency profession?

148. No, as outlined above. These measures would lower the reputation of the insolvency profession and the UK's World Bank 'resolving insolvency' ranking.

Appendix A: Summary of R3 member survey on the Government's 2014 fees and regulation consultation

ComRes interviewed 444 R3 members online between 7th and 12th March 2014.

Regulation

1. How well or poorly do you think the current system of regulating IPs performs in terms of…

- The majority of R3 members believe the current regulatory system is working well in terms of; acting in the interest of creditors (81%); transparency (making an initial complaint, 74%), transparency (outcome of a complaint / disciplinary action, 73%) and transparency (keeping track of a complaint / disciplinary action, 64%); effectiveness of sanctions (deterring future 'bad' behaviour by IPs, 63%); fairness to IPs subject to disciplinary proceedings (63%); effectiveness of sanctions (preventing 'bad' IPs from operating, 55%).
- Mixed response:
  - Speed of disciplinary process (48% says work well, 32% say poorly)
  - Consistency between regulators – how the regulatory process works (48% say works well, 27% say poorly)
  - Consistency between regulators – the sanctions imposed by regulators (43% say works well, 30% say poorly).

2. Which of the following regulatory processes do you think would work best for the profession?

- 50% of R3 members called for a single regulatory process.
- 21% would like to see a single regulator.
- 14% would like to keep the existing regulatory process.
- 14% would like to see fewer regulators.

3. Do you agree or disagree that the Insolvency Service should hold the each of the following powers?

- 71% agree the IS should be able to fine or publically reprimand an RPB for regulatory failures.
- 60% agree the IS should be able to apply to court to impose a sanction directly on an IP in exceptional circumstances.
- 55% agree the IS should be able to require RPBs, IPs, IPs' employers or IPs' employees to provide information on request relating to disciplinary procedures, monitoring, or IPs' work.
- 53% agree the IS should be able to require HMRC to engage in all cases in which it is a creditor.
- 39% agree the IS should be able to reserve the power to designate a single regulator for the insolvency profession.
- 38% agree the IS should be able to issue a direction to an RPB to discipline an IP that is a member of that RPB.

Fees

1. **In a typical 12 month period, how many complaints regarding fees do you receive, as an individual IP?**

- 63% of members receive no complaints in a typical 12 months.
- 86% of members working for a firm which employs 9 or fewer employees receive no complaints regarding fees in a typical 12 months. (72% of members from R3's Smaller Practice Group – SPG, five or fewer appointment takers).
- 51% of members working for a firm which employs 250 or more employees receive no complaints regarding fees in a typical 12 months.
- Only those working for firms employing more than 49 staff say that they receive more than 3 complaints about fees in a typical 12 months.

2. **In what proportion of the completed cases that you worked on in the last year did you not receive a fee for your work?**

- Only 14% of members say that they always received a fee for their work in the last 12 months.
- 26% of members did not receive a fee in 1 – 5% of cases.
    - 30% of SPG members did not receive a fee in 1 – 5% of cases.
- 30% of members did not receive a fee in 6 – 15% of cases.
    - 35% of SPG members did not receive a fee in 6-15% of cases.
- 26% of members did not receive a fee in more than 15% of cases.
- Within this, 7% of members did not receive a fee in more than 50% of cases.
    - 8% of SPG members did not receive a fee in more than 50% of cases.

3. **In what proportion of the completed cases that you worked on in the last year did you receive less in fees income than would have been warranted for the hours you worked on the case?**

- Members received less in fees income than would have been warranted for the hours they worked on in an average of 41% cases in the last year.
- 51% of members received less in fee income than would have been warranted for the hours they worked in more than 50% of cases.
    - 57% of SPG members received less in fee income than would have been warranted for the hours they worked in more than 50% of cases.
- 84% of members received less in fee income than would have been warranted for the hours they worked in more than 15% of cases.
    - 89% of SPG members received less in fee income than would have been warranted for the hours they worked in more than 15% of cases.

4. **If fees were charged at a fixed rate, do you think this would lead to an increase or decrease in each of the following, or do you think it would make no difference?**
   If fees were charged as a percentage of realisations, do you think this would lead to an increase or decrease in each of the following, or do you think it would make no difference?

- At least 75% of members believe the number of cases taken on by IPs will decrease as a result of fees charged at a fixed rate, or percentage of realisations.
- At least 60% of members believe the number of business/company rescues will decrease as a result of fees charged at a fixed rate, or percentage of realisations.
- At least 40% of members believe the amount of returns made to creditors will decrease as a result of fees charged at a fixed rate, or percentage of realisations.

	Fixed fee			**Percentage of realisations**		
	Increase	Decrease	Stay the same	Increase	Decrease	Stay the same
Returns to creditors	11%	40%	39%	15%	41%	34%
IPs fees	12%	53%	21%	12%	54%	23%
Competition in the market	16%	48%	30%	14%	47%	33%
Number business/company rescues	1%	64%	28%	3%	60%	31%
Number of cases taken on by the OR	70%	4%	14%	65%	5%	18%
Number of cases taken on by IPs	2%	77%	17%	4%	75%	17%
Number of complaints about fees	12%	23%	56%	19%	22%	52%

5. **Please find below a list of types of information that could be provided by the IS. For each, please indicate how useful, if at all, you think that they would be in assisting unsecured creditors to negotiate competitive fee rates.**

	Useful	**Not useful**
Information on approving fees	81%	19%
Information on how to appoint an IP	69%	30%
Information on how to obtain a quote from an IP	64%	34%
Information on how to negotiate fees	61%	36%
Comparative fee data by asset size	53%	44%
Information on how to challenge fees	73%	26%

6. **Which of the following, if any, do you believe is the most appropriate policy option for IPs' fees in securing the best return to unsecured creditors?**

Keep the current structure (ability to choose from time-cost; fixed rate; percentage of realisations)	76%
A requirement to use a combination of time-cost; fixed rate; percentage of realisations	13%
A combination of fixed rate and percentage of realisations	6%
Percentage of realisations only	1%
Fixed rate only	N/A
Other	3%
Don't know	1%

7. **In your opinion, which of the following issues, if any, do you think unsecured creditors are most concerned about when it comes to insolvencies?**
   Showing proportion who place each issue in their top three they think unsecured creditors are most concerned about

The amount of money returned to creditors	93%
Action against directors responsible for misconduct or fraudulent transactions	86%
Transparency in terms of IPs' work and what they have done to justify fee levels	55%
The level of fees charged by IPs	43%
Information available to unsecured creditors about how the process works	19%
The level of support available to unsecured creditors from the IS	3%

8. Which of the following statements, if any, most accurately reflects your opinion? In the absence of an engaged secured creditor or a creditors' committee in an insolvency, requiring an IP to work for a pre-arranged fixed fee would…

Not work in any case. Every insolvency case is different and it is impossible to accurately set a fee for the work up-front	57%
Work only if IPs were able to go back to creditors and obtain approval for a higher fee. This is based on instances where work on the case would see the IPs' costs exceed the pre-arranged fee level	20%
Work if statutory work was charged on a fixed fee basis but all other work on a time-cost basis	19%
Be an appropriate way of agreeing fee levels in every such case	1%
None of the above	2%
Don't know	1%

R3 Membership survey, March 2014. ComRes interviewed 444 R3 members online between 7th and 12th March 2014.

ComRes is a member of the British Polling Council and abides by its rules. Full data tables are available on the ComRes website, www.comres.co.uk

Appendix B: Comparative Costs of Insolvency Proceedings Worldwide

I Introduction

The World Bank's *Doing Business* project provides objective measures of business regulations and their enforcement across 189 economies. As part of this study, *Doing Business* assesses the time, cost and outcome of insolvency proceedings involving domestic entities. The ranking on the ease of resolving insolvency is based on the recovery rate for creditors. The cost of the proceedings is recorded as a percentage of the estate's value.

II World Bank Rankings for Resolving Insolvency

The following table replicates the World Bank's top 20 world economies in terms of insolvency resolution (and additionally shows the respective rankings of Spain, Italy, France and South Africa).[1]

Economy Name	**Rank**	**Time (years)**	**Cost (% of estate)**	**Outcome (0 as piecemeal sale and 1 as going concern)**	**Recovery rate (cents on the dollar)**
Japan	1	0.6	4	1	92.8
Norway	2	0.9	1	1	91.3
Finland	3	0.9	4	1	90.2
Singapore	4	0.8	3	1	89.4
Netherlands	5	1.1	4	1	89.2
Belgium	6	0.9	4	1	89
United Kingdom	7	1	6	1	88.6
Ireland	8	0.4	9	1	87.6
Canada	9	0.8	7	1	87.3
Denmark	10	1	4	1	87
Iceland	11	1	4	1	84.5
New Zealand	12	1.3	4	1	83.3
Germany	13	1.2	8	1	82.9
Austria	14	1.1	10	1	82.4
Korea, Rep.	15	1.5	4	1	82.3
Taiwan, China	16	1.9	4	1	81.8
United States	17	1.5	7	1	81.5
Australia	18	1	8	1	81.3
Hong Kong SAR, China	19	1.1	9	1	81.2
Sweden	20	2	9	1	75.5
Spain	22	1.5	11	1	72.3
Italy	33	1.8	22	1	62.7
France	46	1.9	9	0	48.3
South Africa	82	2	18	0	35.5

[1] For details of the methodology see http://www.doingbusiness.org/data/exploretopics/resolving-insolvency

III Examples of Specific Insolvency Practitioner Fee Regimes

The cost of the insolvency proceedings is recorded in the above table as a percentage of the value of the debtor's estate. The cost is calculated on the basis of responses to questionnaires sent out to insolvency practitioners and includes court fees and government levies; fees of insolvency administrators, auctioneers, assessors and lawyers; and all other fees and costs. Insolvency practitioner ("IP") fees are therefore one of several factors taken into account.

The following are examples of how different countries deal with IP fees. Please note that due to the shortage of time in preparing this report we have based our findings partly on materials available online and from published sources but also on information provided to us, most kindly, by a number of academics and practitioners across the world. In a number of cases, due to time pressures, we have not been able to check the accuracy or detail of what we have been told. [2]

1. Singapore

Practitioners' fees are calculated by way of a percentage of realisations or such other basis as is agreed, such as a time cost basis, with creditors (or in compulsory liquidations by the Court). In voluntary liquidations fees are approved by the creditors on the same basis with the right for creditors to apply to the Court to review the liquidator's remuneration. We have not come across any evidence of any requirements to use fixed fees.

2. Netherlands

Fees are calculated on a time cost basis. Fees are determined by the Court on the basis of guidelines, providing for a minimum hourly rate that may be adjusted depending on the experience of the practitioner and the complexity of the case. In exceptionally large bankruptcies (e.g. Lehman Bros) separate arrangements may be put in place that deviate from these guidelines. We have come across no evidence of a requirement to use fixed fees.

3. Ireland

Official Liquidators in a compulsory liquidation are entitled to receive such remuneration as the Court may direct. The Court has analogous jurisdiction in the case of examinerships (a corporate rescue process). Fees are normally charged on a time cost basis for the IP and his staff, though rates are capped for different levels, for example at €357-375 per hour for partners. The Court has held, however, that consideration should be given to the nature, complexity and value to the creditors of the work being carried out when determining the fees payable and will treat each case on its own merits and facts. In practice, remuneration by percentage is not used. In a voluntary liquidation the IP remuneration is a private contractual arrangement between IP and creditors, unless no remuneration is fixed in which case the liquidator can make an application to the Court. We have not come across any evidence of any requirements to use fixed fees.

4. New Zealand

[2] We have shaded the countries in the table on page 1 for which we have been able to locate reasonably reliable information.

Where liquidators are appointed by the Court, their fees are based upon a statutory scale but in practice these fees are seen as too low and a higher fee is charged. If the total fee is greater than NZ$2,000, the Court's approval is required. That apart there are no specified requirements dealing with the rates or overall fees of IPs. Liquidators and receivers may have their fees reviewed by the Court on the application of creditors (or other prescribed parties). It seems that IPs are usually remunerated on a time cost basis. We have come across no evidence of fixed fee arrangements.

5. Germany

Insolvency representatives are paid for their services based on the value of the administered and liquidated insolvency estate; that is the assets under their control, not any wider assets of the insolvent entity. The courts do not have any discretion or leeway in setting fees. Furthermore, to ensure the independence of the insolvency representatives, it is unlawful for them to agree payment with the creditors. Remuneration is calculated on a degressive scale as follows:

Value of estate	Percentage remuneration
€1-€25,000	40%
€25,000-€50,000	25%
€50,000-€250,000	7%
€250,0001-€500,000	3%
€500,000-€25m	2%

Fees have to be drawn within a specified time of becoming payable, otherwise they become statute barred (although the extent of this is subject to debate). We have not come across any evidence of any requirements to use fixed fees.

6. USA

It appears that all fees are approved via an application to the Bankruptcy Court with the US Trustee (the executive oversight in the US system) having standing to challenge. Once approved the fees get paid out of the estate as an expense. It is not clear quite what the criteria the bankruptcy judge applies as regards time or percentage of realisations. They appear to do different things with different cases. We have not come across any evidence of the requirement to use fixed fees.

7. Australia

IPs are paid predominantly on a time cost basis, agreed either by the Court or creditors, with the right for creditors (amongst others) to apply to Court to review the remuneration. The ARITA Code of Professional Practice states that in most administrations a fee based upon time spent will be appropriate. An attempt to permit creditors to appoint a reviewer to report on the reasonableness of remuneration in a corporate external administration is in abeyance (Insolvency Law Reform Bill 2013). There appears to be no requirement or adoption of either percentage of realisations methodology or fixed fees.

8. Hong Kong

Liquidators are usually remunerated on a time cost basis based upon, but not limited to, the charge out rates agreed between the Official Receiver and the Hong Kong Society of Accountants (Panel A rates). It is also possible for the creditors or the court to agree to fees on the basis of a percentage of realisations. The time cost basis is far more usual. There is no apparent practice of using fixed fees.

9. Spain

An administrator of *concurso de acreedores* is remunerated on the basis of a two-tiered tariff. This is based firstly, on the value of the insolvent estate's assets and secondly, the amount of its liabilities. Under this system, a fixed sum is paid for an initial value with a further percentage paid thereafter. For example, where an estate has assets worth €5m, payment would be as follows: €5,500 in respect of the first €1m, and a further 0.4% of the remaining €4m (i.e. €16,000), making a total of€21,500 in respect of the asset value only. The tariff base, set in accordance with the asset and liability values, can then be increased or reduced by specified percentages depending on a variety of factors including the complexity (as assessed on a number of different bases including number of creditors and industry sector) and outcome of the insolvency procedure. We have not come across any evidence of any requirements to use fixed fees.

10. Italy

A Trustee in corporate bankruptcy proceedings is a public officer whose fees are determined by the Court at the end of the proceedings. Due to the length of proceedings, interim payments are often allowed. However, it is illegal for the Trustee to receive fees in excess of those awarded by the Court. The Trustee's remuneration is calculated as a percentage of assets realised, claims presented and revenues and profits if the trade is continued. The Court has limited discretion on the percentage awarded, and has to consider the work provided, results obtained, importance of the bankruptcy and how quickly the Trustee acted. The fees for realisations are as follows:

Realisations	Percentage remuneration
Up to €16,227.08	12%-14%
€16,227.08-€24,340.62	10%-12%
€24,340.62-€40,567.68	8.5%-9.5%
€40,567.68-€81,135.38	7%-8%
€81,135.38-€405,676.89	5.5%-6.5%
€405,676.89-€811,353.79	4%-5%
€811,353.79-€2,434,031.37	1.9%-3.8%
Over €2,434,031.37	0.45%-0.9%

Italian academics report that the fixed payment system compares unfavourably with remuneration across Europe. We have not come across any evidence of any requirements to use fixed fees.

11. France

Liquidators' fees are charged on a fixed fee basis unless the total exceeds €75,000, in which case the liquidator submits a claim to the president of the Court of Appeals. A fixed fee is received for the reorganisation or safeguard proceedings with further proportional fees received for acts including registering and checking creditor claims, continuation of business operations, sale of various assets and payment of creditor claims. A claim in excess of €75,000 is made on the basis of time spent on the case with appropriate supporting evidence. There is no prescribed fee nationally or regionally, but an appropriate fee is proposed by the liquidator. An initial payment of €50,000 is received with the remainder paid on completion of the liquidation. Administrators' remuneration is based on the same principle. This regime was introduced in 2005 and liquidators' remuneration is estimated to have decreased by 15% as a result.

12. South Africa

Remuneration for trustees and liquidators is commission-based, the percentage of the commission varies according to the type of asset. The fee claimed is subject to taxation by the Court so the Court is involved in each bankruptcy or liquidation in assessing the IP's fee. The remuneration payable to business rescue practitioners is time-based, but with specified rates (limiting hourly rates and total daily rates depending upon the size of the company) and an extra payment contingent upon the rescue being successful. The extra contingent payment has not yet been considered by the courts as the legislation has not been in operation very long. There are no requirements to use fixed fees.

IV Conclusion

Although we have been unable to research fully and in detail the law and practice in the jurisdictions considered above, the general pattern of what we have found does suggest a number of general points. It seems that all the jurisdictions considered have, to some extent, adopted a system where insolvency practitioners are predominantly or only paid either on a time cost basis or as a percentage of realisations or as a mixture of the two methods. The only exception that has been identified is lower value liquidations in France where the set fees total less than €75,000. It has not been possible to assess the proportion of cases that would fall within this category. The remuneration is always open to the taxation or scrutiny of the Court on the application of, amongst others, the debtor's creditors. In some jurisdictions, certain procedures require the Court to assess the fairness of the fees in all cases. Some jurisdictions have statutory limits for how much can be charged per hour (and per day) for some procedures although these limits are not always adhered to in practice. Other than those low value cases in France, we have not come across any evidence of a jurisdiction where there is either a requirement for fixed fees or where the use of fixed fees is commonly encountered in practice.

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The Insolvency Service Consultation: Strengthening the regulatory regime and fee structure for insolvency practitioners.

ICAS Response

March 2014

Background
The Institute of Chartered Accountants of Scotland (ICAS) received its Royal Charter in 1854 and is the oldest professional body of accountants in the world. 2014 marks our 160th year. We were the first body to adopt the designation "Chartered Accountant" and the designatory letters "CA" are the exclusive privilege of Members of ICAS.

ICAS is a professional body for over 20,000 members who work in the UK and in more than 100 countries around the world. Our CA qualification is internationally recognised and respected. We are a Recognised Professional Body (RPB) for insolvency, a respected Recognised Qualifying Body (RQB) and a Recognised Supervisory Body (RSB) for statutory audit. We regulate Insolvency Practitioners ("IPs") who work throughout the UK and our practitioners account for the majority of the Scottish IP community.

Consultation
ICAS welcomes the opportunity to comment on this further consultation on insolvency reform. While we recognise that, as an RPB, we have a level of self-interest in certain of the proposals, we have been very careful to set aside any views which could be construed as biased and have responded in a manner which we believe best reflects the public interest as required by the Royal Charter under which we operate.

General Comments
Part 1: IP Regulation
Our strong desire is for the UK to have an insolvency regulatory system which is robust, fit for purpose, and which delivers consistent outcomes and instils public confidence through a series of measures which promote enhanced transparency and accountability. This system should be delivered through a series of measures which bring the RPBs and the Insolvency Service together as 'co-regulators'.

As the grant of RSB and RPB status for audit and insolvency respectively rest with the Secretary of State for Business, Innovation and Skills, ICAS agrees that there ought to be some consistency of approach in relation to the power to sanction. We are, however, unaware of any evidence of "poor performance, misconduct and abuse" by an RPB (paragraph 2 of the Executive Summary refers). If it is simply the case that the Secretary of State desires this power as a precautionary measure, this should have been made clear in the consultation. In terms of the proposed introduction of sanctions, directions and penalties, the consultation paper doesn't set out the reasons why the Secretary of State needs all or any of these powers. In relation to statutory audit there are clearly powers which are delegated to the RSB bodies, whereas this practice does not apply to insolvency. We also note that sanctioning powers must always be subject to the safeguard of a satisfactory right of appeal.

We agree that there should be consistency across each of the RPB bodies and we would welcome initiatives which are designed to ensure that the same high ethical standards are upheld by each of the RPB bodies. To this end, we also support the introduction of common regulatory objectives.

Whereas the OFT Report sought independent regulation, the continuing desire (or threat) to introduce a single, independent regulator for insolvency is a disproportionate response. If independent regulation is the aim then none of the existing RPB bodies can meet this criteria and a new body would need to be formed (in which case there is also little merit in introducing application procedures for new RPB bodies at this stage). Admittedly the issue of a single regulator has arisen in two reports instructed by BIS but ICAS believes that there are alternative ways to nurture and improve public confidence in the insolvency profession.

By contrast, statutory audit regulation in the UK is not delivered through independent regulation but through a sophisticated and mature relationship between the RSB bodies and the Financial

Reporting Council (FRC). Some of the measures in the current consultation are intended to replicate for insolvency regulation some of the Secretary of State's powers in relation to the regulation of RSB bodies for statutory audit. Four of the RPB bodies for insolvency are also RSB bodies for statutory audit and we are very experienced in the regulation of services which directly impact public confidence.

Part 2: IP Remuneration

We accept that the fee proposals do not apply to Scotland. The Court Reporter and procedures for the approval and appeal procedures for both corporate and personal insolvency cases in Scotland safeguard against the potential "abuse" that is referred to in the consultation paper. However, ICAS also authorises a number of IPs who accept appointments in England and Wales and so we have responded to the questions on this basis.

The consultation makes frequent reference to the desire to deliver "value for money" for unsecured creditors as a key regulatory outcome, something which first arose in the original insolvency reform consultation. Value is subjective. There seems to be a failure to acknowledge that creditor apathy is still a very strong feature of most insolvency cases and in any event the approval procedures for IP remuneration in personal and corporate cases is largely governed by a legislative fee approval framework. To suggest that RPB bodies should step into the breach – even if one exists in relation to IP remuneration – will not address the issue without a sincere attempt by the UK Government to review the legislation. Regulators should not be asked to circumvent or overrule the law and to do so will almost inevitably expose the regulators to legal challenge.

The quantum of fees and IP remuneration do not generally fall within the scope of regulation of the current RPB bodies, four of whom also regulate the accountancy profession more widely. Many of the RPB bodies offer arbitration services, so that there is a means of an independent review (albeit we do not mandate it at present). To date, RPB bodies have resisted any move to bring IP remuneration within our regulatory scope for reasons outlined above and below. Any evidence of market failure in relation to IP remuneration should be shared. We note that less than 2% of the complaints submitted to the Insolvency Service Gateway in its first six months related to IP remuneration, which is hardly the landscape depicted by the OFT report which introduced these reforms.

In December 2010, HM Government issued a publication "Reducing Regulation Made Simple". It offered a view of regulation which is relevant in the current context.

The report suggested as follows:

> "*Regulation can appear to be a solution with relatively low costs for government itself. It can seem the most familiar and lowest risk option available to policy-makers to address a problem.*
>
> *But the reality is that regulation is never cost-free, either for government or for those whose behaviour is being regulated. It can be ineffective in achieving its intended outcomes if its effects on the system as a whole have not been properly considered. If the details of its proposed implementation have not been thought through at the outset, including the costs on the economy and the potential impact of enforcement, the burden of regulation can be much higher than necessary. In fact, hastily conceived regulation may prove to be unenforceable and could, in some cases, be more harmful than doing nothing*."

This does not mean that the Insolvency Service should not champion measures to improve regulation by the RPB bodies and be able to positively effect change if necessary; however, we are not persuaded that the measures set out the consultation paper will address the key issues which will truly lead to enhanced public confidence. There is a will to seek continuous improvement and to work with the Insolvency Service to develop a model which provides a holistic solution and recognises the balanced interests of the Minister, the profession and the public interest.

We would respectfully suggest that having acknowledged that the system in Scotland provides appropriate checks and balances such that the same issues do not apply in Scotland, it perhaps would seem more appropriate to consider the introduction of a similar Reporter mechanism in the other UK jurisdictions rather than the complex measures proposed. The mix of insolvency procedure, with or without creditor committee, legal jurisdiction, etc will simply add to an already confused landscape for creditors with the likely outcome that creditors will have an increased apathy and further disengagement.

Consultation Responses
We would respond to the consultation questions as follows:-

Part One – Regulation of Insolvency Practitioners

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

Protecting the public interest is one of the ICAS objectives, conferred by our Royal Charter. Initiatives and measures which seek to deliver consistent outcomes and instil public confidence by enhancing transparency and accountability are to be commended.

While we support the proposed regulatory objectives in principle, the current drafting would require some further discussion and amendment. It is crucial that the meaning and interpretation of the objectives is as clear and unambiguous as possible. This may be particularly challenging with concepts such as the 'public interest' and 'value for money'. There is likely to be a need for the Insolvency Service to produce guidance to clarify each of the objectives for the benefit of the RPBs and interested third parties.

We note that the fifth regulatory objective – 'ensuring that the fees charged by IPs represent value for money' – will need to be subject to the different processes which operate in Scotland, as recognised in paragraphs 20 – 23 of the consultation document.

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

We acknowledge that the grant of RSB status rests with the Secretary of State and fully agree that there ought to be transparency surrounding the revocation process.

The proposal that revocation be linked to the regulatory objectives further emphasises the need for clarity of the objectives, as set out in our response to Q1 above.

We have concerns over the proposal to issue a public notice on possible revocation (paragraph 60 of the consultation document) in advance of an RPB having exercised its opportunity to make representations to the Insolvency Service. The clear prejudice to the reputation of the RPB requires a strong justification for a public notice. We do not agree that such a notice is necessary to allow the Insolvency Service to take representations from third parties (e.g. the IPs authorised by the RPB concerned).

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

We are concerned by the proposal that the Secretary of State should be able to intervene in the regulatory process and direct an RPB to act, or omit to act.

The consultation paper provides no evidence as to:

- Why such powers are required (for example, evidence of previous refusals of RPBs to follow recommendations of the Insolvency Service).
- The benefits of such powers.
- How and when such powers would be used.

The introduction of these powers would simply increase the regulatory and legal costs for an affected RPB, particularly for the RPB bodies established by Royal Charter who have already had to satisfy HM Privy Council as to the adequacy of their constitutional and disciplinary arrangements.

Whilst it is unlikely that our arrangements would be found wanting, the suggestion that the Secretary of State should be able to direct an RPB to amend its constitutional and/or disciplinary arrangements thereafter would undermine the self-regulation model and our existing constitutional arrangements and relationship with the Privy Council.

This power was afforded to the Secretary of State in relation to statutory audit because there are aspects of public entity audit regulation which are delegated to the RSB bodies. This does not apply in relation to insolvency.

The position is particularly unclear in the context of directions which would be given for investigations and disciplinary matters. While we accept that it may be appropriate for the Insolvency Service to direct an RPB to conduct a disciplinary investigation, it would be wholly inappropriate for the Insolvency Service to mandate that a particular decision be reached. Such a power would defeat the purpose of self-regulation and would create uncertainty for all parties.

If a power to issue a direction is introduced then it should be subject to a right of appeal and not simply to Judicial Review (which is a lengthy and costly process).

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

We are familiar with the powers approved in relation to the FRC under the Companies Act 2006 and would be content if this process is replicated under the Insolvency Act 1986. While we are anticipating that the arrangements in contemplation for insolvency would be similar to those introduced in 2012 relating to the RSB bodies, this is not clear from consultation paper. Further details would be required to enable us to comment fully on the scope or proposed procedures.

Furthermore, the consultation paper does not explain:

- What would happen to any penalties received by the Insolvency Service; for example, it would be helpful to know whether the funds would simply be allocated (by virtue of the secondary legislation) to the Consolidated Fund.
- The manner in which the Insolvency Service would calculate the level of the financial penalty and the facts which would be taken into account.

With reference to the common sanctions guidance which the RPBs have introduced, we would invite the Secretary of State to issue a similar policy document in relation to RPB regulation so that RPBs can enjoy the same degree of transparency and certainty as IPs who are subject to sanction.

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

While we accept that the grant of RPB status rests with the Secretary of State and agree that there ought to be a means by which an RPB can be reprimanded without the need for full withdrawal of its registration, the consultation paper does not provide sufficient detail to enable us to comment fully on the scope or proposed procedures.

We are familiar with the powers approved in relation to the FRC under the Companies Act 2006 and would be content if this process is replicated under the Insolvency Act 1986.

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

We note that very short timescales are being proposed. We would suggest that there is a balance to be struck between progress and fairness. An RPB is likely to have complex governance arrangements and we would suggest that the minimum response timescale should be 28 days.

In addition, consideration should be given to accepting representations from an RPB other than in writing, e.g. oral representations taken in the course of a meeting or hearing.

In relation to all of the proposed new powers, we would encourage the Secretary of State to introduce a right of appeal and not simply require an RPB to revert to judicial review. As noted in our response to Q3 above, judicial review would likely incur considerable costs for all parties and would take considerable time.

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?

It is not clear from the consultation paper why this power is required by the Secretary of State. If an act or omission or an IP has particularly serious consequences for the reputation of the profession, the RPB should be taking action. There is no need for the Secretary of State to have a power of intervention in that regulatory relationship. The consultation paper does not provide any historical evidence in support of this proposal; it is reasonable to ask why steps have not been taken to remove the RPB status of any such body if such precedent exists.

The introduction of such a power would raise a large number of questions over the definition of the 'public interest' in an insolvency matter. The power of the FRC relates to statutory audit and, as outlined above, this power is largely based on the audit of public interest entities, rather than public confidence in the audit regime.

The consultation paper raises more questions than answers in respect of the process for sanction which is envisaged. Principally, there is no information as to how the Insolvency Service would investigate and prosecute public interest complaints (with regard to resource and skills). What opportunity would be given to IPs to respond? Similarly, there is no indication as to how this process would be funded (with the costs likely to be considerable).

In our experience, public interest investigations are costly and lengthy (more so than comparable investigations by RPBs). Public confidence in the regime and the reputation of the profession would be better served strong and robust RPBs which are able and minded to take swift, regulatory action.

If there is evidence of inconsistency among the existing RPBs, this is perhaps an area on which the Insolvency Service ought to focus, to raise standards and to ensure consistently high levels of regulation of IPs by all RPBs. There should be no scope for 'regulator shopping' by IPs who might otherwise be minded to seek a light touch regulator.

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?

While we have no objection to the principles in this regard, we observe that the Insolvency Service already enjoys considerable powers in respect of information requests (whether from the RPBs or IPs). One example is the Memorandum of Understanding agreed with the RPBs.

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?

We will address both of these questions together.

We do not agree with the proposal to reserve the power. If the regulatory landscape moves towards single regulation then that should be a separate, dedicated, consultation. It would be impulsive to seek to introduce a power without provision of any detail or full consultation.

We accept that it is possible that the market might be better served by a reduced number of RPB bodies but the move to a single regulator would not bring about any distinct regulatory changes that could not be achieved with multiple RPB bodies. The role of the Secretary of State or the Insolvency Service would be no stronger with a single regulator, and would be inconsistent with the other accountancy related reserved (or statutory) licensing regimes.

With reference to paragraph 46 of the consultation paper, there seems to be a failure to recognise that many IPs are already members of bodies which operate with the best regulatory models for professionals. If there are RPB bodies which do not yet meet this standard then naturally the Insolvency Service should address these matters rather than introduce wholesale changes to the existing structure.

Part Two – Insolvency Practitioner Fee Regime

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

Our comments in relation to the suggestion that regulators deal with fee related complaints are set out in the 'General Comments' section on the first page of our response . Beyond this, it is difficult to assess the costs associated with fee complaints. There doesn't appear to be an accurate impact assessment included with the consultation paper: it only appears to focus on the increased Insolvency Service costs (which it assumes will be transferred to the RPBs), with no consideration given to the additional costs which the RPB bodies will need to incur in order to be able to consider fee complaints under the proposed arrangements.

Much would depend on the level of fee complaints which would be received. Although current indications are that complaint levels would be relatively low, this could change rapidly if creditors and other interested parties believe there is a free and easy way to challenge fees.

IPs already fund aspects of the Insolvency Service. There is clearly a high financial burden being placed on the IP population by the proposed reforms.

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

The existing monitoring regime of IPs carried out by ICAS currently considers IP remuneration both in terms of compliance with the legislative process for the approval of remuneration and in terms of potential misconduct in relation to overcharging by reference to time incurred or hourly rates applied. This is also reflected in our complaints and disciplinary processes. We do not therefore believe that by providing a specific regulatory framework reference to this work will enhance public confidence in the system.

ICAS maintains that the RPBs should not be required to deal with IP fees, particularly as the fee approval procedures are set out in a legislative framework and it falls to be assumed that any failings in the current system must be capable of being remedied by the legislators.

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?

There should be full transparency about insolvency appointments and regulation. Any process that is shrouded in mystery is not in the public interest and the Insolvency Service and RPBs have a duty to work together to address any lack of clarity in general. SIP 9 and legislation already require full disclosure and separate creditor guides have been produced. Information on fees is therefore already widely available to creditors. Unfortunately, as outlined above, there is a high level of creditor apathy and no educational measures will be capable of addressing this underlying issue.

With reference to unsecured creditors, often no single creditor is capable of exerting pressure and real change can only be achieved by providing a mechanism for creditors to collaborate in order to exert influence over IP appointments and fees. HMRC and the Insolvency Service (via the Redundancy Payments Office) are often the largest creditors in any corporate insolvency and experience of our members is that HMRC and the RPO rarely exercise their rights as creditors in relation to the appointment of an IP or the approval of remuneration. Active involvement of Governmental departments and agencies alone is more likely to have an impact on the objectives.

Should comparative data be produced this would have to take account of geographical location, IP firm type and asset category in addition to asset values to make this information of statistical and practical relevance.

Q14. Do you think that any further exceptions should apply?

We do not support a change in the fee structure to a fixed fee or a percentage of realisations only as there are significant practical difficulties which are foreseen in adopting this approach. Irrespective of the level of assets, it is vital that policy makers recognise there is a *de minimis* amount of work required by an IP in statutory compliance and investigation, which would include reports on directors' conduct, but may not lead to asset realisation.

If creditor committees are considered to be an effective means of exerting control over fees then further thought needs to be given to addressing the difficulties faced by IPs in having creditor committees established. This might require the quorum for a committee to be reduced to one or two creditors.

Further exceptions should apply to:

- Administrations where no dividend expected to be paid to unsecured creditors (other than cases where is a possible prescribed part distribution).
- Administrative Receiverships - responsibility is to deal with charged assets only.
- Appointments where it is not possible to establish a creditors committee.
- Appointments where a small number of creditors (say no more than 5) have a majority in value.
- Appointments where no creditor holds an interest less than 10% of total value of claims (that is, any creditor claims with a value > 10% already have the right to lodge appeals).

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 of where secured creditors will not be paid in full?

For the reasons outlined above, we do not support a change in the fee structure to a fixed fee or a percentage of realisations only. Similarly, all other professions are able to charge time in line (for example the solicitors and statutory auditors are not constrained by such restrictions and much of the consultation paper seeks to draw a comparison with these two areas).

As for the quoted Schedule 6 rates, these have not been amended for many years and as a result we would question whether this scale is relevant at all.

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

We perceive that there are three main risks:-

1. The introduction of fixed or percentage fees could lead to increased returns to the IP in cases with high value asset realisations, which would undermine any regulatory rationale for the regime.

2. There would be no incentive to carry out in-depth investigations into director conduct and potential pursuit of additional assets, leading to less effective regulation of company directorships under the Companies Act. During the short consultation period, we have been unable to obtain information to establish the percentage of director disqualification proceedings which stem from insolvency investigations as this will influence the risk rating.

3. The IP may avoid the pursuit of additional assets where the increased level of remuneration would not cover the time incurred, which could be to the detriment of all 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?

We do not believe that this model is appropriate for any procedure.

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?

ICAS is opposed to the proposal to introduce percentage fees which are aligned with realisations. We recognise that this may still be introduced and, if adopted, we would suggest that a prescribed scale be implemented (by which we mean that the Schedule 6 scales would need to be updated to reflect current day values), with an option to seek approval for a variation. Finally, we would encourage the setting of a *de minimis* level to reflect the statutory work which every IP needs to complete.

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?

As noted above, we do not believe the current statutory scale is viable and it does not adequately reflect the amount of work currently undertaken by IPs. We have also commented on the scale at Question 18 above.

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

We think the ability to charge time in line should remain in all circumstances, but in particular in respect of the following areas of work:

- Investigations
- Antecedent transactions

Qs21 – 26:

We consider that our response to each of these questions is sufficiently covered above.

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?

To a large extent, our position on these questions is covered in our responses above; particularly in the section ‘General Comments’.

We believe there is a general will amongst the RPBs to ensure that the insolvency profession is respected and appropriately regulated. These common aims can be achieved through RPBs and the Insolvency Service working together.

We are not convinced that the measures proposed in this document are necessary to improve market confidence and/or the reputation of the profession. Further, we are concerned that the unintended consequences of some of the measures could make matters worse, rather than better.

Response of the Insolvency Practitioners Association to The Insolvency Service Consultation:
"Strengthening the regulatory regime and fee structure for insolvency practitioners"

Closing date: 28 March 2014

Overview and general remarks

Contributors

The comments and opinions expressed below represent the collective views of the IPA's Office Holders and Council and are not intended to reflect the opinion of each individual and firm member of the Association (who remain at liberty to express their own views within their responses to this consultation). Given the relatively short consultation period, it has not been possible to conduct a full review of members' view, or more particularly, their agreement (or otherwise) to some the suggestions made within this response.

This response has been prepared with the assistance of a number of our senior practitioner members, compliance specialists and regulatory personnel, and we thank all those members who have taken time to assist in the formulation of this response. The IPA was also grateful for the opportunity to discuss the consultation with the Insolvency Service, and we have endeavoured to reflect the content of those discussions in formulating this submission.

Regulatory objectives

We broadly endorse the intention of the objectives, however perceive conceptual and practical difficulties with their implementation, not least in that "the public interest" is a fluctuating and nebulous concept, undefined at law.

Furthermore, these concerns apply particularly to objectives 3(ii) – 5, as these latter objectives risk raising creditor expectations beyond that which we consider to be reasonably achievable through regulatory processes, given the current statutory framework of insolvency legislation.

However, we believe that there may be a number of relatively minor adjustments to the existing insolvency regime, that collectively, could facilitate the implementation of the objectives.

Oversight powers

In principle, we do not oppose the concept of enhancing the Insolvency Service's powers as the oversight regulator. However, we would suggest a number of amendments to the powers proposed in order that their use, should it become necessary, would not be unduly injurious to the profession (and consequently, potentially counter-productive to the stated intention of improving public confidence in it).

We can see some merit in complementing the current single (and previously unused) option of revoking an RPB's recognition to include alternative mechanisms for censure, such as warnings and fines. We have a number of suggestions in respect of these powers which we consider would render them fairer and more proportionate (and in turn, more consistent with the regulatory objectives themselves).

Lastly, whilst we understand that the power to revoke the recognition of an RPB would only be used in extreme circumstance, it should be recognised that doing so, or moreover threatening to do so, will occasion cost and uncertainty for those practitioners regulated by it and potentially have a de-stabilising effect on the regulatory processes generally. Moreover, it may inadvertently undermine public confidence in the effectiveness of the oversight regulator's activities and in the regulatory processes of other RPBs. To mitigate this harm, we suggest a number of amendments, in particular, the removal of the publication at the "minded to revoke" stage. Further commentary may be found in our response to question 2 below.

Single regulator

It was seen from the OFT and Kempson reports that the multi-regulator system has not been found to present significant problems in practice, in terms of effectiveness or consistency of application. The 'problem' is acknowledged as being one of perception and there remains, therefore, the possibility that this perception may not be entirely capable of remedy, given the very nature of insolvency practice (i.e. that creditors will feel dissatisfied at having sustained an irrecoverable loss).

Given that it is the Insolvency Service, as a government department and ultimate oversight regulator, which bears the primary responsibility for managing issues of public perception, there is no evidence to suggest that the competency with which this task is executed would improve, irrespective of how many regulators exist within the profession.

Insolvency Practitioners, the primary users or the regulatory process, are understood to broadly support the multi-regulator system and do not favour the introduction of a single regulator, though they typically express a desire for regulation to be clearly defined and consistently applied.

Competition between regulators has driven down licensing cost and led to improvements in RPBs' offerings to their members. There would be no such incentive to innovate, were there to be a single regulatory body.

It is also inherently inconsistent to provide for a single regulator at the same time as establishing a formalised de-recognition process. If there were to be a single regulator, any attempt to de-recognise it would result in the spectre of there being no regulator – clearly an unacceptable situation. Were there to be a single regulator, the power to de-recognise it would necessarily have to be removed, on which basis, the supposed benefits of enhancing Insolvency Service oversight would be largely lost.

It is accepted that 8 regulators would seem an unnecessarily large number for a relatively small profession. The historical reasons for this are well known, and stem from the variety of professional backgrounds from which Insolvency Practitioners are drawn. That number will shortly be reduced to 7, of whom 3 are concerned almost exclusively in the regulation of practitioners who operate under regional variations in the legislative provisions (in Scotland and Northern Ireland). Of the 4 regulators operating largely in England and Wales (where the fee reforms will apply), only 3 operate their inspection and monitoring regimes independently, as the SRA has contracted this aspect of their work to the IPA.

The regulators cooperate through the Meeting of Monitors to provide a consistent regulatory approach to challenges presented within the profession and standards are agreed collectively by the Joint Insolvency Committee. The complaints gateway (covering 98% of insolvency appointment-takers) has provided a single point of entry for complainants and the common sanctions guidance in operation for the five leading RPBs will improve consistency in regulatory outcomes. We would suggest, therefore, that the implication that 8 regulators are operating independently of each other is somewhat misleading, and that in practice, this less of a problem than might, at first blush, appear to be the case.

Insolvency Service has previously mooted revisions to the current per-capita levy system applied to RPBs, which would reduce the element of cross-subsidisation produced by the current system. The IPA would welcome the development of this approach and considers that it may act to reduce the number of regulators, or at least disincline further regulators from entering an already well-served market. It would certainly assist to share the costs of regulatory oversight more fairly.

IP fees

Much is made of the proposition that creditors are dissatisfied with IP fees and that this dissatisfaction stems from their inability to exert sufficient control over them. However, this proposition does not appear to be borne out by the available evidence.

In terms of complaints, around one half of all complaints are found in their initial stages to present no grounds for potential disciplinary action. Of those that do proceed, around 50% concern personal insolvency, where creditors are generally well organised and able to exert significant market influence on IP fees (as is witnessed in the highly competitive IVA market). In terms of complaints numbers generally, complaints about fees represent a very small proportion – just 2% in 2013.

The OFT report, upon which much emphasis continues to be placed, has been widely criticised for examining only a small section of the insolvency profession. It was limited to a relatively small study of administration cases and did not consider the fees charged within more commonly used processes (liquidation, bankruptcy and voluntary arrangements collective accounting for a far higher proportion of insolvency processes used). Its results are now being extrapolated as the basis of reforms to the charging arrangements in other insolvency processes, seemingly without an evidential basis for doing so. This presents a significant risk that the proposals are founded on both incomplete and potentially misleading data.

The OFT report found that in cases where there was greater creditor control over fees (largely, cases where there was bank involvement), fees were on average 9% lower. It also noted that it is normal to see a "discount" in prices where bulk-buying power is exerted. We are concerned that the assumption currently being made that this discount amounts to evidence of over-charging in other cases may be flawed.

Even if it is assumed that this assumption is accurate, as appears to have been accepted by Professor Kempson in her subsequent work, there remains no evidential basis to suggest that the same "market failing" applies in other forms of insolvency, such as liquidation and bankruptcy. Studies conducted by one member firm indicate that when analysed across their portfolio of cases, the average hourly rate actually recovered from an insolvency cases was in fact significantly lower than the hourly rate recovered in "bank led" work (given that practitioners often only recover a proportion of their time and rate).

The proposed changes to the manner in which remuneration may be charged are designed to produce a move towards fixed or percentage fee charging. However, no evidence is presented to suggest that charging on this basis will in fact result in a reduction in fees charged, or that a reduction will bear any relation to the 9% "failing" alleged by the OFT, or that fees will represent better value for money. We believe that this move may ultimately have the counter-effect, for the reasons set out below.

Charging on the basis of a fixed or percentage fee may also distort, if not disconnect, the link between value and the nature and complexity of the task performed. It is also something of a retrograde step. There was a deliberate move away from the old "scale rate" provisions which once applied as the default basis for remuneration, largely on the grounds that it resulted in anomalies where IP fees did not necessarily reflect the work undertaken, and in essence, amounted to a cross-subsidisation of estates (those with large, readily realisable assets effectively funding the IP practice to conduct cases with lower or less readily realisable ones).

Existing regulatory provisions provide that the fees charged by IPs should be *"appropriate, reasonable and commensurate reflections of the work necessarily and properly undertaken"*[1], in essence, that they represent value for money. However, the current proposals do not address the difficultly presented in assessing what this is in practice, they merely shift the responsibility for finding a solution to this difficult task from the government to the RPBs.

Regulators will be presented with even greater difficulties in challenging a fixed or percentage fee on the basis that they are not a commensurate reflection of the nature and complexity of the task, as by definition, a fixed or percentage fee need not be a reflection of the time expended in performing the task.

To summarise our concern, it is that the wide-ranging changes proposed are based upon a number of **flawed assumptions**:

a) that there is over-charging in all forms of insolvency proceedings;

b) fixed or percentage charges will produce better value for money; and

c) the value to creditors of a fixed or percentage charge can be more readily assessed by regulators.

We consider there to be a significant likelihood that none of these propositions are accurate.

Improving transparency and creditor engagement

Creditors are largely dissatisfied as a result of the losses they have sustained, combined with a sense that the IP contributed to that loss (rather than helped to minimise it, as will often be the case in reality).

Profession Kempson recognised that there was probably no 'silver bullet' solution to dissatisfaction expressed by creditors. We concur with that view; however, we do feel that a number of suggestions made either within the consultation, or by contributors to this response, could act to improve transparency and creditor engagement. In turn they would assist RPBs in becoming more involved in assessment of value:

- Improved management of creditor expectations, through creditor guides, fee estimates and estimated outcome statements (see below regarding how this could assist in regulatory intervention and also the draft complaints leaflet at Appendix 1);

- Enhanced capital requirements and/or direct financial contribution by directors to the basic costs of insolvency processes;

- Fixing a minimum fee for those statutory elements of an insolvency administration that will generally not be of direct financial benefit to the creditors;

[1] Paragraph 2, Statement of Insolvency Practice 9

- Data collection and benchmarking of fee data (potentially through RPB monitoring processes);

- Guidance and/or compulsion of IPs to make greater use mixed fee bases for different elements of the work involved within an insolvency administration. The onus could be put on the IP to justify why the basis sought is appropriate to the nature of the assets, the complexity of the task and the value that it is estimated will result.

- Requiring express creditor approval for remuneration which materially exceeds previously supplied fee estimates.

Facilitating greater regulatory intervention

Assessing what amount to an *"appropriate, reasonable and commensurate reflections of the work necessarily and properly undertaken"*, essentially value, has proved to be a difficult task and one in which, we acknowledge, RPBs have not typically been seen to fully engage. This is primarily due to the existence of statutory processes to determine and challenge practitioner remuneration. We have historically considered that it would not be wholly appropriate for a regulator to circumvent due process. If remuneration has been approved in accordance with the legislation and creditors have not availed themselves of the option to challenge fees, it has been viewed as difficult to justify going behind the statutory provisions. We would certainly be opposed to routine regulatory involvement in fee assessment.

However, we do feel that there may be scope for RPBs to become more engaged in tackling abuses of the remuneration system, were they to be given sufficient information with which to do so.

We have suggested above that one mechanism for managing creditor expectations and informing their consent would be the routine provision of a fee estimate and/or an estimated outcome statement at the commencement of the processes, or otherwise when seeking approval to the basis of future remuneration on time and rate. (Noting that there be no purpose in providing an estimate where approval for a crystallised amount is sought, such as at the conclusion of an investigation or recovery action). The provision of this information would assist the RPBs in the routine monitoring of practitioner performance against the estimates they provided. The IPA would be content to factor such a comparison into its routine monitoring procedures.

Fee estimates would provide not only an avenue for assessing individual practitioner performance, but would ultimately assist in benchmarking reasonable practice across the profession.

Additionally, such estimates would provide greater scope for RPB intervention if fees materially exceeded an estimate upon which creditor approval for remuneration had been obtained.

The manner in which RPBs might reasonably take a greater role in curbing excessive fees and/or the provision of insufficient or misleading information when seek approval was considered during the recent reform of the complaints process. The IPA highlighted the difficulties presented, for instance, in challenging hourly rates that had been agreed by creditors. However, it also noted that the charging of unjustifiable uplifts and or excessive time could reasonable be examined in more detail. Our previously suggested wording for a possible complaints leaflet explaining what RPBs can do is attached at Appendix 1.

The RPBs already have processes in place that can address some remuneration issues by requiring members to repay unauthorised fees to the estate from which they were drawn. This is relatively simple as the value and quantum are not in issue in such a case; it is simply *all* the *unauthorised* remuneration.

It is arguable that if a fee in not an *appropriate, reasonable and commensurate reflection of the work necessarily and properly undertaken,* then it is not properly authorised in accordance with SIP9. Existing powers within the RPBs' committee rules enable fees issues to be addressed by reference to misconduct in this regard, though it is only likely to be the more obvious cases of apparent excess that would come under scrutiny. These provision do not, however, ameliorate the difficulties associated with quantifying the appropriate re-payment, as this requires the empirical assessment of what the fee *ought to have been*.

The RPBs are not best placed to conduct a detailed fee assessment process. Difficulties could also arise in requiring fee repayment in respect of complaints arising after the closure of a case (who should bear the cost of re-opening the case, and would it be in the interests of stakeholders for it to be re-opened?).

However, we can see no reason why, in a case of apparent excessive charging, the RPB could not direct the practitioner repay such fees as exceed the original estimate provided, or else direct the IP to have their fees assessed by a Court (perhaps in conjunction with some other sanction, such as a reprimand or fine).

The ability to take such action would disincline practitioners from under-estimating, and the conduct of those that routinely under-estimated could be addressed though the monitoring and inspection regimes.

In summary, we consider that the routine and mandatory provision of fee estimates would serve to:

- Improve transparency about what the practitioner is ultimately going to be paid;
- Better manage creditor expectations as to the likely financial outcome of the case;
- Encourage practitioners to engage more effectively with creditors, if their consent is required to material deviation from an estimate.
- Provide a benchmark for monitoring individual practitioner performance as against their own estimates;
- Indicate whether individual practitioner performance is consistent with practice within the profession generally;
- Enable the RPBs to engage more effectively in complaints about fee levels;
- Facilitate the quantification of any repayment to be made to the estate.

Response to 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?

It is understood from conversations with the Insolvency Service that the proposed regulatory objectives are not presented in a hierarchy. This is not made clear in the consultation document and should be made so in any subsequent enactment. Given the inherent tension noted between some of them, this will be particularly important.

Objective 1: *protecting and promoting the public interest*. The IPA's Articles of Association provide that it exists "*in the public interest*" to promote similar ends. However, whilst accepting that it is appropriate for a regulatory system to operate with this objective, it should be noted that IPs' primary obligations are to the creditors' interests and that, in individual cases, promoting the public interest may actually reduce creditor returns. There is, therefore, an inherent tension between this objective and those contained at points 4 & 5. A clear example would be where savings jobs may be in the public interest, but not necessarily in the interests of creditors.

It is noted that objectives 1-3(i) largely mirror existing requirements contained in the Ethics Code for practitioners. These objectives, therefore, represent a duplication of existing provision and we would question whether this is entirely necessary.

Objective 3(ii), *considering the interests of all creditors in any particular case*, can only be achieved if the legislation governing insolvency processes allows. Statute does not uniformly provide that the IP should act in the interests of all creditors and there are clearly defined circumstances when their statutory obligations (e.g. to a secured creditor, or to a class of creditors) preclude them from so doing. We consider that this is more appropriate as an objective of the insolvency legislation itself, rather than the regulation of practitioners.

Objective 4, *promoting the maximisation of the value of returns to creditors and also the promptness in making those returns*; we perceive both conceptual and practical difficulties.
Losses sustained by creditors in insolvency processes are a function of the actions of the insolvent party, prior to its entering insolvency. The insolvency process itself merely crystallises the loss, it does not cause it. The fact that there are relatively few challenges to IPs' fees could indicate that there is little dissatisfaction about fee levels, rather, that the general dissatisfaction which exists stems from the loss sustained. Ameliorating these losses requires tackling the underlying causes of business failure and personal debt.

We fail to see how the regulatory process, no matter how robust, can have any more than a marginal impact on actual returns to creditors. Underlying economic conditions, borrowing / lending behaviours and realisable asset values will all have a far greater impact on creditor returns and cannot be controlled by a regulatory system alone. However, we do accept that there may be scope for regulators to do more to address public perception of creditor disenfranchisement in relation to IP fees.

As for the promptness of returns, such an objective may incentivise practitioners to make early distributions, potentially at the expense of longer term and more valuable investigations and recovery actions. Given creditors' known dissatisfaction with the robustness of action against the directors of failed companies, if seems counter-intuitive to promote a culture of "quick kills" rather than the thorough investigation and pursuit of claims against directors. It seems unlikely that this will increase overall return to creditors or creditor satisfaction with the insolvency regime.

Objective 5: *value for money.* Arguably, the inherent difficulty in ascertaining what actually represents value for money lies at the root of the current lack of greater regulatory intervention under existing provisions. Setting this as an objective alone does nothing to mitigate those difficulties, it merely shifts the responsibility for finding a solution.

The stated intention of the proposals concerning fees is to ensure that fees properly reflect the nature and complexity of the work done in any given case – something already covered in the Insolvency Rules. However, fixed fee working necessarily weakens the link between the specific case and the fee charged and could ultimately drive an increase in IP fees, rather than act to reduce them. Furthermore, acting in the public interest may require actions which will not produce an improved financial return to creditors, or indeed, may serve to reduce it.

Even were all processes to be conducted at no cost to the estate (clearly not a viable proposition) creditors would still sustain irrecoverable losses, about which they would feel naturally aggrieved and dissatisfied. The regulatory process alone cannot address this and we consider that it is inappropriate to imply that it can. We consider that merely enshrining objectives 4 & 5 without also properly managing creditor expectations and strengthening mechanisms for the RPBs to address the perceived problems in this regard risks over-inflating creditor expectations, and in turn, could have a detrimental effect on public confidence.

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

It is contrary to the principles of natural justice to publish an intention notice prior to consideration of and reaching a final decision on representations made by the body concerned. This pre-empts the outcome of the process as the damage to the reputation of the body will have already been done (as the sanction is effectively the publicity itself). Representations would at that point be largely irrelevant.

We consider that it is wholly inappropriate to imply in a public statement that recognition will be revoked in advance of a decision having been made to do so. Practitioners could incur unnecessary cost and expense in switching to another RPB when there was no reason for them to do so. Public confidence in the regulators (and by association, RPBs other than the one concerned) could be irrevocably and unnecessarily damaged.

Lastly, we consider that there should be some avenue of review or appeal open to the RPB, other than by the notoriously costly process of Judicial Review.

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

We have some concerns that this could be a transgression from oversight into direct regulation, where the conduct of an individual practitioner has already been considered by an RPB. If the RPB has systems in place to deal appropriately with complaints and other regulatory matters (and the Insolvency Service's oversight will no doubt ensure that this is the case), then directions in relation to specific cases should not generally be necessary. Such a direction should not be possible where an RPB has already conducted such a process.

Uniform time periods within which RPBs can make representations should be applied to the various mechanisms. As currently drafted, periods vary from 14 – 28 days, which may cause confusion and ambiguity where more than one remedy is sought simultaneously.

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?

The time period allowed for representations should be increased to at least 28 days.

From a corporate governance perspective, it is undesirable for there to be no upper limit to the penalty sum, whatever that limit might ultimately be. It prevents the RPBs from undertaking the sort of prudent financial planning one would expect from them. The IPA, for instance, is a company limited by guarantee, and would be unable to assess the risks presented to its board of directors, or acquire appropriate insurances, were no limit to be in place.

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

None, save that uniform time periods for representations should be applied.

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

As noted above, the logic of the different time periods is unclear and unhelpful.

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?

We understand from our recent meeting that it is not intended that this power can or will be used in cases where the IP has already been subject to a disciplinary process via an RPB. In our view, to do so would introduce a degree of double jeopardy and be contrary to principles of natural justice. It would also serve to undermine confidence in the RPBs' regulatory processes if complainants felt there was a "second bite at the cherry". This should be made clear in any enactment.

Generally, we consider that the power to direct an RPB to take certain action (such as commence an investigation) should be sufficient, and we cannot envisage a circumstance where it would be appropriate to entirely bypass the regulatory process in this way. Direct action could also have an impact on other cases already being processed within the regulatory system.

We note the intention that there is proposed a public interest requirement for such action, however, would suggest that undermining the regulatory processes of the RPBs may be of itself, outside the public interest. If such a power is to be included, we would suggest that the RPB themselves be invited to make representations and/or otherwise collaborate in the process.

We have some concerns that any such power could become the subject of potentially inappropriate political pressure from time to time, in high profile or media sensitive cases.

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?

Subject to the concerns expressed above, were the Insolvency Service to be empowered to bring direct action, they could only do so effectively if they were able to require the provision of information. However, if the Service were to collaborate with the RPBs, such additional powers may not be necessary.

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

Our views about the need for or desirability of a single regulator are articulated above. Given the acknowledgment that no such step would be taken without further consultation, we suggest that the content of any such provisions would be better considered in the event that there was a clear intention to establish a single-regulator.

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

We consider that a single regulator would necessarily have the same functions and powers that RPBs currently possess.

Any provision for de-recognition would, however, necessarily need to be repealed as there would be no alternative 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?

Practitioner members report that they consider the familiarisation costs to be grossly understated. Whilst it is accepted that the changes themselves are “not difficult to understand”, the implications on the IP’s business could be far-reaching, and it will be necessary for them to expend resource in establishing viable rates for the fixed fees and percentages to be sought.

As for the increased costs to the regulatory systems, this is almost impossible to assess in the absence of guidance on *how* value is to be assessed. Will a full review of time spent and how this compares to the fixed or percentage fees charged be required? Will on-site visits to review practitioners files be expected? Requiring practitioner to provide fee estimate could limit the additional regulatory cost.

It is unclear how the estimated cost of £2,715 per case review is reached and we cannot, therefore, comment on its accuracy. This unit cost this is then subject to a multiplier which is also an estimate (anticipated fee complaints). Therefore, we cannot confirm whether the assessment of cost is accurate, or even reasonable.

It is also noted that the financial benefits are estimated as a function of the OFT’s prior estimate of alleged over-changing in administration cases and assumes that a proportion of these funds would necessarily be paid to unsecured creditors if the proposed fee arrangements were implemented. However, this assumption is not supported by any actual evidence that adopting fixed or percentage fees would act to reduce fee levels.

It is also of note that the RPB can sanction the practitioner by way of fine, but that this would not result in an increased return to the unsecured creditors, which could only be achieved by the repayment of remuneration to the estate. On which basis, even if fee complaints were upheld, there would not necessarily be a financial return to creditors as a consequence unless RPBs were willing and able to quantify and direct a repayment to the estate.

On balance, the assessment of costs contains so many estimates, assumptions and unquantified variables, that it is almost entirely speculative.

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?

No, not as currently anticipated. Statutory and regulatory provisions already exist requiring fees to be reasonable and commensurate reflection of work necessary and properly undertaken. (i.e. value for money). Merely adding value for money to the regulatory objectives does nothing to assist in assessment of what this amounts to in practice.

The regulatory challenges presented flow from the entirely subjective nature of establishing what value for money is and in whose opinion such value should be ascertained. The government has been singularly unable to define these concepts and appears now to expect the RPBs to be able to do so upon their behalf.

Assuming it is feasible to RPBs to form a view on value in more extreme cases, presumably on a relatively broad brush basis, we are unclear on what basis an RPB could interject when the fee basis has been approved by a statutory process. This would be a usurpation of Court's powers. One option suggested above is mandatory the provision of fee estimates against which RPBs could measure compliance.

This is central to the claim that changes to the RPB role regarding fees might improve creditor confidence in the regime. The Service has confirmed in its discussions with us that it envisages RPBs using their existing regulatory mechanisms to deal with fees matters – in effect, addressing over-charging where that is blatant as matters of misconduct under current rules. Whilst we accept that more could be done by existing RPB committees and tribunals, any decisions in this arena have to be made in the context of those rules and regulations, and it should be recognised that the complaints process is not primarily designed to compensate creditor or other complainants nor directly benefit creditors or a class of creditor.

Furthermore, the proposals undermine the legislative provisions of the 2010 rules which provide windows of opportunity for challenge to fees and the minimum value of a financial interest necessary in which to mount such a challenge. If 90% of creditors have approved as IPs fees, it does not appear reasonable to allow a minority financial interest to delay the administration of an estate. No detail is given on how the intended review by RPBs would interact with the statutory provisions and upon what basis they would be empowered to interject.

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?

It may assist marginally, but in practice, only the largest and best organised creditors will benefit from being able to negotiate fees.

We consider the issue to be more of expectation management. In the majority of smaller cases, the basic message that needs to be conveyed at an earlier stage is that they are unlikely to make a significant recovery of the monies owed to them, as their loss has already been incurred. It would also be helpful to better explain that there are certain costs properly incurred in administering a case which no not directly produce any return for creditors (e.g. CDDA reporting).

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?

There may be some merit in a default basis of remuneration, but only where the creditors have not resolved in favour of an alternative. The IP would then have to engage creditors to ensure that they understand what is being sought. Estimates of time cost and/or costs when calculated on the percentage sought could also be provided at the outset. Creditors who did not want to engage could effectively exercise control by virtue of declining to participate.

Some adjustment of the majorities required to approve a remuneration resolution, as an alternative to the default, may be another option to be considered (e.g. requiring the consent of a proportion of creditors, by value, rather than just of those voting). This may encourage IPs to actively seek greater creditor participation.

The current proposals as currently formulated would disenfranchise creditors, at general meeting, from electing that the IP be remunerated on a time and rate basis, even if they unanimously agreed that was the appropriate basis for some, or all of the activities concerned in the case.

We consider that the likely consequence of the current proposed changes will be the increased use of creditors' committees. We would anticipate that these committees will ultimately comprise representatives from IP practices, acting on behalf of frequently occurring creditors. We are doubtful that this is what was intended, or indeed will have the desired effect of reducing cost. Members of creditors' committee are entitled to receive their expenses and increased use of creditors' committees may well serve to increase cost.

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?

We are disappointed that a number of the other recommendations made by Professor Kempson have not been adopted. Encouraging the greater use of mixed bases would be a positive step. Greater onus could perhaps be placed upon the IP to explain and justify why the bases sough were appropriate to the nature of the asset and/or the task to be performed.

We do not consider that fixed or percentage fees necessarily incentivise IPs appropriately. Fixed fees, in particular, present inappropriate economic motivator to avoid non-profitable tasks and may in turn have an adverse effect on standards.

See our introductory remarks above concerning the alternative of mandating the provision of estimates when seeking to fix the basis of future remuneration on a time and rate basis.

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

Conducting a case on a fixed fee basis necessarily involves a process of estimation at the outset. The characteristics of an estimate are they will be formed with the benefit of previous knowledge and experience of cases of the type concerned and necessarily involve a margin of error, which may be in either direction.

Given the acknowledged difficulties in obtaining creditor engagement (few creditors vote, let alone agree to be appointed to a creditors' committee), if the default basis is a fixed fee, the rational IP will be inclined to over- rather than under-estimate the time costs involved. Competition between IPs may have a limiting effect, though it would seem likely that patterns of industry practice will develop around "the going rate" for certain types of work (as is evident with Statement of Affairs fees in voluntary liquidation).

If practitioners work primarily on fixed fees estimated at the outset, it should be recognised that this invariably results in an element of cross-subsidisation of cases, with cases where the fixed fee is ultimately profitable, subsidising those where the fixed fee results in the IP making a loss by reference to time given.

The wider use of fixed fees may also make it more difficult for RPBs to engage more actively in fee monitoring and assessment, and more difficult for creditors to successfully challenge them. If a fixed fee is agreed, would this still be measured against the time and rate alternative were it necessary to review the value it represented, and will IPs still be required to maintain time records on each case if time cost charging is prohibited? If not, what would value be measured against?

On balance, we do not consider that the fee structures proposed are likely to result in increased return to unsecured creditor, and could have the opposite effect.

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?

We do not consider that the proposed changes should apply at all, but as indicated, they would be inappropriate to CVAs, IVAs and MVLs (although, perhaps less so in the case of IVAs, where a percentage basis is in fact the norm already in cases largely involving regular, fixed monthly contributions from income).

Ideally, a system applicable to all forms of insolvency proceedings would be preferable, even if the expected or prevalent basis of remuneration varied according to the process type, asset composition or nature of the officeholder's role.

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?

No. The percentage should be appropriate to the nature of the assets to which it is to be applied, and this will vary considerably. There seems little justification in applying the same percentage to cash at bank and to debtors, real property or recoveries from legal actions.

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?

Our members report not. It is noted that these rates were set almost 30 years ago, at a time when the regulatory expectations were perhaps lower and statutory burdens were smaller. They were also largely abandoned as a default basis for remuneration on the grounds they were not operating appropriately. On this basis, it is difficult to envisage them being appropriate today.

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

Yes - in any instance where the creditors have actively agreed, with the benefit of appropriate and accurate information, that this is the appropriate basis.

Impact Assessment questions:

Q21: Do you agree with this estimation for familiarisation costs for the changes to the fee structure?

No – we are advised by members that they are substantially under-estimated. They fail to recognise the need for IP staff to be fully familiarised with any changes and the need to revise standard internal documentation and systems.

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?

N/A

Q23: To what extent do you expect the new fee structure to reduce the current level of overpayment?

We do not consider that sufficient empirical evidence has been presented in order to accurately formulate any such calculation.

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?

No. A proper assessment of the appropriate percentage should be conducted and a reasoned explanation to creditors will need to be provided. The provision of any additional, non-standard, information is likely to ultimately increase the cost of insolvency processes in the round.

However, the provision of such information may be necessary and warranted if creditor engagement is to be improved, so to a degree, cost of this type may be the unavoidable consequence of any reform of the way in which fees are authorised and the basis upon which they are charged.

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?

No – for the reasons set out at question 11 above.

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?

For the reasons provided elsewhere, we have concerns about the accuracy of the impact assessment, due to the number of largely unproven assumptions upon which it is based. Any empirical attempt to weight the relative costs would probably only represent a further distortion.

We would comment that the likely financial impact upon creditors is comparatively small in the context of the total number of unsecured creditors and the amounts they are collectively owed in insolvency processes. The impact upon Insolvency Practitioners in the major revision of their systems could be very pronounced, and the views expressed to us by our members have been universally negative.

Q27: Do consultees believe these measures will improve the market confidence?

Not significantly.

Q28: Do consultees believe these measures will improve the reputation of the insolvency profession?

No. Furthermore, they risk undermining public confidence by failing to properly manage creditor expectations.

About the IPA

The Insolvency Practitioners Association is a membership body recognised in statute for the purposes of authorising Insolvency Practitioners under the Insolvency Act 1986 and Insolvency (Northern Ireland) Order 1989. It is the only recognised professional body to be solely involved in insolvency and for over fifty years the IPA is proud to have been at the forefront of development and reform within the profession.

The IPA has approximately 2,000 members, of whom approximately 550 are currently licensed insolvency practitioners. In addition to its recognition under the Insolvency Act for the purpose of licensing IPs, the IPA is also a Competent Authority approved by the Official Receiver for the purpose of authorising intermediaries to assist with debtors' applications for Debt Relief Orders.

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

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

For further information or assistance, contact us at:

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27 March 2014

Appendix 1

Possible complaints leaflet wording regarding complaints about fees

As a Recognised Professional Body regulating Insolvency Practitioners (IPs) under delegated statutory authority from the Secretary of State for Business Innovation & Skills, we can also deal with complaints about fees to a limited extent, and we set out below some of the matters we can address through the complaints system. You should however be aware that IPs' fees are fixed by reference to statutory Rules and a profession-wide statement of required practice, Statement of Insolvency Practice (SIP) 9. In some cases the fixing of fees will have been delegated by the general body of creditors to a creditors' or liquidation committee. We urge you to look at SIP 9 and in particular at the accompanying creditors' guides to fees. These clearly set out how fees are fixed, what information should be provided, and what to do if dissatisfied.

The Insolvency Rules were amended in April 2010 and now provide more opportunities for creditors to challenge fees. SIP 9 includes reference to the amended Rules, but the main points may be summarised as follows:

i) enhanced reporting requirements;

ii) rights to further information without cost; and

iii) rights to challenge fees and costs during an 8-week window after each report.

The complaints system should not be used as a substitute for the remedies available through application of the Rules. In particular, if your concern is solely about the amount of fees charged, you should first consider the following:

- whether the information provided by the IP explains how the amount has been calculated, and if so which aspects if any you believe to be inappropriate

- whether the report from the IP refers to a creditors' or liquidation committee, in which case you may wish to contact one or more of the committee members for further information, and

- whether the IP or his/her firm could usefully provide more information, in which case you should first contact the IP or the firm to give them an opportunity to address your concern before making a complaint.

Within the complaints system, we can address any misconduct on the part of the IP, where we have evidence to support allegations of wrong-doing. For example, if there is evidence to suggest that an IP has not followed the SIP 9 requirement regarding provision of information or has failed to provide sufficient information to enable creditors to form a view as to whether the fees are reasonable in all the circumstances, then we would investigate this as a potential breach of the SIP and consider appropriate disciplinary sanctions if a case were proven against the IP.

We can also take action where fees are drawn without the proper authority from creditors (and this may include circumstances where fee estimates have been materially exceeded). Fees that you consider to be excessive can be investigated, but fees that appear high may nevertheless be justified and may be a reflection of work properly undertaken by the IP in creditors' interests and in compliance with statutory obligations.

In cases where fees appear to have been drawn without justification, we can make further enquiries which may lead to one or more of the following remedies:

i) disciplinary action possibly resulting in a fine/ reprimand with publicity, and/or

ii) measures with a view to any unauthorised or grossly excessive fees being repaid to the insolvency estate

iii) targeted monitoring of the IP's practice to ensure future charges are commensurate with work necessarily and properly undertaken.

You should bear in mind that insolvency is a collective process and as such any redress ordered by the court, or any fines imposed by a regulator, will not be paid to the individual complainant. In many cases the IP will be acting as an officer of the court and therefore the court is the appropriate place to determine disputes, while the regulator's primary role is to ensure that IPs comply with the statutory Rules, SIPs and Code of Ethics, and are fit and proper persons to be licensed to act.

In some cases, you may be discouraged or barred from using the complaints system to address fees issues, e.g. if your claim against the estate is less than 10% of the total indebtedness in the case concerned, or if you have failed to exercise your statutory rights under the Insolvency Rules within the timeframe allowed. There may also be some cases in which the value involved is so high or the matter so complicated that it ought to be dealt with by the court and only the court.

If you wish to make a complaint about fees, please provide us with the following:

- copies of reports or other documents received from the IP
- a note of enquiries made of the IP/firm or creditors' committee, and
- an outline of your concern and details of any other steps taken.

Your complaints will initially be acknowledged within two weeks and we will advise you how the matter may be taken forward.

ICAEW

ICAEW REP 47/14

ICAEW REPRESENTATION

STRENGTHENING THE REGULATORY REGIME AND FEE STRUCTURE FOR INSOLVENCY PRACTITIONERS

Memorandum of comment submitted in March 2014 by ICAEW, in response to The Insolvency Service consultation paper Strengthening the regulatory regime and fee structure for insolvency practitioners published in February 2014

Contents **Paragraph**

INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the consultation paper *Strengthening the regulatory regime and fee structure for insolvency practitioners* published by The Insolvency Service on 17 February 2014, a copy of which is available from this link.

WHO WE ARE

2. ICAEW is a world leading professional membership organisation that promotes, develops and supports over 142,000 chartered accountants worldwide. We provide qualifications and professional development, share our knowledge, insight and technical expertise, and protect the quality and integrity of the accountancy and finance profession. As leaders in accountancy, finance and business our members have the knowledge, skills and commitment to maintain the highest professional standards and integrity. Together we contribute to the success of individuals, organisations, communities and economies around the world.

3. ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.

4. ICAEW's regulation of its members and affiliates in insolvency is overseen by the Insolvency Service, and ICAEW is the largest of the Recognised Professional Bodies (**RPBs**) under the Insolvency Act, currently licensing over 700 practitioners.

5. ICAEW is also a regulator for audit, financial services, consumer credit and is an accredited body for the issue of statements of professional standing. And this month, the Lord Chancellor has accepted ICAEW's application to regulate probate and license alternative business structures.

6. This response reflects the views of ICAEW as a regulator and consultation with the following ICAEW committees:
    - Insolvency Committee (a technical committee made up of Insolvency Practitioners working within large, medium and small practices).
    - Insolvency & Restructuring Group Committee (which offers support to ICAEW licensed insolvency practitioners and their staff belonging to the Group).
    - Insolvency Licensing Committee (the committee responsible for regulation of ICAEW insolvency practitioners, via licensing and the consideration of monitoring reports).

MAJOR POINTS

Part 1 – Regulation of insolvency practitioners

7. We endorse the overarching aims of the regulatory regime for IPs to ensure fair and consistent regulatory outcomes for the benefit of all those with an interest in insolvency cases. But we do question the assertion that the regulatory regime as it stands is not fit for purpose. The majority of the steps proposed in this document appear to us to be a series of reactive measures to deal with unsatisfactory outcomes, rather than a pro-active approach to ensuring that the consumer and other interested parties receive the best and fairest service at the outset. Many of the shortcomings outlined are outcomes from the law as it stands, rather than malfeasance by the regulator or the practitioner, and we believe stronger attention to educational programmes for the consumer and the practitioner and the strengthening of best practice guides such as through the SIPs are far better tools for the government to achieve its aims in

this area.

8. We do welcome the introduction of regulatory objectives for the regulatory regime. Regulatory objectives provide certainty for both the oversight regulator and the RPBs and provide a framework against which any new initiatives may be assessed. We believe though, that the Insolvency Service should take the opportunity to devise regulatory objectives for the entire insolvency regime rather than just for the regulatory regime.

9. However the increased powers of sanction by the oversight body seem to be little more than window dressing to address non-existent illegal actions. We are not convinced that the Insolvency Service as oversight regulator requires any additional powers over the RPBs. In our view, the system of regulation operates at its most effective when the oversight regulator and the RPBs work together, as demonstrated through the introduction of the complaints gateway. In our response, we have set out some suggestions as to how the Insolvency Service could play a greater role in the complaints process – for example via case conferences, receiving reports at key stages in the process and attending tribunal hearings.

10. We are also unconvinced that there is a need to take a reserve power to designate a single regulator. This seems contrary to developments or current arrangements in most other aspects of regulation. With effective oversight, the number of regulators should be irrelevant. We also believe that such a step could reduce competition and therefore be in direct conflict with the proposed regulatory objectives. The current regime with competing RPBs, appears better to meet the objective to promote competition. We would add that taking such a power could be interpreted as a lack of confidence in the current regime and therefore counter-productive given the overall aims of the consultation.

11. We would ask the Insolvency Service to consider using professional standards such as statements of insolvency practice to deliver their policy objectives. We comment in our response to Part 2 on how SIP9 could be used in relation to the fee setting process. Using statements of insolvency practice also has the advantage that the changes can be applied UK-wide – one of our concerns is that the changes proposed will only apply in England and Wales.

12. Overall, we are strongly of the view that much of the cause of the supposed lack of confidence in the insolvency regime stems from a knowledge gap amongst the infrequent users of it. It should not be left to the insolvency profession to educate creditors via the administration of a particular insolvent estate. There is much more that the Insolvency Service could do to provide a basic level of information about the operation of the insolvency regime for those who may only experience insolvency once or twice in their business career. The material the Service produces about bankruptcy and personal debt is often commended by its users, so the offering for creditors could equally be enhanced.

13. Trade bodies which represent creditors should also support their members in this area as well as providing guidance on how to avoid becoming a creditor of an insolvent entity – for example by effective credit control or detailed client acquisition processes and due diligence. We also think that more could be done to encourage participation in creditors' committees, particularly by other government departments and that use of technology could make participation in the committee process more straightforward.

14. In 2012 ICAEW launched the Insolvency Quality Forum. As part of the OFT review and subsequent consultation, some stakeholders in the insolvency process raised concerns about their interactions with the insolvency profession. They said that the only time they normally get together with representatives of the insolvency profession is when the Government minister calls them to a meeting. The Insolvency Quality Forum aims to address these concerns.

15. The forum has a strong educational slant and is aimed at understanding stakeholders' concerns. The main purpose of the forum is to encourage stakeholders to work together by promoting open and constructive dialogue about transparency, accountability and confidence

in the insolvency profession. For example as part of her review of the pre pack process, Teresa Graham has attended a meeting of the Insolvency Quality Forum which shows that the Forum can be used as a mechanism to bring together the participants in the insolvency process and break down barriers.

Part 2 – Insolvency practitioner fee regime

16. The objective underlying the fee proposals is to increase net returns to unsecured creditors. There is, however, nothing in the consultation document to suggest that the fee reforms will, in fact, meet this objective. In our view, the proposals for fixed or scale fees are unlikely to further this objective and may well be counterproductive.

17. The proposals also appear to be motivated by a desire to address negative public perception of IP fees. We would also like the public to have a better appreciation of the value of the work carried out by IPs and some of our suggestions in the response are intended to help achieve this. However, the negative perception appears to derive from an impression that IPs are overcharging (in effect, abusing their position) and this impression is misplaced. Lack of engagement of unsecured creditors combined with the current court process for challenging fees could, result in the **potential** for charging excessive fees. However, there other constraints on fees and we do not believe that fees are, in fact, generally excessive.

18. As a result, we believe that the Insolvency Service should focus on improving the existing regime (rather than imposing scale or fixed fees), in particular: to minimise risks of actual abuse occurring; to encourage creditor engagement; and to improve information available and public understanding of the regime.

19. We comment in our responses to Part 1 of the consultation on the extent to which the proposed reforms of the regulatory regime could be expected to result in improvements in these respects.

20. The 2010 reforms (and revised SIP9) were designed to address some of the concerns about creditor engagement, including by increasing the information available to creditors. While the Insolvency Service appears already to have concluded that those reforms failed, we believe that it would be useful to obtain and consider recent evidence on this more fully.

21. We believe that fee reporting requirements could be changed to address a number of the specific concerns highlighted in the consultation. SIP9 could for instance, be amended to provide for estimates to be given at the outset of the case and for periodic reporting with reference to that estimate. Given the inherent uncertainties at the outset of the case, there would necessarily be caveats to any estimate but this could be explained to creditors. As will be apparent from responses from the IPs we license and their firms, there are a number of other aspects of the current regime which might be changed, for instance the timescale for setting fees or timing of payment of fees. If the Insolvency Service is minded to take any of these forward we would be happy to consider the potential advantages or disadvantages further with the Insolvency Service and IPs licensed by us.

22. We believe that reforms in this area should apply throughout the UK and comment further on this in our response to Q13.

23. As regards creditor engagement, it may be that practices from other jurisdictions could be adapted for use in the UK, although we highlight general risks of this approach below and any specific measure would require careful consideration. For instance, if it could be established that paying unsecured creditors to attend creditor committees would increase creditor engagement without materially increasing the costs of the insolvency process (and so returns to creditors), this could be worth considering in more detail.

24. More could also be done to move away from physical meetings which can be time consuming and expensive to attend. There could be more use of telephone conferencing, e-meetings or resolutions by correspondence, all of which will be less expensive for attendees.

25. It should also be possible to increase engagement of certain classes of unsecured creditor, in particular government departments or bodies (such as HMRC). It is disappointing that more has not been done across government to encourage other departments to engage with the insolvency process already, as this is not a new issue. It sends a strong negative message to other creditors if government itself does not exercise its rights as a creditor in the insolvency process.

26. There will be limits to the extent disinterested creditors can be expected to become actively engaged, but we believe that reform of the existing regime as outlined above would largely address the concerns identified by the Insolvency Service. By contrast, adopting the more radical approach of fixed or scale fees, will, in our view, produce a much worse result, inherently so when judged in terms of 'fairness' and most likely when judged in terms of maximising net returns to creditors (or creditor engagement).

27. The Insolvency Service has based its proposals on the 2010 OFT report and the 2013 Kempson report (together with the consultation, the **Reports**). Collectively, these paint a distorted picture of the profession and create the impression that, because creditors are not engaged, there are no constraints on IPs' fees, but this is simply not the case; IPs operate in a competitive market. The fact that creditors often receive no returns results from lack of available assets, rather than IP's fees (and IPs themselves are frequently unable to recover all their costs for the same reason).

28. The Reports rely far too heavily on a finding by the OFT of a differential between charges negotiated by secured creditors and certain unsecured creditors and imply (through use of terminology such as 'overcharging') that this is 'unfair', when that is not the necessarily the case.

29. The Reports do not produce any evidence that IPs are charging in an abusive way (and Professor Kempson acknowledges that the concerns related to 'inefficiencies' rather than 'a deliberate attempt to inflate fees' and that 'the evidence base is thin'). In fact, there is clear evidence that fees are generally fair, because there are very few fee complaints (even informal ones). This inference of 'unfairness' in the current regime underlies the proposal for fixed or scale fees on the basis that they would be 'fairer' or result in 'fair value'. However, there is nothing inherently fair in a basis of charging where the results depend upon the amount and quality of realisable assets, rather than the work required.

30. We do not believe that the proposals are best designed to meet the declared objective of increasing net returns to unsecured creditors (or the other key objective underlying the existing regime of bringing wrongdoers to justice). The proposals can also be expected to have other unanticipated adverse outcomes. There is a base cost associated with every insolvency. There are many actions taken by the IP that are prescribed by law and follow a detailed process as set out in the Insolvency Rules. IPs are also required by law to fulfil functions in the wider public interest such as CDDA and AML reporting, all of which take time. If the scale rate does not allow an IP to fulfil his or her statutory obligations then they will not seek appointment in a particular case, or depending on the nature of their practice, may decide to exit the formal insolvency market. The Insolvency Service risks designing a system where an insolvent is unable to access a formal insolvency process because it is not commercially viable for that process to be provided – this seems contrary to the public interest.

31. We have answered the specific Questions below in the interests of completeness, but we do not consider that they seek to address many of the broader issues necessary for a proper perspective. We have, therefore, expressed our views on some of the broader issues arising further in the Appendix to this response.

32. We understand that this initiative is to some extent driven by a desire to address public perception of unfairness in the insolvency process, irrespective of whether or not there is, in fact, widespread 'overcharging' or abuse. However, that perception may, for the most part, be formed from those who are infrequent participants in the process and see IPs being paid when they themselves are receiving little or nothing by way of dividend. We suggest that an increase of 0.1 p in the pound in the returns they would receive (if the proposed reforms were to have the effect anticipated by government) is unlikely to change their opinion of the process or justify the risks involved making the changes.

Consultation process

33. We would have expected the consultation period for such significant proposals to have been twelve, rather than six weeks, or for an explanation to have been given for the short timeframe, given government policy on this (cited in the consultation). The fact that the consultation follows on from the OFT and Kempson reports is not sufficient reason.

34. The short timeframe means that we have not necessarily obtained substantiating data as extensively as we might otherwise have done and this is particularly pertinent when considering in detail how the existing fee regime might be improved (for instance, through additional or changed reporting requirements).

35. We would be happy to work with the Insolvency Service further on these matters (and conduct further detailed research if necessary). It is important that any reform is based on transparent, up-to-date and accurate data wherever possible.

36. While the reforms to the regulatory regime would require primary legislation, there would be scope to address changes to the existing fee regime through revisions to SIP9 or other standards (which would not need to be tied to the legislative timetable).

37. R3 has conducted a survey in the limited time available and we understand that it will include the results in its response to the consultation (**R3 Survey**). We believe that this is consistent with our views on the broader aspects of the proposed fee reforms.

RESPONSES TO SPECIFIC QUESTIONS/POINTS

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?

38. We support the introduction of regulatory objectives for the regulatory regime.

39. Any objectives should provide the framework for delivery and a benchmark against which the regime may be assessed. The Insolvency Service should be able to justify all requirements it imposes on the RPBs and the profession generally by reference to the regulatory objectives. Similarly, all policy initiatives as regards the regulatory regime should display clear links to the regulatory objectives and support those objectives. This will benefit the RPBs who will have a clear understanding of the purpose of any change and will also assist the Joint Insolvency Committee with its role as standard setter.

40. Before commenting on the proposed regulatory objectives in detail, however, we question why the regulatory objectives focus only on the regulatory regime for insolvency practitioners. As the Insolvency Service has policy responsibility for insolvency matters beyond the regulation of the insolvency profession, this is an opportunity to develop regulatory objectives for the insolvency regime as a whole. As the introduction of regulatory objectives for regulatory

regime requires a change to primary legislation this would appear to be an opportunity to include overarching objectives for the insolvency regime as a whole as the Financial Services and Markets Act 2000 does for financial services.

41. Turning now to the proposed regulatory objectives as detailed in the consultation document:

Objectives 1 & 2

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

42. We have no real concerns about the design of these two objectives, which draw very strongly on the objectives included in the Legal Services Act. However, we would question two small points of detail. Objective 2 uses the expression 'persons'. The Interpretation Act defines person as including a body of persons corporate or unincorporated. The use of person would appear unsuitable in this context as only a natural person may be an insolvency practitioner. We also question the inclusion of the phrase 'and any other principle considered to represent best regulatory practice' at 2(ii). Although this objective directly reproduces s3(b) of the Legal Services Act, in the context of Legal Services, the Legal Services Board must only have regard to 'any other principle considered to represent best regulatory practice'. The RPBs by contrast (see paragraph 51) must act in a way which is compatible with the regulatory objectives. The open ended nature of the expression 'any other principle considered to represent best regulatory practice' seems contrary to the desire to provide certainty in the approach to regulation.

43. We also note that there is no reference in the objectives to fairness in the treatment of the IPs who will be subject to the regulatory processes.

Objective 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.

44. The first sub paragraph of this objective is exactly the same as the second regulatory objective proposed in your consultation paper Reforms to the regulation of insolvency practitioners issued in 2011. We will therefore repeat the comments we made in our consultation response.

45. This objective mixes some of the ethical standards that apply to the profession via the insolvency code of ethics (integrity, objectivity, professional competence and due care, confidentiality and professional behaviour) with the need for a competitive profession. There appears to be an obvious tension within the wording of this objective. We are supported in this view by the design of the regulatory objectives in the Legal Services Act where competitiveness is a standalone objective.

46. It's also unclear which aspect of competition you are expecting the RPBs to encourage. Taking legal services as an example, the competition aspect of the regulatory objectives is interpreted as allowing access to the market rather than in relation to pricing. We're assuming that this regulatory objective also refers to the process to become an IP, as with legal services, but would welcome clarification of this. If this objective does not encompass the criteria and process for becoming an IP, we would flag that the objectives as currently designed make no reference to the licensing process, which is an omission. If competitive is meant as a reference to fees, we would refer to our response to Q19, as in other professions the use of a fee scale is seen as a barrier to competition, and the proposal to use a scale made later in the consultation could be seen as being in conflict with this regulatory objective.

47. You may also wish to consider whether paraphrasing some of the ethical principles applying to IPs dilutes the impact of those principles.

48. Sub paragraph (ii) of objective 3 is interesting as insolvency law sets out the treatment of creditors and a regulator can only monitor an IP's compliance with the law. We would not expect an IP to act contrary to the law, but the objective as currently phrased may raise false hope amongst users of the insolvency regime who may expect greater weight to be given to their interests than is required by law, and may therefore make complaints to the RPB on that basis.

Objectives 4 and 5

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

49. The consultation document offers further explanation of objective 5, but we would suggest that objective 4 is in fact suggesting a similar concept to objective 5 as an IP's fees will have an impact on the value of returns to creditors. Whatever the underlying purpose of objective 4, we'd suggest that the phrase 'and also promptness in making those returns' is unnecessary as quality of service (which would include timeliness of returns) is captured by objective 3. Overall we consider objective 4 to be unnecessary.

50. We are most concerned about the proposed introduction in objective 5 of the concept of value for money in relation to IP's fees. Firstly, we are somewhat perplexed that the concept is described as enhanced monitoring, but the impact assessment only provides costings for the investigation of fee complaints and provides no details for the additional costs of monitoring – which we believe will be significant. We revisit this issue in our response to Q11.

51. We think this objective is impractical if achieving it is placed solely in the hands of the RPBs. Value for money work is most prevalent in the public sector and takes two forms. Auditors of local public bodies have to provide a value for money conclusion as part of their audit opinions. And the Audit Commission publishes extensive guidance on how this work should be conducted. We are of course aware that the Audit Commission is in the process of being abolished, but the value for money work carried on by auditors in the public sector will continue under the National Audit Office.

52. In central government, the National Audit Office undertake value for money studies on large projects – their current work programme includes the privatisation of Royal Mail and the building of the Hinkley Point C nuclear power station. These studies can take anything from 3 to 12 months. We appreciate that most insolvency cases cannot be compared with the large scale projects reviewed by the National Audit Office (though some could be), but you should recognise that to perform a 'value for money' assessment in a case will require a detailed audit of the case whether as part of a monitoring visit or the investigation of a complaint which will be a very time consuming (and therefore expensive) process.

53. We also suggest that unless the Insolvency Service issues detailed guidance, similar to that which is produced by the Audit Commission, any reviews conducted will be subjective and will not provide the consistency of approach which is being sought.

54. We would add that monitoring and the complaints process necessarily takes place after the event, so will not achieve the objective regulatory objective of ensuring that the fees charged are value for money, except to the extent that an individual IP may change their working practices after a monitoring visit or a successfully prosecuted complaint. There is also the possibility that other IPs make take note of the publicity associated with a complaints and amend their behaviour, but overall this seems to be the wrong means to change behaviour. We suggest that a more positive approach would be an education programme or issuing of industry guidance such as SIPs, so that fees charged are 'value for money'. The Service also has the opportunity via the legislative change proposed in the consultation document to ensure that the fees charged by IPs are value for money. We are unconvinced that the changes proposed will deliver value for money, but will address this in our responses to the questions in Part 2.

55. We have also noted that, at paragraph 51 of the consultation, a further amendment is proposed which will require the RPBs to act in a way which is compatible with the regulatory objectives. We have no difficulty with the concept but would challenge the proposed wording (albeit without sight of any draft legislation which has not been included in the consultation document). Paragraph 51 appears to paraphrase section 3 of the Legal Services Act 2007, but there are significant differences in drafting which we do not think justified. The Legal Services Board must act in a way that is compatible with the regulatory objectives so far as is reasonably practicable. To be consistent with this, the Insolvency Service proposals would need to be changed so that the Insolvency Service is required to act in a way which is compatible with the regulatory objectives (rather than merely being required to 'have regard' to the objectives) and the requirements of both the Insolvency Service and RPBs would need to be qualified with "so far as is reasonably practicable'.

56. If the regulatory objectives are to be adopted it will be helpful for the RPBs to know to what extent the Service thinks that the current arrangements comply with the objectives. If any changes are required, the Service should allow sufficient time for such changes to be made.

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

57. We would oppose the publicising of the notice of intention to revoke an RPB's recognition given that this intention could subsequently be reversed by persuasive representations envisaged in paragraph 60, and on the basis that the notice of intention to revoke, might of itself cause irreparable damage to the RPB before a final decision has been made.

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

58. We don't believe it is necessary for the Secretary of State to acquire new powers to sanction the RPBs. Whilst there is a theoretical disconnect between the powers of the Insolvency Service as oversight regulator and other oversight regulators in the UK, there is no evidence provided which demonstrates that the Secretary of State actually needs any additional powers to sanction the RPBs.

59. We have the opportunity to develop an open and constructive relationship between the oversight regulator and the RPBs within the existing framework. It is in the interests of all that the regulatory system operates effectively but that can be achieved by working in together in a positive fashion rather than for the Secretary of State to take powers which suggest that there is a need for the RPBs to be controlled by directions or otherwise. We'd suggest that the acquisition of these powers by the Secretary of State will suggest to stakeholders that there are flaws in the current system which can only undermine confidence in the regulatory regime.

60. The consultation document does not include any proposed legislation to introduce the power to issue the direction, so it is difficult to comment on the detail of the directions process. The Legal Services Act, which is quoted as a model for this power includes extensive detail on the

process for issuing a direction and the parameters for issuing such a direction. We believe that consultees should have the opportunity to review any proposed legislation as the detail of these proposals will have a bearing on our views and enable us to provide more detailed feedback.

61. We would like to highlight one particular issue. Section 32 of the Legal Services Act restricts the Legal Services Board from using a direction in respect of a specific disciplinary case or other specific regulatory proceedings. So we are surprised that the consultation document suggests that the Secretary of State should be able to direct an RPB to commence an investigation into individual IPs. It is worrying that the Secretary of State would wish to acquire the ability to control individual enquiries, which could undermine the fairness of the procedure (and hence be contrary to the proposed regulatory objectives) or be seen as a means by which the Secretary of State could pursue a political agenda. In our response to Q7, we have suggested an alternative means whereby the Insolvency Service could participate in the complaints process, without the potential to compromise the fairness of the regulatory system.

62. Another issue arises in the possible use of a direction to compel an RPB to change its rules and practices in relation to disciplinary proceedings. This use of a direction could also be seen as compromising the fairness of the system (and therefore contrary to the proposed regulatory objectives). It is also the case that, with the exception of one RPB, the RPBs are subject to oversight of other bodies such as FRC, LSB, FCA, and IAASA. So a change directed by the Insolvency Service could be contrary to the regulatory objectives of another regulator. We are not suggesting there should be a hierarchy of regulators but we would like to see an obligation on the Insolvency Service to consult with other oversight bodies should they seek to make a direction about something as fundamental as an RPB's disciplinary rules.

63. We also note that the only route to challenge a direction is to do so via judicial review. This is obviously an onerous and costly process and places an RPB at an immediate disadvantage should they wish to challenge the issue of a direction.

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?

64. As stated above, we do not believe it is necessary for the Secretary of State to acquire new powers to sanction the RPBs, which includes a power to impose a financial penalty on an RPB.

65. In particular, we would object to the unlimited amount of potential penalty stated in paragraph 74. In this regard, the Service has not followed the precedent regimes they have quoted because the Legal Services Act provides that there be a maximum penalty which will be reviewed from time to time and does not provide for an unlimited penalty. The consultation document offers no explanation as to why the Insolvency Service should be able to impose an unlimited fine yet the Legal Services Board is restricted by a maximum penalty.

66. The possibility of an unlimited fine would make it very difficult for the RPBs to carry out any effective risk management planning.

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

67. As stated above, we do not believe it is necessary for the Secretary of State to acquire new powers to sanction the RPBs.

68. Again, we note that the route to challenge any such reprimand would be by way of judicial review and that judicial review is an onerous and costly process and places an RPB at a disadvantage.

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

69. Again, we note that the route to challenge any such reprimand would be by way of judicial review and that judicial review is an onerous and costly process and places an RPB at a disadvantage.

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?

70. We have serious concerns about this proposal, which we consider to be an unnecessary power and unworkable in practice. Firstly, we question the basis for the need to change as set out in paragraph 79 where it suggests that RPBs 'felt they were unable to bring disciplinary proceedings against an IP that they authorise'. We are not aware that this has ever been the case with any of the RPBs. It would be helpful if the Service could provide details of these examples so that we are able to understand the scale and the nature of the problem this proposal seeks to address.

71. While a lot is made in paragraph 79 of the objective of the Insolvency Service being able to take action similar to that available to other regulators like the FRC, what the draft goes on to say about the detail of what is intended is completely different to the operation of the FRC with the only similarity being that the Insolvency Service wants to be involved in public interest cases.

72. Neither paragraph 79 nor 80 deal with how 'public interest' cases are to be defined, whether they will be based upon the same criteria as set out by the FRC. Given the difficulties in determining where the line should be drawn with the FRC, any such legislation in this area should perhaps be more prescriptive.

73. The key problem is the machinery for determination of any public interest case as set out in paragraph 81. According to this paragraph the process would appear to be for the Insolvency Service to investigate using the types of powers set out in paragraphs 82 and 83 to reach a determination as to whether misconduct took place and then to decide on an appropriate sanction. This would then be offered to the IP who would be invited to enter into an undertaking in relation to the sanction, failing which the Secretary of State would refer the matter to the court for 'an order to impose the sanction'.

74. The fundamental problem with this is that the proposed legislation does not envisage there being any stage at which a proper disciplinary hearing will be held to allow the IP to deal with and refute the findings of the Insolvency Service investigation and it is envisaged that the Secretary of State, through the good offices of the Insolvency Service would be investigator, prosecutor and judge (determining both guilt and sanction). Despite the prior references to following the FRC model, there is no suggestion of the Insolvency Service setting up a Conduct Committee which would decide after preliminary enquiries whether there was sufficient evidence to merit a formal investigation, or an independent disciplinary tribunal to make determinations in relation to misconduct and, if so, to decide on appropriate sanction.

75. All that is envisaged instead is that, if the IP failed to accept the sanction, a Court would be asked to enforce without there being any further process. Aside from having to prescribe a whole new Court process (as it is difficult to see how it would fit into any current judicial process) we wonder whether this process could be susceptible to challenge on the basis of human rights legislation given that there appears to be no provision for a fair trial by an independent tribunal.

76. That is unless what the Insolvency Service mean is that the Court will not just be asked to sanction but will provide the forum for the IP to contest and to have a public hearing into the misconduct of which he or she has been accused. If this is what is meant then this could end up being a more costly and lengthy way of determining matters than the current FRC machinery. For instance, there would need to be a process to be followed whereby the IP

could present a defence or an appeal against the determination and perhaps also the rights to disclosure followed by a hearing to allow the hearing and cross-examination of witnesses etc.

77. Our other linked concern is the question of who picks up the likely significant costs of the new machinery which would have to be created for the Insolvency Service to have sufficient investigation capability (or for the granular investigation work being outsourced to private firms at significant hourly charge rates) and then the costs of either the machinery which would need to be put in place to provide for a disciplinary tribunal etc. or for a lengthy court procedure at the end of each investigation. If the intention of government is that these costs would be passed back to the RPB then these costs would have to be passed on by each RPB to their licensed population. This might, in turn, lead to a huge increase in the cost of insolvency licences which may then require all IPs to increase their charges in order to run a commercially viable business or this could lead to a significant reduction in the number of licensed IPs which would then in turn diminish competition and this in itself could drive higher overall insolvency costs. This possible effect would be contrary to the proposed regulatory objective to encourage an independent and competitive IP profession, and also lead to a dilution of the objective seeking to maximise creditor returns.

78. All RPBs would have to consider carefully whether they wished to continue as RPBs given the considerable risk of bearing losses between the costs to be paid out for the public interest cases and the ability to recoup all of these costs from their IPs. If all RPBs reached the conclusion that they could not continue, there would be no licensing authority for IPs as the Secretary of State is to cease direct authorisation.

79. We suggest the following as a means of ensuring greater independent scrutiny of public interest cases without all of the human rights and costs issues entailed in the current proposals:

- The Insolvency Service would agree with each RPB when a complaint is received by the RPB from the Complaints Gateway whether the case raised important matters affecting the public interest.
- Each public interest case would then be closely monitored at the various stages of the RPB's process by the Insolvency Service.
- The Insolvency Service could agree a special process for public interest cases with RPBs which could include the requirement for some or all of the following:
  - written progress reports at agreed intervals;
  - the holding of case management conferences during the case where the Insolvency Service could satisfy itself as to the nature, direction and progress of the investigation and make suggestions of other issues or matters to be followed up by the RPB
  - a report on the investigation's conclusions prior to the listing of the matter before a RPB's investigation or disciplinary committee
  - the ability to attend the RPB's investigation or disciplinary committee hearing which will adjudicate on the complaint

80. This alternative solution would allow the Insolvency Service to take a greater role in the oversight of public interest cases, satisfying itself that those matters were fully and properly investigated and determined and without incurring the very significant costs of replicating the same investigation and determination apparatus of the FRC or the costs of conduct matters being litigated in the Courts. This is particularly relevant consideration given the understanding that the Insolvency Service would only be seeking to investigate matters directly in a very small number of cases. The adoption of this alternative solution would also avoid there being any additional significant costs and the question of who would fund those costs.

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?

81. Firstly, we see no need for the Secretary of State to have a power to require information from an RPB. We are unaware of any occasion where an RPB has refused to provide information to the Insolvency Service.

82. Also the memorandum of understanding between the Secretary of State and the RPBs requires the free sharing of information between the RPBs and the Secretary of State. The memorandum also requires the bodies to furnish the Secretary of State with sufficient information to enable the Secretary of State to be satisfied that the bodies are meeting its legislative and otherwise agreed obligations.

83. We have also noted that the power proposed extends much further than s1224 of the Companies Act, in that this new power extends to an IP's employer, employees and other third parties. We would be interested to know why the Insolvency Service is of the view that this wider requirement is necessary as the consultation document doesn't offer any explanation of this.

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

84. We do not agree with the proposal.

85. Outside of mainstream financial services, there are few professions where there is a single regulator. There are multiple regulators in audit, legal services and 'non mainstream' financial services. Multiple regulators should not necessarily lead to inconsistency - the key is effective oversight of those bodies. The structure for legal services regulation is a new model having become fully operational on 1 January 2010. The adoption of this structure was subject to extensive consultation and review.

86. It is interesting to note that this consultation uses the model of the Legal Services Board on which to base the regulatory objectives. The Legal Services Board sees multiple regulators as a key constituent in its drive to encourage a competitive market, so it could be argued that a single regulator would be contrary to competition as a regulatory objective as proposed in the consultation.

87. We also question whether the introduction of such a power would have a negative effect on confidence in the current regime as it could be seen to demonstrate on the part of the Insolvency Service a lack of commitment to the changes proposed for the regulatory regime and a lack of confidence in its part in the RPBs.

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

88. As noted above, we do not support the proposal to designate a single regulator.

89. We think it would have been helpful, even if this is only a proposal to take a reserve power, to have prepared an impact assessment for this proposal. A proposal which may seem attractive at a theoretical level, may seem less so when the costs of such a proposal are set out.

Part 2 - Insolvency practitioner fee regime

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

90. We are not convinced that giving the RPBs the role envisaged will achieve the aims sought. We also note that there are currently few complaints about fees and any additional regulatory requirements should therefore be proportionate. There is a risk that the Insolvency Service's

proposals on scale rates or fixed fees would result in an increase the number of complaints. We comment on these issues further in the Appendix.

91. Turning, now to the costs, we are somewhat perplexed that the concept is described as enhanced monitoring, but the impact assessment only provides costings for the investigation of fee complaints and provides no details for the additional costs of monitoring – which we believe could be significant.

92. When carrying out insolvency monitoring visits, ICAEW's reviewers already look in detail at the insolvency practitioner's time records. They will question the time recorded against specific tasks, where it doesn't appear commensurate with the work evidenced on the case files; where it appears to have been carried out by a more experienced member of staff than we would consider appropriate; or where it appears excessive. For larger cases (where a significant number of hours have been worked) and where the time records are extensive, (running to several hundreds of pages) this would currently be done on a sampling basis. We understand from a recent meeting with the Consultation Policy Lead that this is the type of work envisaged by the reference to 'Enhanced monitoring by the regulators – providing value for money'. If that is the case, we wouldn't expect this change to increase our monitoring costs. But if the intention is for a much greater level of review, as is understood by value for money reviews conducted by other bodies (see our response to Q1) and for the RPBs to effectively conclude on each file reviewed that the IP's costs represent value for money, we would expect there to be a significant impact on our monitoring costs; potentially doubling them.

93. The costs of the complaints process seem reasonable, though we think that the costs of the committees may be overstated – it is unlikely that every case that an RPB investigates will lead to a committee hearing. However, there are risks which could increase the costs beyond those stated. Legal costs will increase significantly if there is an increase in appeals or cases taken to judicial review. Any necessary up-front costs for example process and systems development would also need to be considered. We are also uncertain about the treatment of any fines paid.

94. Any process which increases the costs to the RPBs will lead to an increase in the costs charged for an insolvency licence. IPs will then have to decide whether to bear that increased cost or to pass these on to the users of their service.

95. We also question whether creditors will really benefit from having a system to raise complaints about fees, unless there is more done to educate creditors as to the purpose of the disciplinary process. A creditor unfamiliar with the regulatory framework may expect that the disciplinary process would deliver greater returns in a particular insolvency rather than action being taken against a particular IP. Unless there is serious expectation management amongst the creditor population, confidence in the regime could in fact decline as creditors may not receive the results they were expecting.

96. We also think it will be challenging for some creditors to grasp the concept of 'value for money'. An unsophisticated creditor may see an IP receiving payment when they themselves have lost money and simply complain on that basis. If their complaint is rejected, this could also impact on confidence in the regime overall.

97. An alternative approach would be to consider a low cost but binding fee arbitration system. ICAEW already operates an arbitration scheme to deal with fee disputes and we would be happy to provide you with more information about how this scheme works.

98. When the possibility of the RPBs dealing with fee complaints has been debated previously there have always been criteria applied to prevent vexatious complaints (similar to those applied to an application to court). We'd expect to see similar entry criteria for any new system, including any arbitration scheme.

99. As we state in our response to Q1, the monitoring process and the complaints process necessarily takes place after the event, so will not achieve the objective regulatory objective of ensuring that the fees charged are value for money, except to the extent that an individual IP may change their working practices after a monitoring visit or a successfully prosecuted complaint. There is also the possibility that other IPs may take note of the publicity associated with a complaint and amend their behaviour, but overall this seems the wrong means to change behaviour. We suggest that promoting an education programme or issuing of industry guidance such as SIPs, so that fees charged are value for money, would be a more positive and proactive approach.

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?

100. ICAEW already investigates cases for potential misconduct where there appears to us the possibility that excessive fees have been charged either by way of very high hourly charge-out rates (in comparison to fees charged by the same IP on other cases) or charging for work which we can prove was not carried out. We would also investigate complaints where it was alleged that fees were not properly authorised. And as stated in our response to Q11 ICAEW's reviewers already look at the fees charged. We take these actions now without reference to any regulatory objective.

101. We could in theory run a service for the handling of complaints about fees, helping to avoid challenges to fees being heard in the courts but this presents a number of practical challenges:

- The assessment we make in considering a complaint, and which could be made by our investigation or disciplinary committee, will necessarily have to be a subjective judgement both in terms of appropriate hourly rate and in the time spent on particular tasks. This judgement would be susceptible to challenge by an IP who might easily be able to obtain expert evidence suggesting that the hourly rate and / or time spent was justified. Such matters could end up being challenged in the High Court.
- Assessments made on the appropriate hourly rate and the amount of time spent on a piece of work may end up being inconsistent between those making the assessment within an RPB or between RPBs. This inconsistency could be reduced considerably if the Insolvency Service were to publish detailed guidance on what are the acceptable parameters for hourly rates (which may have to reflect different geographic areas and complexity of cases) but we think that this would be difficult to do.

102. We also believe that the Insolvency Service has significantly underestimated the work involved in assessing whether an IPs fees are value for money on a case by case basis (see our response to Q1 and Q11). In our view, it would be more appropriate for professional standards such as the SIPs to set out a framework which represents a means of achieving 'value for money' which can be applied positively in each and every case. It is worth noting that the standard setting body now includes 3 lay members – Association of British Insurers, HMRC, and Institute of Credit Management, and that all proposed new standards are subject to scrutiny via a public consultation, so the views of all participants in the insolvency process are taken in account in the design of standards.

103. It could also be argued that the Service has the opportunity via the legislative change proposed in the consultation document to ensure that the fees charged by IPs are value for money. We are unconvinced that the changes proposed will deliver value for money and comment further on this in the Appendix.

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?

104. It will always be helpful to provide information to creditors which will enable them to exercise their rights and participate fully in the insolvency process. We all recognize that there will be some creditors who are infrequent or one–time participants in the insolvency process and will need detailed guidance to assist them.

105. This is therefore the opportunity to mention something touched on only briefly in the introduction to the consultation document – the jurisdictional scope of the proposals. The introduction states that these proposals will not apply in Scotland (paragraphs 20-23) or Northern Ireland (paragraph 25). And certain insolvency procedures are also scoped out of the proposals (see paragraph 112).

106. If these changes are considered necessary, then they should be applied UK wide irrespective of the implications of devolution. It is disappointing that the Insolvency Service has not worked more closely with colleagues in other jurisdictions to devise proposals for the UK as a whole. Creditors will not necessarily distinguish between the jurisdictions and if the systems differ this will be an obvious cause for confusion, which in itself could have an impact on confidence in the regime.

107. This is where the use of standards rather than legislative change would be beneficial as a standard can be applied UK wide.

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?

108. We do not agree with the proposals for fixed or scale fees and providing for further exceptions would not overcome the objections. However, the proposal appears designed to protect, in particular, those unsecured creditors who are assumed not to understand the processes (for instance, because they only rarely encounter insolvency) and who would not be expected to become engaged because they are owed a small proportion of the debt and might not expect to have influence. In other cases, creditors could be expected to exercise requisite control. There would, therefore, be a logic in excluding cases where there are any government creditors or creditors regulated by a body such as FCA (including banks), as they can be expected to understand the position and exercise control (if no-one else does). Where any creditor is (or creditors who are connected are) owed a substantial proportion of the unsecured debt, they should not be indifferent and relevant cases should also be excluded.

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?

109. Given our objection in principle to the proposed changes, we do not comment on the detailed proposals in Annex A at this stage. Should the Insolvency Service proceed as proposed, we would have comments as our cursory review already indicates a number of problematic provisions.

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

110. We think that there will be an adverse impact. Please see our Major Points above (and the Appendix).

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?

111. We agree that the proposed changes should apply as narrowly as possible (if they must apply at all), but do not necessarily agree with the Insolvency Service's rationale for this.

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?

112. We do not agree that a scale should be imposed. We comment more fully on this issue in the Appendix, but note here that RICS abolished its fee scales for valuation as far back as 2000 after an adverse report from the Monopolies and Mergers Commission concluded that they restricted competition and worked against consumers and were against the public interest[1]. If the Insolvency Service is intent on pursuing this course of action it will need to consult with the Competition Commission to ensure that mistakes of the past are not being repeated.

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?

113. We do not believe that any one scale will be 'appropriate' (or necessarily reflect 'fair value') for all cases. It is disappointing that neither the consultation document nor the impact assessment contains an assessment of the commercial viability of what is being proposed.

114. Professor Kempson's report was published in July last year and it would have been helpful had the Insolvency Service developed an evidence base for the use of scale rates in the consultation. If the scale rate proposal is to be pursued a great deal more work needs to be done to establish a feasible scale and we would be happy to do further research to provide an analysis of the impact of scale rate on particular case types and asset levels.

115. One of the regulatory objectives proposed is for 'a competitive IP profession'. As noted above, in an analogous case the Monopolies and Mergers Commission concluded that scale rates restricted competition.

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

116. In our view the current regime should be retained and any specific concerns regarding cases of abuse or other failings addressed through more targeted reforms. We explain more fully in the Appendix why we think hourly rates are an appropriate form of charging and some of the risks of adverse consequences should the proposals for fixed or scale fees be implemented.

Impact assessment questions

Q21. Do you agree with this estimation for familiarisation costs for the changes to the fee structure?

117. 'Familiarisation' would also need to cover assessment of the impact of the proposed regime on the income and returns to an IP's business, possible effect on normal hourly rates (where still permitted) and, possibly, introducing procedures for assessing whether or not a case should be accepted if likely to be uneconomic. The estimate seems low.

[1] http://www.rics.org/uk/knowledge/more-services/guides-advice/chartered-surveyor-fees/

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?

118. N/A

Q23. To what extent do you expect the new fee structure to reduce the current level of overpayment?

119. Use of terminology such as 'overpayment' is inappropriate for reasons outlined elsewhere in this response. We do not believe that there is currently sufficient evidence to assess the impact of the changes on IP's fees. We think that there is the possibility that the proposals could result in an increase in the IP's fees in some cases.

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?

120. There is bound to be an increase in costs, even if this would be a small increase, if an IP has to perform an additional action.

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?

121. Given the time made available to respond to this consultation it would be difficult to acquire data to support or refute any of the assumptions on the impact assessment. We would, however, question the benefits of making these changes if the benefits in a best case scenario only equate to 0.1p in the pound.

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?

122. We do not think that the proposals result in a 'fairer' result at all, so do not comment on particular weightings attributed.

Q27. Do consultees believe these measures will improve the market confidence?

123. No. See Q28 below.

Q28. Do consultees believe these measures will improve the reputation of the insolvency profession?

124. This should be treated as our response to Q27 and 28.

125. The impact assessment contains no measure of either market confidence or the reputation of the insolvency profession.

126. For market confidence, the impact assessment relies on the belief of the 2010 OFT report that, if confidence increases, users will approach IPs to provide other services or seek advice earlier. We struggle to see how this can genuinely be used as a measure of confidence, given that most people approach an IP only in times of crisis. It would have been helpful had the consultation included an evidence base to support this measure, but if this idea is to be pursued it would be necessary to obtain relevant data now against which to measure the success (or failure) of the proposed initiatives (and we would be happy to assist in this).

127. These questions presuppose that the perceived low levels of market confidence and reputation suggested in the Reports are justified on an objective and substantiated basis, which we do not think is the case. If we turn to objective measures, a different picture emerges. In particular, the World Bank report referred to at the end of this response can be expected to be objective and shows that the UK remains one of the most effective jurisdictions for resolving insolvency.

128. We should also recognise that the majority of the repeat users of the UK insolvency regime, such as secured creditors are satisfied with the service they obtain from IPs. The dissatisfaction in the insolvency process and with the profession stems in the most part from those who are infrequent participants in the process and see IPs being paid when they themselves are receiving little or nothing by way of dividend. We suggest that an increase of 0.1 p in the pound in the returns they receive is unlikely to change their opinion of the process.

129. Overall, we are strongly of the view that much of the cause of the supposed lack of confidence in the insolvency regime stems from a knowledge gap amongst the infrequent users of the insolvency regime. It should not be left to the insolvency profession to educate creditors via the administration of a particular insolvent estate.

130. There is much more that the Insolvency Service could do to provide a basic level of information about the operation of the insolvency regime for those who may only experience insolvency once or twice in their business career. The material the Service produces about bankruptcy and personal debt is often commended by its users, so the offering for creditors could be equally enhanced. Trade bodies which represent creditors should also support their members in this area as well as providing guidance on how to avoid becoming a creditor of an insolvent entity – for example by effective credit control or detailed client acquisition processes and due diligence.

131. In 2012 ICAEW launched the Insolvency Quality Forum. As part of the OFT review and subsequent consultation, some stakeholders in the insolvency process raised concerns about their interactions with the insolvency profession. They said that the only time they normally get together with representatives of the insolvency profession is when the Government minister calls them to a meeting. The Insolvency Quality Forum aims to address these concerns.

132. The forum has a strong educational slant and is aimed at understanding stakeholders' concerns. The main purpose of the forum is to encourage stakeholders to work together by promoting open and constructive dialogue about transparency, accountability and confidence in the insolvency profession. For example as part of her review of the pre pack process, Teresa Graham has attended a meeting of the Insolvency Quality Forum which shows that the Forum can be used as a mechanism to bring together the participants in the insolvency process and break down barriers.

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APPENDIX

Fee proposals - broader issues to be taken into account

IP fees are not unfair - competitive constraints apply and recovery rates are low

1. Professor Kempson acknowledges that concerns on fees related to 'inefficiencies' rather than 'a deliberate attempt to inflate fees' and that 'the evidence base is thin'. We agree that there is no evidence of generally inflated fees (or 'overcharging'), although there will of course, be isolated examples of bad practice as in any walk of life.

2. The implication from the Reports is that because unsecured creditors fail to exercise their powers of control, IPs are unconstrained and could charge what they want. This is far from the case. In administrations (the only example covered by the OFT, but the same would apply more broadly), IPs are often appointed by the directors who (or whose lawyers) will typically seek competitive bids for work. Indeed the trend for aggressive tendering process appears to have increased in recent years, in particular in the context of s98 meetings.

3. This competitive environment has led to cost pressures and redundancies in many firms which carry out insolvency work and a resulting increase in the number of IPs operating as sole practitioners or micro practices. This demonstrates both that there is competition, and in itself results in increased competition, at least at the smaller end of the market. Feedback we have received suggests that, at the lower end of the market, at least, fee rates (and income) are declining due to competitive pressures.

4. The OFT report itself (point 4.13) shows that larger firms (which typically have higher hourly rates) are used more for higher value cases. While this relates to secured creditors, it is indicative of a market which is competitive and sensitive to differing hourly rates.

5. In short it is not right for the Insolvency Service to characterise the charges to unsecured creditors as being above the 'market rate' just because they may be different to rates charged to secured creditors.

Differential in pricing for different clients is not in itself unfair

6. In concluding that there is 'unfairness' in the current charging regime, the Reports rely heavily on the OFT conclusion that unsecured creditors are charged 9% more on average than secured creditors (once the secured creditors have been paid in full).

7. The OFT data used is now considerably out of date. In particular, it does not take account of the impact of the reforms introduced in 2010. The methodology used is somewhat impenetrable but, even if we were to take the findings at face value, we do not agree with the conclusions drawn from them by the Insolvency Service. In particular:

    - There is an inference permeating the Reports that IPs are increasing their fees to take advantage of lack of control by unsecured creditors, through use of terms such as 'overcharging', 'increased fees' and the like. This inference is unfair to IPs. As noted above, Professor Kempson makes clear that the differential is not indicative of abuse on the part of IPs. We believe that this should be accorded far more prominence in the analysis than has been the case to date and that neutral terminology more objectively reflecting the facts (such as 'price differential' or 'undiscounted fees') should have been used.

    - It is natural in a competitive market for certain categories of buyer to be able to negotiate greater discounts than others. Given the strong negotiating position of the banks including prospect of repeat or additional work, it is difficult to see why a differential of, say, 9% should be considered inherently concerning. The differential, for instance, between prices charged for consumer goods to wholesale or retail customers could be expected to be much higher (and still not exploitative of consumers).

- The Kempson report notes that banks surmise that, even after the reductions they have negotiated, 'work was being done on a lower profit margin rather than a loss'. In fact, this could be a wrong assumption, because IPs could do some work at a loss but maintain overall profitability elsewhere. However, if the aim of the Insolvency Service is to reduce IPs fees in aggregate to a break-even level, it seems unlikely that a high quality profession will be sustained.

- Any discount afforded to secured creditors also benefits unsecured creditors, whether or not they are offered the same terms once the secured creditors have been repaid. This is because the reduced fees will increase the amount of net realisable assets available to unsecured creditors.

- Even if regulatory reforms were to result in convergence of rates applied between different classes of creditor (by whatever means), it cannot be supposed that charges would necessarily fall in aggregate. In order for business to remain economic, IPs might be unable to offer banks the current level of discounts (where work for unsecured creditors would be involved).

8. We therefore disagree that a differential shows 'market failure'.

9. The consultation notes that 'despite numerous discussions with the profession and the regulators little has changed to address' the issue. In fact, the regulations were changed in 2010 and SIP9 has also been updated. We believe that further time is required to judge the impact of those changes. It is difficult to see that the industry could itself have introduced the sort of changes proposed, which require government action. In particular, imposition of common scale rates by the industry would have been (or at least appeared to be) anti-competitive.

Low level of complaints

10. The impact assessment on regulatory change notes that there is a low level of complaints against IPs, particularly considering the nature of insolvency (which will typically involve loss). While the cost implications may in part account for a low level of formal complaints through the courts, our understanding is that the level of informal complaints (eg, to IPs) is also very low. The low level of fee complaints has recently been confirmed in Parliament[2], where it emerged that fee complaints are low in absolute terms (13 in 2013) and relative to all complaints (2% in 2013) and at their lowest levels (in absolute and relative terms) since 2010. The R3 survey also substantiates this.

11. General lack of engagement during the insolvency process would not itself explain a low level of complaint at the end of the process were there to be genuine widespread concern about fee levels. The obvious conclusion from the low level of complaints is that IPs generally charge fairly.

12. Following the OFT report, the Insolvency Service, with the support of ICAEW, introduced the single complaints gateway to address the concern that creditors may not know where to address complaints given the complexity of the regulatory regime. Neither the Insolvency

2 http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm140311/text/140311w0002.htm#140311w0002.htm_spnew20

Service, nor the Kempson report say whether or not this initiative has been effective (in reducing confusion), nor how many legitimate complaints on fees have been received through the gateway. Our understanding is that there have been very few indeed.

13. Some of our practitioners recall the pre-1986 regime, when fees were paid according to a fixed scale and we are informed that the level of complaints was far higher then than it is now. Should the Insolvency Service proceed with its proposal for scale fees, there is a risk that complaints will increase (irrespective of any reforms to the regulatory regime on complaints).

14. Despite this, the impact assessment cites Professor Kempson's objective of 'reducing the number of complaints and challenges relating to fees' as the starting point for reform.

Scale rates are inherently unfair compared to hourly rates, do not provide certainty or give creditors control and do not incentivise desired behaviours

15. Unless knowingly agreed, a scale fee (percentage of realisations) is inherently unfair. Scale fees applied before the reforms which led to the 1986 Act and the *Cork Report* identified the key difficulty, that 'they result in poor recompense for the liquidator in relation to the amount of work involved in a complex case and are over-generous on occasions (eg where the only asset is a bank account)'. Sliding scales would also need to be adjusted to take account of inflation. Another difficulty is that IPs are expected to do work which is not directly related to realisations or distributions. The consultation refers to some elements of this, but is not comprehensive (for instance, it does not consider work done by IPs in dealing with creditor queries or the like). An immense amount of work is required to investigate the position in insolvencies, including reviewing records, interviewing directors, doing money laundering checks, irrespective of whether or not there will ultimately be any assets available.

16. By contrast, there is nothing inherently 'unfair' about hourly rates. On the contrary they will typically be the fairest mechanism (which is why use remains widespread). They are fair to IPs because they are set on a basis reflecting the IPs costs and therefore enable an IP to operate at economic level, or at least know if work is uneconomic. They are fair to creditors because IP rates can be compared on that basis, so encouraging competition and the benefits that a competitive market brings. This is not to suggest that they cannot be open to abuses of the kind outlined in the Kempson report.

17. Any suggestion that a scale fee produces 'certainty' for creditors is also misplaced, because the fee will be based on the amount of realisations (or distributions) which will be unknown until the end of the process. An unsecured creditor will still not know at the outset what return he can expect or how much (in absolute terms or terms of 'fairness') an IP will be paid for his efforts.

18. Neither will scale rates result in more unsecured creditor 'control'. Indifference of unsecured creditors will not be altered merely because of a type of charging mechanism applied. Indeed, where scale rates apply, there will be nothing to control, because the rates apply irrespective of work done and creditor engagement could be expected to decline. It may be that the rates will be so uneconomic in particular cases, that IPs themselves will be motivated to bring about creditor engagement (if possible) in order to have an alternative charging rate applied. In cases where realisable assets are low, it is perhaps more likely that an IP would decline the case than make these efforts with uncertain result. If the scales are designed so that IPs would need to seek alternatives even in cases with high levels of realisable assets, there is a risk that, in the face of continuing lack of engagement by creditors, an industry of creditor representatives encouraged by the IPs themselves could develop (at the expense of creditors).

19. Scale fees may also reduce effectiveness of the insolvency regime in relation to other government objectives, in particular in bringing wrongdoers to justice and to increasing net returns to unsecured creditors (on which we comment further below).

20. Hourly rates incentivise IPs to pursue even difficult and relatively small claims, so long as there will, ultimately, be sufficient assets, at least, for the IPs to be paid. A scale fee provides an incentive to recover only the easiest or largest assets. An IP may not pursue a claim at all if the work required would be uneconomic on scale rates, and the creditor would then recover nothing.

21. This is not to suggest that IPs are so motivated by profit that they would fail to carry out work to recover assets (or other work) whenever it would be uneconomic for them to do so. Indeed, evidence suggests that this is far from the case under the current regime. IPs frequently carry out work where there may be insufficient assets recovered to pay their charges and charges are frequently ultimately written-off. Nevertheless, it is clearly preferable for the fee regime to incentivise the desired outcomes, and the proposed scale rate (or fixed fee) regime is not best designed to do so.

Levels of hourly rates are reasonable, scale or fixed rates at any level will produce unreasonable results in some cases

22. Professor Kempson notes that much the disquiet about the reasonableness of IP's fees stems from the headline hourly rates. However, neither the OFT nor Professor Kempson establish that hourly rates currently charged by IPs are in themselves unfair (particularly when compared to other professionals such as accountants or lawyers acting as advisors or otherwise than as IPs). Neither does the consultation seek to establish to what extent those rates have changed over recent years. Any analysis of rates needs also to take account of relevant risks, in particular that an IP has personal liability and the Reports fail to do so.

23. In many cases (in fact, typically), there will not be sufficient assets for the IP to recover the full amount of the fees chargeable on an hourly basis because there will be insufficient assets available to pay them. From our enquiries (and research noted below in relation to the Official Receiver's scale) it is clear that the level of write-offs is substantial, in the region of 40%. This is also supported by the R3 Research. The use in the Reports of 'headline' hourly rates therefore gives a misleading impression of the level of fees actually paid to IPs and the resulting 'disquiet' is misplaced.

24. As regards scale rates, a number of options are considered in the consultation, including use of the Official Receiver's scale rate. We do not see any particular logic in reference to this scale. While much work done by IPs is for the public good, unlike the Official Receiver, IPs operate in the private sector and a competitive environment and assume the risks of business (as well as personal liability). This view is backed by judicial authority. For instance, Ferris J in *Mirror Group Newspapers v Maxwell 1998* said of the Official Receiver scale that 'by its very nature that scale is one applicable to the services of a public official'.

25. Given the brief consultation period, we have not had the opportunity to develop a detailed evidence base regarding the likely effect of any given scale rate, but we have conducted some limited research. In addition to indicating that IPs are already generally writing off significant costs, it shows that fees based on the Official Receiver's scale rate would not adequately recompense the level of work required. Our research was based on a sample of insolvency reports filed at Companies House, for different case sizes. On these cases, the IPs were unable to recover between 35% and 52% of their time costs. Also, across the sample, fees based on the current Official Receivers' scale rate would have been 15% to 19% of the time actually incurred. With increasing regulatory and compliance requirements and a decreasing asset base, we do not believe this would support a viable insolvency industry. The R3 Survey also highlights consistent underpayment (or non-payment) to IPs, particularly in smaller practices.

26. Secretary of State fees includes a band of 100%. This is akin to a fixed fee (so long as there are sufficient assets to cover that band). While this route might be appropriate to cover some elements of an IPs work carried out irrespective of returns (such as initial investigations), it

would not overcome the inherent difficulty that a scale does not necessarily relate to work actually done as cases vary in complexity etc.

27. Comparison with the official scales does, however, highlight just how lucrative scale fees can be (compared to work done). In a case with £50,000 of assets and no distribution, the total fees of the Official Receiver and Secretary of State would be £15,220. The fact is that scale fees can result in large payments for little work, as well as inadequate recompense for some types of difficult and important work.

28. It follows from our comments on the inherently unfair nature of scale rates that there is no 'right' rate for any scale. Each case is different and if a scale rate is 'fair' for one case, it can be expected to be 'unfair' for another (in contrast to hourly rates). We do not, therefore, comment further on the possible rates as such, save to note that the risks for the Insolvency Service in setting rates too low could have severe adverse consequences (on which we comment further below).

29. Professor Kempson herself clearly saw perils of scale rates as she suggests that it might be more 'promising' to explore an approach which allows for different methods of charging for different aspects of a case, as provided in the 2010 rules. We agree that it might be possible to reduce (although not eliminate) the intrinsic unfairness of a mandatory scale fee with a more nuanced approach, but the Insolvency Service has ruled this out as being, in effect, too complicated (or having the 'potential for over charging' in respect of hourly elements). We do not necessarily agree that it would be too complicated to address the obvious shortcomings of current proposals in this sort of way. However, the fact that it would be necessary to do so and the complications that would inevitably arise, merely serve to highlight that the basis of hourly charging would remain preferable.

30. The Reports compare the position in the rest of the UK with the position in Scotland. We are unclear to what end the comparison is made. Hourly rates in Scotland might be lower than elsewhere for a variety of reasons including lower overheads. If it is correct that a high proportion of all fees in Scotland are reduced through independent scrutiny, that scarcely suggests that the regime is a working effectively. It is also possible that where fees are routinely subject to reduction, the base rates might be increased to anticipate this.

The fee proposals should not be expected to increase net returns to creditors

31. The consultation document might be taken to suggest that, were it not for IP fees (but nevertheless IPs carried out the necessary work), creditors would always recover some of their debt. For instance, the Forward refers to 'ensuring that there will be funds available to make payment to creditors' and one of the objectives is stated to be that 'not all realisations are swallowed up in fees and remuneration.' We take it that the Insolvency Service does not mean this literally but, as it is potentially misleading, note here that it is self-evident that creditors will receive nothing if there are no assets (or no assets after payment of other fees, such as those of the Official Receiver or Secretary of State).

32. In fact, it is often the case, probably increasing in recent years, that there are insufficient assets to result in any meaningful distribution to unsecured creditors (irrespective of IP fees). This is in part attributable to companies granting security to creditors more extensively and creatively than in the past, but also to more sophisticated and widespread use of retention of title mechanisms by suppliers to companies. Assets, such as stock, which may appear to be an asset of the company, in fact, remain assets of the supplier who is able to recover them. The supplier is not a creditor as such (secured or unsecured), but is able to recover his assets. A scale rate would not recompense an IP for work carried out in establishing legal claims of assets of this kind, but it would be part of the IP's role to do so.

33. In addition to fees of the Official Receiver and Secretary of State, VAT (If not recoverable) and the costs of other professionals billed as disbursements (such as lawyer's fees) all serve to

reduce the amounts available. Bonding costs are imposed upon IPs by law. If the government wishes to reduce the costs of insolvency, it might look to reducing these costs. We note, however, that the Insolvency Service is increasing Official Receiver's fees[3].

34. If IP's fees are reduced through fixed scales, it seems reasonable to suppose that some work that might otherwise have been conducted by an IP within the IP fee, will be done elsewhere, possibly (eg for lawyers) billed on an hourly fee basis and charged as a disbursement (resulting in no reduction in overall levels of fees).

35. Even if scale rates were to be set at a level which would reduce IP's fees compared to the current regime of hourly rates, it is unclear what evidence the Insolvency Service relies on to conclude that this would increase net amount recovered. As noted above, scale rates (or fixed fees) are not necessarily best designed to incentivise IPs to maximise returns. Returns to unsecured creditors are also dictated by the priority order set by government under insolvency legislation which, for instance, gives priority to secured creditors.

36. The Kempson report makes some selective international comparisons, in particular regarding practices in Australia, Austria and Germany. While it is completely appropriate to consider whether good practices abroad could usefully be applied in the UK, a cautious approach is required as controls over fees cannot be looked at in isolation from other aspects of a regime in judging effectiveness.

37. We have not done a full comparative study (the time allowed would not permit apart from anything else), but, by way of illustration, the effectiveness (or otherwise) of the Australian regime, taking into account recent proposed reforms, was considered by a prominent Australian law firm[4], based on various industry sectors (considered to be generally representative). Of the 5,698 companies covered that went into external insolvent administration in the period July 2010 to June 2011, 5,332 (or over 93 per cent) of them paid creditors no dividends at all. In the author's opinion 'Despite the significant impact of insolvency on unsecured creditors and shareholders, there does not appear to be anything in the Australian law, or in the current legislative programme of reforming insolvency law, that will improve these outcomes.' In considering whether any particular foreign practices should be applied in the UK, careful consideration is therefore required and any particular proposal would need to be considered in the UK context. We would be happy to consider this further, but more time would be required to do so meaningfully.

Recovering assets and pursuing wrongdoers; Jackson reforms

38. The Reports do not describe the efforts that are often required to recover assets for unsecured creditors. In practice, assets may have been removed from the company shortly before insolvency, or generally hidden, often for the benefit of directors or persons connected to them.

39. Pursuing these assets can be difficult, time consuming and costly, involving Counsel and Solicitors fees. It may be that claims may not ultimately result in meaningful returns to creditors, yet it is in the public interest that they be pursued.

40. IPs are personally liable for pursuing claims and should under no circumstances be required to pursue action where they may be personally exposed to irrecoverable costs.

41. Conditional Fee Arrangements and After the Event Insurance facilitate action by IPs in this context. However the exemption from the Jackson reforms was expressed by the government

[3] http://insolvency.presscentre.com/Press-Releases/Changes-to-the-fees-charged-by-the-Insolvency-Service-announced-69a30.aspx

[4] http://whoswholegal.com/news/features/article/29821/current-trends-insolvency-australia

to be a temporary measure. If IPs are to have the best available tools to recover amounts owed to creditors, it is important that this exemption is made permanent.

Unintended Consequences

42. As noted above, IP's charges cover work done in connection with disqualification of unfit directors. The government has expressed concerns[5] that the director's disqualification regime is failing adequately to sanction directors who fail to comply with the law. There is a risk that paying IPs solely by reference to realisations or distributions will reduce incentives to carry out this work to high standards and undermine this objective of government. This is an important issue for unsecured creditors who wish to see wrongdoing addressed. The Insolvency Service itself could improve market perceptions and confidence in this respect by pursuing more vigorously cases of wrongdoing reported by IPs, particularly in serious cases where sentences might exceed six years.

43. If scale fees are set at a level which reduces IPs' fees (in aggregate), there is a risk that the work will become uneconomic and IPs will leave the market, particularly in the case of smaller practices. This will reduce choice and competition in the market. It will also risk driving down standards.

44. Another possible knock on effect would be a reduction in cases where unfit directors are identified if a company remains outside the formal insolvency system as a zombie company or left as a shell on the Companies House register. Again, it would be inappropriate to charge RPBs with responsibility for practices that result from a fee regime imposed by government which can be expected to have these consequences.

45. Another possibility is that low returns would result in changes in the market akin to those seen in the IVA market with so called IVA 'factories'. The Reports do not contain any meaningful analysis of that sector, such as whether it is currently operating to produce best long term results for all stakeholders (debtors as well as creditors) or whether similar approaches could, in fact, be applied to other sectors. If this is an intended or expected outcome, this issue should be considered more fully and a further consultation conducted on that basis, as it is not without risks. Our assessment is that fees are controlled to such a level that anyone with more complex financial affairs struggles to find an IP willing to act as supervisor to an IVA and so is left in debt limbo, or contemplating bankruptcy.

46. If the proposed new regime were to be successful in reducing IP fees (or its failure to do so were not to be apparent), it is difficult to see why creditors would choose to play a more active role in the insolvency proceedings. This seems contrary to the aim to encourage greater creditor control of fees, which in itself relies on active participation by creditors and may even lead to fewer creditors' committees being formed than are currently.

The supposed benefits of the proposals do not justify the costs and risks

47. The impact assessment highlights a number of potential concerns about the proposals:

'..if the percentage fee is too low, more work will then fall to the Official Receiver, with costs incurred with no benefit or prospect of repayment (for instance where assets are not investigated and do not materialise or where costs of realising them are more than the value of the asset). In some cases, this could mean that insolvent companies could continue to trade with a detrimental impact on the economy as a whole.....Creditors will be out of pocket as their debts will be written off with no prospect of a return and more assets will be written off.'

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[5] https://www.gov.uk/government/consultations/company-ownership-transparency-and-trust-discussion-paper

We agree with this, but that suggestion in the impact assessment that the concerns will be 'overcome' through regulatory objectives of RPBs and monitoring is fanciful. The consequences would result from a fee regime imposed upon the profession by the government and RPBs would not be in a position to do anything about it.

48. The private sector cannot be expected to take on cases that would be uneconomic. They will fall to the Official Receiver. The government will, therefore, need to take this into account in setting any scale and be prepared to make resources available to the Official Receiver. Whether or not an enlarged Official Receiver service would ultimately produce better returns for creditors than the private sector is a matter of speculation, but we have seen no evidence to suggest that it would.

49. The Insolvency Service itself recognises that the 'quantifiable benefits' of the proposal are difficult to quantify. We agree with this, because we think it completely unproven that, even if the reforms were to reduce IP fees in aggregate, this would result in a corresponding increase in returns to unsecured creditors. The lower estimate of benefits in the consultation is less than the estimate of increased costs of regulation and industry costs of 'familiarisation', so that, even on the Insolvency Service's own estimates, this could cost more than it saves in quantifiable terms.

50. As regarding the non-quantifiable benefits, it is clear from the above, that we do not believe that imposing a fee scale will increase efficiency, result in fairness or otherwise be beneficial to creditors or the industry.

51. The Reports refer to IPs charging about £1bn in fees as against £4bn made in distributions. We do not believe that IP fees are nearly as high as £1bn. We assume that the £1bn figure includes costs of administration (including disbursements such as legal fees) and this could have been made clearer so as not to create an unfavourable impression regarding IP fees.

52. The proposition (obliquely made in the impact assessment) that a reduction in charges by IPs would increase the absolute amounts of credit made available by unsecured creditors is unsubstantiated and, in our view, completely unconvincing. The whole premise of the consultation is that these unsecured creditors are unknowledgeable and disinterested (even when they have lost money). It is difficult to see that these individuals would alter their behaviour because IP fees in aggregate in the UK might be reduced by a relatively small percentage. Well informed creditors will take steps to minimise exposure to failing companies (and do so, which is one reason why there is so little left for unsecured creditors). If the government wishes to increase the amount of unsecured lending in the UK, there would be more effective ways of doing so.

53. The very limited and speculative advantages that Insolvency Service thinks might result from the proposed fee reforms need to be considered against the potential disadvantages. A number of these are highlighted above, but there is a risk of looking at this issue too narrowly. The reality is that insolvency regimes involve balancing various interests, including those of secured creditors against unsecured creditors. The OFT report referred to World Bank input. The 2013 World Bank report[6] shows the UK insolvency regime to be highly successful by international standards, ranking 7th (compared to 8th in 2012), ahead of all the countries whose practices are noted in the consultation for comparative purposes (and ahead of the United States). The UK also performs well when measured in terms of fees as a cost to the estate. The UK insolvency regime also attracts forum shoppers – so called bankruptcy tourism, which also demonstrates the attractions of the UK insolvency regime.

[6] http://www.doingbusiness.org/data/exploretopics/resolving-insolvency#sub-menu-item-link

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28 March 2014

Dear Sirs

STRENGTHENING THE REGULATORY REGIME AND FEE STRUCTURE FOR INSOLVENCY PRACTITIONERS

This is the response of Grant Thornton UK LLP to the consultation document published on 17 February 2014.

Regulation of insolvency practitioners

Questions 1 to 10

In principle we support the proposals to create a structure to enable the Insolvency Service to have effective oversight of the Recognised Professional Bodies. We leave it to the RPBs to comment on the detail as they think appropriate.

We do, however, disagree with two points under this heading:

A regulatory objective to ensure that fees represent value for money. This is a matter for the creditors, not for the regulators to second guess.

Likewise we do not think it appropriate for the Secretary of State to be given a power to sanction an IP directly. This exposes an IP to double jeopardy and adds a dangerous political dimension to the professional disciplinary process. We note that the full process would involve an application to the court, but also that this could be shortcut by an undertaking being agreed.

Remuneration

We dispute fundamentally the notion that the ability of repeat bulk purchasers to secure a price reduction means that in other cases there is an "overcharge". This is to put an emotive political spin on the natural functioning of market forces.

It should further be noted that where an IP acts for secured creditors he can generally be confident that there will be an appropriate fee. When acting in other cases, there is a much greater risk that the assets will turn out to be illusory with the consequence that there may be no fee, or a derisory fee. Such market realities, at least as much as a more active or knowledgeable involvement of the fee approver(s), may explain why IPs are willing to work for lower rates on behalf of secured creditors.

The paper notes at paragraph 95 that time and rate is used in almost all administration, winding up and bankruptcy cases. To prohibit this in the great majority of cases, those where the basis is set by the general body of creditors, would be a profound change in market conditions. The most significant risk this presents is a significant reduction of the investigation work that is undertaken as regards concealed assets, voidable transactions and misconduct generally. We are also concerned that, in a market where corporate insolvency volumes are already low, then a further reduction in the level of remuneration may lead to withdrawals of practitioners from the market leading to a reduction of competition.

The input of resource that is required to handle a case is generally poorly connected to the asset value. There is rarely any direct causal link, and this is the simple reason why percentages are rarely used.

If the RPBs are to be given a regulatory objective of assessing value for money, there is no indication in the paper as to how this might be done. The obvious method is to compare the outcome of the percentage calculation, or the set fee, with a measurement of time cost, but that is to recognise that time and rate is the true measure of the resource committed by the office holder. It is an absurdity then to propose abolition of time and rate as a basis of remuneration other than in limited circumstances.

We believe that greater opportunity for creditor input can be achieved without the need for the severely restrictive prohibition proposed. We refer you to our answers to Q14 and Q20 below.

In commenting on the detail we are essentially seeking to highlight, and to suggest ways of ameliorating, the damage that these proposals risk causing. None of our comments should be read as an acceptance of the proposals.

Q11 Do you agree with the assessment of 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?

The paper only attempts to quantify the costs of the RPBs dealing with remuneration related complaints. The addition of a review of value for money to routine monitoring will also add cost, both for the RPB and for the IP. Creditors may be reluctant to use the court process, but it should be noted that this is also extremely onerous for the IP and reported judgments indicate an elementary failure of understanding by the courts as to the work that is necessary to administer a case and the extent to which uncooperative or actively hostile directors or bankrupts can inflate the resource required. If the RPBs are to follow the lead of the courts in their approach to dealing with an increased number of complaints (because cost free and risk free to the complainant) and in routine monitoring, then this may be a heavy bureaucratic weight and simultaneously a cause of significant reduction in billable remuneration contributing to the departure of practitioners from the profession.

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?

In principle we favour background information being readily available to creditors. Our twin practical concerns would be (1) the cost of production of this and (2) whether creditors who currently fail to engage would be any more likely to do so merely because such information is available and signposted. Professor Kempson noted that burgeoning compliance requirements have caused reports to creditors to grow in size and shrink in usefulness. We are not immediately persuaded that the likely benefit will justify the cost.

The production of comparative fee data is potentially a particularly expensive exercise to undertake and would have a continuing cost in the need for a continuous programme of information gathering and updating of the analysis. Such an exercise is inevitably fraught with difficulty where figures arising in many and varied circumstances are combined to produce an average which tempts the unwary to conclude that the average is a benchmark, but which may have no meaningful application to any particular case on its own facts.

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?

It is not unusual for a very small number of unconnected creditors to make up a majority by value, quite possibly one or two as mooted in the paper. Certainly time and rate should be permitted where there are insufficient creditors to form a committee, namely one or two. It would seem to us that the exception should apply where up to five unconnected creditors make up a simple majority in value, so that the formality of forming a committee can be avoided.

An alternative, or additional, approach would be to allow time and rate where a majority by value of the whole unconnected creditor constituency votes to approve this, regardless of how many creditors that might be.

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?

We assume that this question is seeking comment on the detail of the draft Rules rather than the principle, which is discussed elsewhere.

While disagreeing with the policy, we have no comments on the detail as regards the restriction of time and rate.

We would refer the Insolvency Service to the R3 response to the September 2013 consultation draft of the Insolvency Rules 2015 which made a number of important comments on other aspects of the drafting of this Part of the Rules.

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

If the changes in fact serve to reduce IPs' fees to any significant degree we anticipate a reduction in the number of practitioners in the market, with a longer term impact also on quality. Larger firms may choose to invest resource in areas other than statutory insolvency work. This will reduce competition and damage the outcome of cases, reducing returns to creditors. If the changes do not serve to reduce IPs' fees to any significant degree, then the reform is pointless.

If an office holder is not able to use time and rate to price the work as it progresses, he is faced with additional risk. One possible response is to exit the market, so reducing the number of competitors. The other response is to price in the increased risk when seeking remuneration based on percentages or a set fee. An IP will inevitably take a cautious view as to the resource that will ultimately be required when being forced to name his price at the outset. It would be unsurprising if the result was an increase in the "overcharge". In short the removal of the comparatively low-risk route of time and rate is likely to result in fewer IPs and higher prices.

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?

Yes, although it might be noted that consumer debtor IVAs, which are largely a standardised commodity quite unlike any other Insolvency Act procedure, are particularly unsuited to time and rate and the market has settled on a standardised percentage of realisations as the basis of remuneration.

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?

As noted in answer to Q17, in consumer debtor IVAs market forces have led to the adoption of a standard percentage, but it should be noted that these appointments are very different in nature from other insolvencies as the essence of these is the handling of a predictable income stream. It should also be noted that these market forces saw many providers withdraw from this market.

Outside of the special case of consumer debtor IVAs the use of a prescribed scale as a statutory default position suffers the drawbacks that (1) as noted previously, asset realisations are a poor proxy for the input of resource required, (2) it could therefore result in "overcharging" in particular cases where the scale is too generous in the circumstances and (3) this is in principle anti-competitive.

Where creditors fail to engage, then a scale of percentages as a fall-back position is required. This is currently the position in winding up by the court and bankruptcy and was also the position for creditors' voluntary liquidation from 1986 to 2010, but was inexplicably withdrawn from CVLs in 2010 leaving a prohibitively expensive application to court as the fall-back. The need for such an application is also a waste of the court's stretched resources in the rare event that such an application is made rather than the liquidator accepting a practical reality that he ends up handling the case for free.

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?

The current schedule 6 scale is a long way below something that would be commercially viable in most cases, even if no discretionary investigation work is undertaken. The use of this as a standard would inevitably see the withdrawal of most of the insolvency profession (quite probably the entire profession) from the affected areas of work.

If a prescribed scale is envisaged, it would need a 100% band at the start to allow for the substantial burden of compliance tasks that have to be undertaken in all cases. There is a precedent in this as regards winding up by the court and bankruptcy with the official receiver's lump sum fee followed by a starting band of 100% for Secretary of State fees (even though the Secretary of State fee is simply a hypothecated tax and most certainly does not represent the delivery of value to the estate in question).

We are unable to suggest any practical means by which such a scale might be set given the wide variety of circumstances that are encountered in case work.

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

Rather than prohibit time and rate, the Rules could simply be amended to require a further resolution of creditors to approve each tranche of drawings. This would achieve the objective of requiring creditor engagement. It may cause a degree of difficulty in cases where creditors refuse to engage after the stage of the initial resolution, but would not risk the potentially devastating consequences of the proposed prohibition.

A variant on this could be a periodic budget process, effectively approval in advance of the work to be undertaken and cost to be paid, rather than approval in arrears, although this does introduce an element of speculation as to what can usefully be done and the prospective results. Such a process would also add to the procedural burdens of routine case work.

Alternatively, if the prohibition is to be applied, then we would urge that an exception be made for time and rate subject to a cap. Time and rate is in practice frequently subject to a cap imposed by creditors, particularly in bankruptcy. A further specific request is then required if the cap is to be changed or removed in the light of a change of the circumstances that were taken into account. The imposition of a cap demonstrates active creditor control at the outset, and the need for the office holder to justify any subsequent request for an increase ensures that this control continues.

In cases where prolonged investigation is necessary before the prospects of recovering assets can realistically be assessed, the 18 month rule for fixing the basis of remuneration is particularly unhelpful to the creditors. They should have a chance to make their decision regarding the basis of remuneration in the light of the eventual direction that the case may take, including the prospects for litigation. We urge that this provision, introduced in 2010, should be removed. We think it is misguided as it is the office-holder, not the creditors, who bears the risk of undertaking work at a time when the basis has yet to be agreed.

We do not see as credible the suggestion in paragraph 129 that creditors who currently do not wish to engage will be willing to form committees to enable investigation work to take place and so that the IP can use a basis of remuneration that is otherwise deemed inappropriate. We see investigation work and the recovery of "difficult" assets as the areas that will be most heavily adversely impacted by these proposals, which would appear to be a consequence very much at variance with policy objectives.

Impact assessment

Q21 Do you agree with this estimation for familiarisation costs for the changes to fee structure?

Familiarisation costs in respect of such a change will represent a small part of overall familiarisation costs in relation to the Insolvency Rules 2015.

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?

n/a

Q23 To what extent do you expect the new fee structure to reduce the current level of overpayment?

As noted in our opening remarks we dispute that "overpayment" occurs in any systematic way. Please refer to our answer to Q16 above.

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?

We agree that this will not incur any additional procedural costs, but as noted elsewhere in this response, the pricing in of risk could result in a higher fee, and investigation work and the pursuit of "difficult" assets may be discouraged.

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?

It will be apparent from our comments that we see the proposed reforms to the basis of remuneration as potentially causing significant disruption in the market and to the availability of IPs. In this context the theoretical "overcharge" of £15 million (the description of which we dispute) is not the point.

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?

IPs come in all shapes and sizes from the Big Four accounting firms to the sole practitioner. Likewise creditors may be multinational corporations or individuals. We see no merit in weighting costs or benefits to one side or the other.

Q27 Do consultees believe these measures will improve the market confidence?

If these proposals are implemented in their current form we fear that the issue will not be one of market confidence, but of possible market disruption.

Q28 Do consultees believe these measures will improve the reputation of the insolvency profession?

It seems that the very nature of insolvency work means that the reputation of IPs will always be tarnished by an incorrect association in the minds of stakeholders and/or the public between the work of the IP and the loss that they have suffered by reason of events prior to the occurrence of the formal insolvency. There is an often-repeated perception among non-business people that the losses inherent in an insolvency should not be added to by the charging of any fees at all to the estate, but the corollary of that is that the work has to be funded either out of taxation or entirely by the charitable sector, neither of which is a realistic policy approach.

A shift from time and rate, which reflects the input of resource, to the guesswork of percentages or set fees will not serve to enhance the reputation of the profession.

Yours faithfully

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STRENGTHENING THE REGULATORY REGIME AND FEE STRUCTURE FOR INSOLVENCY PRACTITIONERS

A consultation paper issued by the Insolvency Service

Comments from ACCA
March 2014

ACCA (the Association of Chartered Certified Accountants) is the global body for professional accountants. We aim to offer business-relevant, first-choice qualifications to people of application, ability and ambition around the world who seek a rewarding career in accountancy, finance and management.

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Further information about ACCA's comments on the matters discussed here can be obtained from:

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ACCA

ACCA welcomes the opportunity to comment on the proposals issued by the Insolvency Service. ACCA's Insolvency Committee has considered the matters raised and their views are represented in the following.

SUMMARY

ACCA has always been open to constructive ideas for improving the effectiveness of the UK's framework of insolvency practitioner regulation and agrees that despite the changes that have been made in the recent past there is still scope to enhance the level of consistency in the system. We welcome the proposal to introduce a framework of objectives for the insolvency regulatory framework and believe this will benefit the Insolvency Service and the RPBs alike. We are not opposed to the idea of a single independent regulator provided that it is a genuine single regulator and that option would deliver the same or better outcomes on a more efficient basis. ACCA would not support any partial rationalisation or one of the existing RPBs being designated as the single regulator. We endorse, therefore, the idea of giving the Secretary of State new powers of intervention and a reserve power to introduce a single independent regulator at some future stage should the evidence suggest that radical reform would produce more efficient and cost-effective regulation.

We do not believe that the consequences of the proposal to reduce drastically the circumstances in which IPs may base their fees on the hourly rate method have been fully considered. We fear that it would many IPs to question the wisdom of taking on smaller asset cases, with ramifications for how creditors' interests are to be safeguarded in such circumstances and how the actions of errant directors are to be investigated and pursued in future. We acknowledge that there is a public interest dimension to the fees issue, but believe that an enhanced focus on value for money, which we support, can best be explored via alternative approaches. We suggest, in this light, that consideration be given to requiring IPs to justify to creditors and regulators their use of the hourly rate, by reference to prescribed criteria, and to the adoption of a threshold approach whereby cases where assets fall below a set threshold, or where anticipated fees did not exceed a set threshold, would be exempt from any new restriction. This latter approach would be designed specifically to avoid distortions in the supply of IP services to small asset cases.

Further, moving away from a system which allows fees to be based on hourly rates to one which was scale-based would risk re-creating a situation which the Cork report recommended be revised in the 1980s because it created scope for 'poor recompense for the liquidator or trustee in relation to the amount of work involved in a complex case'. While we appreciate that there is some legitimate concern about fees, and accept that there is likely to be some abuse of the time–cost method, we believe that any changes made must be balanced and

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proportionate to the scale of the problem that exists. In this respect we note that in 2013, of the 748 complaints about IPs received by the Insolvency Service, only 2% related to fees. While this statistic may not tell the full story about whether fees drawn by IPs are always 'fair', it does suggest that the level of concern on the issue that is felt by creditors is not so generalised or acute as to warrant potentially destabilising change. We suggest that, rather than focus attention on removing the right to charge on an hourly rate basis, the Insolvency Service considers more measured alternatives for achieving the policy objective. Alternatives could include IPs being required to give an advance estimate of the costs likely to be incurred on a time cost basis, perhaps accompanied by an onus to seek approval for time costs which fall above that figure; IPs being expressly required to justify their use of the hourly rate basis as being appropriate for the case concerned; and more targeted support given to creditors to enable them to assess the reasonableness of the amounts being claimed.

SPECIFIC COMMENTS

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

We agree with the suggestion that the regulatory regime for insolvency should adopt a coherent framework of principles which sets out what the regime is intended to accomplish. This will help to guide the activities of both the Insolvency Service and the individual RPBs.

On the specific framework in para 50, most of the contents seem to us to be uncontentious. We welcome in particular the first point, viz the reference to protecting and promoting the public interest. In point 2(i), however, it is important that the reference to delivering 'fair treatment for persons affected by [IPs'] actions and omissions' should not be capable of being misconstrued to entitle every dissatisfied stakeholder to pursue a grievance against the system: 'fair treatment' in this context must mean only the treatment that IPs are expected to afford to stakeholders under the law and technical and ethical standards. In point 5, the meaning of the term 'value for money' will need to be authoritatively understood if it is not to become a term which is subject to multiple interpretations. A clear understanding on this matter must be arrived at if RPBs are to assume any new regulatory responsibility with regard to it.

We would additionally suggest, in the context of the findings of numerous inquiries into the state of insolvency over the years, that there might usefully be added an objective for the regulator to enhance the level of understanding of insolvency issues among the business community and general public. As has

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been noted on several occasions, and acknowledged officially, the perception of IP misconduct on the part of lay people has very often been worse than the reality. The adoption of an on-going commitment to addressing this shortfall in understanding could make a useful contribution to improving the efficiency of the regime.

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

We do not have any specific comments but would suggest the Insolvency Service should establish and publish clear procedures in this regard.

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

We do not have any specific comments but would suggest the Insolvency Service should establish and publish clear procedures in this regard.

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

We do not have any specific comments but would suggest the Insolvency Service should establish and publish clear procedures in this regard and any sanction imposed is proportionate.

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

We do not have any specific comments but would suggest the Insolvency Service should establish and publish clear procedures in this regard

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

Yes. Any proposed arrangements should include a right to a fair hearing prior sanctions being imposed.

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

We do not have any specific comments but would suggest the Insolvency Service should establish and publish clear procedures and guidance in this regard.

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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?

No.

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

We have no issue of principle with the idea of a single independent regulator so have no objection to this proposal provided that it is a genuine single regulator. ACCA would not support any partial rationalisation or one of the existing RPBs being designated as the single regulator and would prefer to pursue improvements within the current framework.

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

As a provisional list of functions, it appears to be appropriate, although further thought would need to be given in due course to the respective remits of the regulator and the individual professional bodies, and in particular how their respective disciplinary processes would operate.

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

If an obligation to review complaints about the quantum of fees and remuneration were to fall onto the RPBs, and the additional resources needed to meet this obligation turned out to be disproportionately expensive, ultimately this cost will be passed on to IPs as an additional licensing fee, and at the same time increase the time and effort it takes them to recover their fees. This will make private insolvency practice less financially viable and may result in too few appointment-taking IPs being available to meet the needs of the UK economy.

We would add at this point that under ACCA's current disciplinary arrangements, its committees are able to consider fee-related complaints in certain circumstances. ACCA's Disciplinary Committee can, specifically, consider and rule on whether an IP has:

- in fact undertaken work which is covered by a claim for fees
- charged the correct hourly rate for work which has been undertaken (for example we would not expect a partner to charge his hourly rate in respect of routine administrative work undertaken).

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Thus, where a complaint has professional conduct connotations, it can be accommodated within ACCA's current arrangements and dealt with as a professional conduct matter. ACCA does not, however, intervene in matters relating to the level of fees which an IP charges; we believe this is a matter for the IP and the creditors and, ultimately, the courts (NB the courts in Scotland have special powers to intervene in these matters).

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?

We do not object in principle to the assumption by RPBs of a new responsibility to monitor and assess IPs' compliance with expectations regarding fees. But for this to work those expectations must be reasonable for the bodies to regulate and they must be clear. We do not consider it would be reasonable for RPBs to make subjective judgements regarding fee rates charged by practitioners, since commercial matters should remain the preserve of practitioners and it should be a matter for the free market to determine whether particular rates are appropriate. The role of RPBs in assessing value for money must be determined by reference to criteria which are clear and assessable and related directly to the amount of work undertaken and the results achieved.

Q13 Do you think 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?

Yes. While the proposed initiatives will not compel creditors to engage with the fee approval process, it will provide material support to them to do so.

Q14 Do you think that any further exceptions should apply?

Rather than address what exceptions should be made to the proposal it is first necessary to address the proposal itself, since we believe that there are issues connected with that which need to be seriously considered.

With regard to the main proposal, viz to severely limit the circumstances in which an hourly rate may be charged by IPs, we do not believe that this step is necessary or desirable either to control fees or to protect stakeholder interests. It would inevitably have to lead to a significant new emphasis on fixed fee agreements. Yet since their introduction for all types of appointment in 2010, very few fixed fee approvals have been given: while this is not in itself a reason for curbing their increased use in future, it is an indication of the widespread view that they are not considered to be generally appropriate as a means of setting fees in insolvency engagements. We would also make the point that the proposal to further regulate the approval of fees comes just as the Insolvency

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Service is proposing to reduce the involvement of creditors in creditors' meetings. Rather than introducing solutions which assume an absence of engagement on the part of creditors, it would perhaps be a more constructive approach to focus on measures which would enhance the confidence of those creditors in existing procedures.

In this connection we remain of the view that Crown creditors are in a privileged position to influence the level of fees in all or almost all cases, and efforts should continue to be made to ensure that their influence is routinely exerted before resorting to legislative changes of the kind being proposed.

In respect of the specific proposal being made, we foresee a number of practical difficulties, as follows:

i) In many if not most cases it will not be possible for IPs to estimate the amount of work involved in a case with any certainty. Faced with this situation, it is conceivable that some IPs will feel minded for their own commercial protection to factor in more work than might in the event be necessary, in which case fees could end up being over-estimated – this would clearly not achieve the aim of the exercise and would create new problems for regulators. On the other hand, where an IP has charged a fixed fee and has reached the point in the engagement where that fee will not cover any more work, the IP will be faced with the prospect of continuing without pay. It would be unfair to expect that an IP should be prepared to continue on an unpaid basis which will have no equivalent in other types of professional engagement. Expecting IPs to continue without due compensation would not only be unfair from a commercial perspective, to the IP and his firm, but would present the IP with an ethical problem, since the IFAC code of ethics makes clear that a threat to an accountant's compliance with the code is created where the fees being received are so low that it may be difficult to perform the engagement in accordance with applicable technical and professional standards.

ii) Should IPs be obliged to seek agreement on either a percentage of realisations or fixed fee basis, we consider it to be conceivable that it will prove more difficult for smaller cases, viz those with small amounts of assets to be realised, to be dealt with. If that were to happen, there would be implications for the level of recoveries able to be made for creditors and for the incidence of disqualification actions against errant directors (bearing in mind that Government policy is currently to increase the effectiveness of existing measures on this matter). We recommend that the implications of the proposal for the

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commercial attractiveness of taking on smaller cases be seriously considered before the proposal is taken further.

iii) Creditors meetings are often fraught occasions and we consider that the prospect of having routinely to secure agreement on a fixed fee basis will introduce new complications into the relationship between IP and creditors.

Overall, while we accept that there is likely to be a degree of abuse of the time-cost method, we believe it is important to adopt a proportionate approach to reform. We should be careful to avoid pursuing measures that are impractical and which could have serious unintended consequences. It is our understanding that, while creditors are naturally interested in the basis of approving fees, their principal concern is to ensure that fees are arrived at and disclosed in a fair and transparent manner. Improving practice in relation to those matters does not in itself require elimination of the right to charge on an hourly rate basis.

It must be acknowledged that insolvency administration inevitably carries with it a degree of risk not only for creditors but for IPs themselves. Most IPs will find themselves occasionally in situations where they cannot make a full recovery of their fees. IPs accept that this is an unfortunate fact of the environment they are in. The Insolvency Service and the creditor community must likewise accept that the professional administration of insolvency work will always carry a cost, and IPs cannot be expected to operate systematically on a basis where the full recovery of their fees is uncertain.

We support a greater focus on delivering value for money but suggest that the proposal being put forward is not likely to achieve that goal. On the contrary, it may cause IPs to question the wisdom of taking on smaller asset cases; where they decide to take such work on the proposed reform could result in an over-estimation of the likely fixed cost of the work involved.

We suggest that alternative options for ensuring that IPs give value for money be explored instead. For example, there could be a new stress on IPs having to justify their use of an hourly rate, by reference to set criteria, and a new onus for regulators to monitor the use of IPs' judgement on the matter. Another option would be to provide in law that any new statutory restriction on the use of the hourly rate should be made subject to a set threshold, related to either asset level or anticipated fees, so that cases below that threshold were exempt. This approach would be consistent with the Government's own commitment to proportionate regulation, and would be designed to pre-empt potential complications for the taking on of smaller cases. It would also, we consider, be consistent with another feature of the current insolvency regulatory regime which provides that time costs need not be recorded where they fall below a given threshold.

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Q19 Is the current statutory scale commercially viable?

There is a danger that recourse to a statutory scale on the current level would entrench the influence of 'factories' in the IVA market and encourage their emergence in other areas of insolvency. We question whether this model, which has been able to thrive in the IVA market and eliminate competition through economies of scale, is one which should be given further encouragement. The present official scale rate of 10% in the standard band would make it difficult for most IPs to compete.

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IP regulation and fee consultation question response sheet
(Consultees may wish to respond just to those questions that are of relevance to them)

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Preliminary Comments

Our responses to the consultation questions are set out below. However, we feel it important to make some preliminary comments regarding concerns we have with Professor Kempson's report (July 2013). It appears to us that the Insolvency Service is introducing proposals on the back of a report that contains factual and legal inaccuracies such that the proposals are based on false premises. Examples are set out below.

At page 18 of the report it is stated that secured creditors seldom attend or vote by proxy at creditors' meetings and that banks confirmed they would only do so if they were an unsecured creditor. What is not included within the report is that this is because the legislation prevents them from doing so. The lack of understanding of this critical point suggests an absence of adequate understanding of the legislation surrounding voting procedures.

At page 20 (para 4.2.1) of the report it is stated that secured creditors almost invariably sit on creditors' committees when they are set up and that it is appropriate for them to do so. This does not explain the effects of Rule 4.152 Insolvency Rules 1986 under which a secured creditor who is wholly secured is specifically excluded from liquidation committee membership. To be able to serve on the committee the secured creditor would have to value their security and then sit on the committee in respect of the unsecured element of their claim only. However, most secured creditors are reluctant to do this. Rule 2.50 contains similar but differently worded provisions in the case of administrations.

At page 21 of the report it is stated that any unsecured creditor owed less than 10% of the total amount owed to unsecured creditors will need to contact other creditors to achieve the requisite amount to challenge an IP's fees but that this is frequently hampered by a lack of contact details of other creditors. In most corporate cases details of other creditors will already have been supplied to all creditors (e.g. with a statement of affairs or proposals) either by post or being made available through a website link, details of which will have been communicated to creditors. This is an indication that some creditors fail to read documentation sent to them.

At page 23 of the report there is commentary regarding IPs' progress reports and time analyses. The example of a SIP9 matrix put forward by Professor Kempson, which she describes as "a typical time analysis of costs contained in" IPs' progress reports is in fact a **non-compliant** example. This would have been apparent from the SIP9 requirements. We consider that there is, therefore, a potentially flawed conclusion that the reporting regime is inadequate and that any perception of deficiencies within the reporting regime may be more properly explained by compliance and monitoring failures.

Page 32 of the report: There seems to be an underlying assumption (and throughout the report) that IPs' fees are too high. We are not sure that this has been empirically tested and, consequently, this is one of our fundamental concerns with Professor Kempson's report. That creditors think fees may be too high and they struggle to measure/understand the work done does not necessarily mean that fees are in fact too high. We suggest that this is a dangerous assumption.

At page 33 of the report there is reference to findings reported in the OFT market study, which used historical data. We consider that these findings should not have been relied on, as the data in the study was from 2006, 7 years prior to the Kempson study. In the intervening period the SIPs, regulation and the Insolvency Rules 1986 have been subject to considerable change as has the wider economic environment including collapsing values in property and general assets and the 2007 banking crisis. Using 2006 data in a review of the revised insolvency rules (April 2010), SIPs and regulation is unsound.

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?

Most (i.e. with the exception of ensuring that IP's fees represent value for money) appear fair and reasonable and are currently in operation through various regulations and codes of conduct although not necessarily incorporated in statute.

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

Revocation of an IP's insolvency licence is and has been a sanction open to the RPBs for some time, so it would appear fair and reasonable that the Secretary of State should have similar powers over the RPBs. It is hoped that there would not be any recourse to implement this sanction but the process seems acceptable.

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

As regards directing an RPB to commence an investigation into an IP, this should only be possible provided the source and totality of the intelligence received by the Secretary of State is to be disclosed to the IP, otherwise this would be inequitable.

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?

None other than the imposition of financial penalties on IPs has been a sanction open to RPBs for some time so it would appear fair and reasonable that the Secretary of State should have similar powers over the RPBs.

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

As above none other than it would appear fair and reasonable that the Secretary of State should have these powers over the RPBs as the RPBs have been able to advertise adverse findings against IPs for some time.

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

If this will be identical for existing procedures under the Legal Services Act 2007 then yes because it would be inequitable to provide fewer rights to RPBs.

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?

Insufficient information has been given regarding the procedure to be able to comment as it is not clear at what point the IP will be advised of the allegations and given a chance to make representations. By stating “If, having considered the evidence,……….he will give notice to the IP…… of his intention to apply to Court for a sanction against the IP” implies that there will be no direct communication between the IP and the Secretary of State during the consideration stage. How will any statutory investigation by the Insolvency Service be conducted and the outcome decided? A paper exercise? One person deciding? A panel decision? Will the IP have a right to appear in person to make representations? What will be the appeal process against any decision by the Secretary of State? More information is required.

Further, given the potential impact on the IP's employees, wider firm, supply chain and live cases the right of appeal needs to be enshrined in the legislation and there needs to be clarity as to what should occur between the original judgment / verdict and the hearing of any appeal.

Where a sole IP is appointed thought needs to be given and workable rules generated for what will occur as regards an orderly transfer of that IP's appointments (both within and outside the IP's firm, as applicable). An immediate transfer of appointments to another IP may not be beneficial for stakeholders except in the most extreme cases of misconduct.

There is a perceived danger that the Secretary of State may act for political expediency rather than due to a commercial rationale and/or objective. By its nature the insolvency profession encounters many stakeholders at a time where they have experienced loss and will be looking to apportion blame; it is for this reason that the profession is already highly regulated and is often involved in the making of common law. The greatest areas of risk (and potential for misconduct to occur) are outside the scope of the regulations (e.g. the decision to sell an asset, who to, the pricing, the timing etc.) and, therefore, there is no simple formula to determine misconduct.

The "procedure" needs to highlight the criteria/events that will trigger review by the Secretary of State. Will the Secretary of State be resourced adequately? Currently, there is a perception within the insolvency profession that IPs' adverse conduct reports on errant directors are frequently not pursued by the Secretary of State due to under-resourcing. Consequently, the insolvency profession and stakeholders may be concerned that: (1) matters will not be investigated adequately; (2) technical prosecutions will be made to show that the powers are being used; (3) public money will be wasted on heavily defended cases that the Secretary of State fails to resource adequately.

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?

None except that any request must be properly formulated and the information requested defined, i.e. fishing expeditions should not be permitted.

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

Yes, this seems sensible.

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

In principle a single regulator would be the ideal and would ensure a fair and consistent approach to the treatment of all IPs, especially concerning matters such as evaluation of “fitness and propriety” and determining complaints and disciplinary action. It would also ensure that monitoring standards and practices and guidance given to the profession are consistent. The functions and powers are those we would expect the existing RPBs to be operating.

The consultation document, however, makes no suggestion as to how a single body would be set up, funded or managed.

Part 2 – Insolvency Practitioner fee regime

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

No. We believe that given a qualified costs draftsman / costs lawyer would cost between £150 to £400 per hour (depending on seniority and geographical location) and the necessity at all stages of the process to have committees comprising suitably qualified but independent professionals (i.e. no practising insolvency practitioners should sit or be involved in any part of the process) the assessment of costs is inadequate. As it is intended that the costs will be passed on to IPs we consider that a full and accurate evaluation is a prerequisite for a proper consideration of the proposals.

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?

By definition adding “IP fees representing value for money” will mean that “more” monitoring is undertaken by RPBs and so if this is the interpretation of “greater” then, yes, we would agree. However, if “greater” is used to mean “improved or better” then we do not agree. Our reasons are set out below.

We do not think that the proposal is a suitable means of dealing with any complaints or other issues arising from the quantum of fees charged (unless, as at present, the issue relates to drawing remuneration without proper authority including overdrawing against the basis of remuneration agreed by creditors).

There are fundamental difficulties in adding the task of ensuring that IPs’ fees represent value for money to the RPBs’ list of objectives. Key difficulties are:

- Value for money would be a largely subjective assessment.
- When conducting an insolvency inspection visit the RPBs only have a limited amount of time to assess IPs’ files and they do not as part of their monitoring role undertake more than a sample of an IP’s caseload. Suggesting that the RPBs would be able to monitor value for money as part of their normal review process is unrealistic and unworkable given the amount of time that would need to be dedicated by the inspector to this aspect alone if a fair and accurate view as to the level of fees charged by the IP is to be reached as part of that monitoring inspection. Further, the RPBs do not engage with the lifespan of the case in the same way as creditors should do/are able to do and, unlike many creditors, have no prior knowledge of the insolvent entity.
- Complaints received at any time other than to coincide with a scheduled monitoring inspection would necessitate a visit to the IP’s practice for files and records to be reviewed.
- The qualification and experience of the inspectors may not be suitable for assessing fees given that where solicitors’ fees are in issue there is a detailed (and costly) process involving expert costs draftsmen/lawyers who prepare comprehensive schedules of all work undertaken for consideration by the court.

Moreover, there is a statutory and legal process for fees to be challenged and/or for further information to be provided to creditors and other interested parties. Fee disputes should be left to the courts to determine. This is not a matter for regulatory bodies to arbitrate. A free complaints service to creditors will encourage any disgruntled creditor to lodge a challenge knowing that it will not cost anything whereas it is hoped that only genuine fee disputes, which are not capable of negotiated settlement, will be referred to the court under the present system.

Creditors in general are understandably dissatisfied because they have lost money and, if they are able to complain without cost to themselves, they probably will. This raises the issue of the time that will have to be spent by IPs communicating with their regulatory body defending malicious and/or unfounded fee complaints.

On appointment an IP generally has a very limited knowledge of the assets and certainly cannot estimate accurately how much time and effort will be required to realise these assets. It is unclear how a regulator will be expected to analyse critically the time and effort that has gone into recovery of an asset.

The concept of "fees representing value for money" is not defined in the proposals. How will the criteria for applying and testing the concept be set? What are the parameters? Will these be published?

It appears that the presumption is that value for money will correlate with fees charged on a percentage basis. However, this is likely to result in IPs not realising assets that are more difficult and time consuming to realise, especially those requiring legal action, if they are not going to be remunerated adequately for their efforts and time spent. This will result in lower net recoveries being available for creditors.

Requiring RPBs to assess value for money will have resource implications for them. The assertion in the consultation is that increased RPBs' costs will be offset by the benefit to creditors. It is acknowledged in the impact assessment that the RPBs are likely to pass these increased costs to their IPs through the cost of their membership, licensing and other fees but this is not mentioned in the proposal. We do not agree therefore that the RPBs' costs will be offset by the benefit to creditors as the proposal is effectively asking IPs to pay more for their professional fees and licences while at the same time cutting the amount of their remuneration in order that an unquantified higher return can be made to creditors. In any event, we do not consider that the proposal will provide enhanced returns for unsecured for reasons explained in the previous paragraph and elsewhere.

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?

We do not consider that the statements in paragraph 103 about creditors not knowing that they can negotiate down fees or question the amount of work done are correct. There is an obligation on IPs under SIP9 and SIP7 to provide information to creditors at each reporting date regarding their rights to request more information about fees/work done and their rights to challenge an IP's fees. We agree, however, that a lack of expertise may prevent creditors from exercising these rights and publishing a guide would be helpful to encourage creditor participation.

In principle providing comparative fee data by asset size could be helpful in any fee regime. However, the provision of such data is fraught with difficulties. Unless the resultant fee database also takes account of other factors, such as nature of the assets, types of creditors, third party assets, number of employees, extent of investigatory work, geographic location, the proximity to the relevant quarter day and specific health, safety and regulatory hazards, it would potentially contain unusable and valueless information that unsophisticated creditors (which many unsecured creditors will be) will not be able to interpret adequately. There is a danger that flawed statistics will be used selectively causing wasted time by RPBs, courts and IPs, all of which distract from the job of enhancing creditor value.

Notwithstanding an information sheet, we think that there is still a risk that unsecured creditors will have little interest in negotiating fees given that they will still believe they can have little influence.

Paragraph 104 states that work is being done to ensure a proactive stance from crown creditors, which is welcome if it results in greater crown involvement. Our experience to date is that crown creditors often seem to have pursued a policy of avoiding voting. It is hoped that the work being carried out will encourage informed crown participation.

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?

We do not agree to the proposed changes regarding IPs' remuneration, but for the purposes of this consultation we provide our answers to this question below.

We think there will need to be many exceptions, especially where assets are difficult to recover (e.g. construction debts and actions against directors). Fixed rate remuneration will need to be relatively high to reflect the risky and time intensive nature of the recovery and high percentage based remuneration will also be sought. Both may make these types of asset recovery unpalatable to unsecured creditors.

Approval is already required from creditors in most cases to commence legal action. Any IP considering legal action will automatically be looking to minimise costs in case the action is unsuccessful so time costs would be a more appropriate basis for remuneration.

At para 117 (and repeated in other parts of the consultation) it is asserted that one of the advantages of the proposed basis of remuneration will be to encourage the creation of creditor committees. This pre-supposes a latent willingness from creditors to sit on committees. Our experience of most liquidations is that getting the minimum three creditors required to form a committee is a struggle; creditors in the main simply do not want to commit the time to engage with IPs and the prospect that their return might improve by 9% (i.e. in a scenario where the return to unsecured creditors is 11%, it would be improved to 12%) will not provide them with an incentive to do so.

We do not see therefore how the perceived advantage of encouraging creditor committees will work in practice. The existence of a committee would potentially enable IPs to be remunerated on a time and rate basis but creditors may use this provision as a means of preventing a time and rate basis by being “unwilling” to establish a committee. We believe this to be a significant defect in the proposals.

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?

We do not agree that the proposal set out in Annex A to restrict time and rate as a basis of remuneration should be limited to cases where there is a creditors’ committee or where secured creditors will not be paid in full as we do not believe that it should be implemented at all.

In many cases there will never be a creditors’ committee as creditors are unwilling to serve as committee members and we do not believe that the proposal will change this. To impose such a restriction on when remuneration may be based on time and rate would not only be unfairly prejudicial to IPs who cannot control whether creditors form a committee or not but could result in creditors refusing to form a committee if they perceived this as a way of limiting IPs’ fees. This would be inequitable and would undermine the statutory purpose for establishing committees.

We do not necessarily accept that the establishment of creditors’ committees is, per se, effective in controlling and/or reducing the level of IPs’ fees. Indeed Professor Kempson states in her report (page 22) that “although committees can be effective in reducing fees ‘suggesting that there is room for manoeuvre’, more commonly they did not challenge fees, largely because they lacked the knowledge and expertise to assess them.”

The suggestion that IPs could charge time costs if secured creditors are not repaid in full but (by implication) a lower fee on a percentage or fixed basis if secured creditors are unexpectedly satisfied, is illogical and could penalise exceptional work by an IP and be a disincentive for IPs to maximise recoveries for unsecured creditors.

Restricting IPs to percentage based recovery scales and fixed fees in liquidations, administrations and bankruptcy is likely to have a detrimental impact on the recoveries for stakeholders:

- It will result in IPs abandoning assets that are more challenging to realise unless creditors agree commensurate remuneration. Given the losses just incurred by unsecured creditors they may be reluctant to do so.
- When taking on an assignment there is unlikely to be sufficient certainty to be able to define either a fixed fee or percentage based fee accurately. Neither offers an upside to creditors in the event that recoveries are easier than anticipated.
- The difficulty in setting appropriate fixed or percentage based fees will necessitate recourse to creditors for an amendment to the level of an IP's remuneration. This will require the preparation of a substantial formal report for creditors resulting in increased costs. It may also result in an increasing number of applications to court.

A final point is why does Annex A 17.14 (4) not include an option to use a combination of fixed and percentage basis as section (5) of the same rule?

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

Overall we believe that the proposed changes may result in a reduction in IPs' fees as a percentage of realisations but will not improve returns to creditors.

High fixed fees or high percentage based fees may become common because IPs, not being able to charge on a time and rate basis, may seek high fixed rate/percentages to compensate for the risks and uncertainties they will be adopting. With no current requirement for IPs to provide SIP9 analysis of time spent and work undertaken creditors will be less able to assess whether the IPs' fees represent value for money. Unless unsecured creditors are willing to engage in insolvency processes high fixed rate fees and/or high percentages are likely to go unchallenged.

If creditors are unwilling to agree to the fixed rate or percentages requested by the IP this may result in lower returns to unsecured creditors as IPs will not be prepared to pursue asset recoveries which are more difficult and time consuming to realise or are speculative.

The loss of the ability to be remunerated on a time and rate basis may discourage IPs from undertaking more risky assignments and will penalise those who take on an assignment in the expectation of a certain set of circumstances and subsequently find during their investigations that matters are not what they first seemed because facts have not been disclosed, they have not been told the truth, or those instructing them have simply not had all the facts (e.g. an undisclosed option to purchase in the hands of a third party over a critical asset, an environmental issue, a sales ledger that is full of disputed debt). These issues are failures of the insolvent's management not of the IP.

IPs' fees are likely to reduce due to certain assets not being cost effective for the IP to seek to recover. This is unsatisfactory as it is likely to include actions against directors under the IA 1986 and would send the wrong message to both directors and the general public. In general, it will also make recoveries more difficult if the party being pursued seeks to avoid or dispute payment knowing that the IP is on a fixed or percentage fee.

A further consequence will be that IPs will not be prepared to accept appointments for small burial liquidations which will be left with the Official Receiver to administer. Current practice is for risky and/or difficult cases to be passed out to IPs by the Official Receiver but IPs will be reluctant to accept these appointments if there is not a reasonable basis for their remuneration.

The loss of time and rate remuneration may drive a number of IPs (and particularly those dealing with smaller and medium sized businesses) out of the market, which would be bad for competition.

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?

The proposed changes as discussed above are not fit for purpose and will fail to achieve the desired results as discussed in the other questions in this section. They should not be implemented at all and definitely should not be considered for voluntary arrangements and members' voluntary liquidation.

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?

If a percentage scale is to be used then it would be better to have a default position of a scale rate as long as it was a commercially viable rate. If it wasn't, then obtaining approval from creditors to increase this where they have just lost significant sums of money will be nearly impossible. This is therefore likely to result in a dramatic increase in applications to court for fee approval, with the resultant increase in costs and diminished returns to creditors.

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?

We do not think the current statutory scale is commercially viable. It is the fee regime that was applicable to Official Receivers acting in insolvency estates whose role, responsibilities and operating model is substantially different from a private sector insolvency practitioner. In particular we would draw out the following:

- This fee regime was revoked for Official Receivers and replaced with a £2400 fixed fee plus the Secretary of State fee plus a time and cost arrangement for some tasks (such as distributions).
- The Insolvency Service (and hence the Official Receiver's office) is a civil service and as such receives funding from central taxation. While it no doubt has a remit to recover such costs as it can (through fees, Official Receivers' deposits and the Insolvency Services Account charges) it does not need to be commercially viable on a standalone basis.
- Most of the more challenging and complex bankruptcy and compulsory winding up cases are passed out to the private sector because the Official Receivers' offices lack the resources (in terms of systems, headcount and skill sets) to administer them.
- Many of the bankruptcy and compulsory winding up cases handed out require risks to be taken to make recoveries; these risks principally being recovery of costs and exposure to liability from litigation and pursuing uncooperative directors and debtors/bankrupts. They often also require an outlay in advance from the independent IP's firm (e.g. legal and court fees) with no certainty of recovery. The Official Receiver's office has little incentive to pursue such cases (because of funding constraints and the relatively low recovery from the statutory fee regime that they are subject to) and would be using public money to do so.
- The Official Receiver is specifically carved out from various matters of personal liability and relieved of a substantial number of reporting requirements.
- The statutory reporting requirements of Official Receivers are significantly less onerous and detailed than those for an independent IP.
- Further both the proposal and the Kempson report fail to recognise this discrepancy in reporting frameworks and the significant additional costs placed on IPs by statutory reporting requirements (or indeed the revocation of the scale rates referred to above). We highlight the need for repeated information and the level of fine detail required. In our view the level of detail and red-tape compliance now contained in a fully compliant report may actually serve to turn readers away and may be regarded as "information overload" and appears to

be based on an assumed but untested premise that more detail automatically makes the report more transparent and useful to the reader. This issue is picked up in pages 23 and 24 of Professor Kempson's report.

- The Official Receiver is not required to carry professional indemnity insurance or have enabling bonds or regulatory visits. All IPs and their professional staff must complete continued professional development to maintain their skills across all of the procedures covered by the Insolvency Act 1986 and secondary legislation and to maintain the standards required by the RPBs. The income of an independent IP (their firm) from fees needs to be sufficient to meet these costs.
- An Official Receiver, typically, may not have the same broad commercial knowledge, professional qualifications or experience of an independent IP. These skills are vital in cases where there is anything more than the most straightforward of assets to explore ways of achieving enhanced values. We consider that charging for these more extensive skills on the same basis as the Official Receiver (formerly) is inequitable.
- An independent IP doing work that carries with it substantial risks of non-payment, personal liability and normal commercial risks should expect to be able to make a reasonable market return on their initial investment in their qualifications and their firm. Those acting as Official Receivers are not exposed to these risks and therefore taking this, the skills differential and the more complex and risk laden work undertaken by independent IPs into consideration it appears right and equitable that they are **not** remunerated on the same scale as that previously used by the Official Receiver.
- It is also noted that the Schedule 1 (Annexe A to the consultation) remuneration for the Official Receiver ignores the substantial top-slicing of recoveries through the Insolvency Services Account ("Ad Valorem fees") in those types of case where the Official Receiver is predominantly the office holder.

Looking at the recovery for the Insolvency Service in the round from a compulsory liquidation with an asset base of £12,000 where the Official Receiver was acting as liquidator the actual recovery for the Insolvency Service would be some £6,511 subject to our assumptions on resourcing for a distribution. We note that the Official Receiver is entitled under statute to charge on a time and rate basis under Part 5 of the Insolvency Regulations 1984 according to a statutory scale but not required to report these automatically.

Fees of an Official Receiver/the Insolvency Service in a compulsory winding up

Asset recoveries				12,000.00
Initial Official Receiver's fee				-2,400.00
Charges on funds deposited at the Insolvency Services Account				
2500	@	0%	0.00	
1700	@	100%	1,700.00	
1500	@	75%	1,125.00	
6300	@	15%	945.00	
12000				-3,770.00
Available for distribution				5,830.00
Distribution fees on an hourly rate				
7.5	hrs @	45.5	341.25	-341.25
Insolvency Regs 1994 Reg 35 & Schedule 2				
Assumes an average of all provincial rates				
				5,488.75
Official Receivers'/Insolvency Service fees				**6,511.25**

Of this amount all but £341 would be retained by the Secretary of State if the case had been passed on day one to an independent IP to realise and distribute the assets.

For undertaking all of the functions of a liquidator (including what is typically the most difficult aspect of realising the assets) and the burden of much greater reporting requirements the independent IP would receive only £2,512 (assuming no agents fees, legal fees or other disbursements). It is disappointing that the consultation paper failed to assess the fees of IPs against those drawn by the Insolvency Service (albeit we recognise that an element of these will be used to fund the Insolvency Services Account).

Setting this against a general commercial backdrop where in our experience the following apply:

- We consider that it is in the public interest that IPs are remunerated in a way that motivates them to investigate the affairs of companies properly and, where appropriate, pursue assets and recoveries from directors and bankrupts/debtors through the civil remedies available to them. A percentage basis for remuneration (and particularly one that rewards IPs as poorly as illustrated above) is not appropriate or conducive to IPs performing this role and will perhaps encourage IPs to seek easy wins on the assets and to abandon an increasing proportion of potential claims.
- Legal claims often require substantial investment by and risk to the IP to investigate and pursue.
- At the onset of any asset recovery it is not clear to the IP (who at the time of appointment may have extremely limited knowledge of the entity to which the IP is being appointed) how much it will cost to realise that asset.

- It is becoming increasingly difficult to extract value from insolvent companies. In particular the ascendancy of asset based lending models has resulted in ever increasing proportions of an insolvent company's assets being subject to prior claims and many asset classes being in negative equity in the event of a corporate failure.

The prescribed statutory scale takes no account of the complexity of the realisation of any asset and its use as a basis would be inappropriate. For example commencing legal action to recover sums for creditors could not untypically result in the IP's costs exceeding 20% of any recovery due to the complexity involved. Alternatively, realisation of cash held in a bank account would result in a disproportionate cost being suffered by creditors. An IP should be able to propose what he considers appropriate in the given circumstances in order to maximise recoveries for creditors.

In virtually no case would the scale rate be commercially viable. The Insolvency Service's own research (See Part 2 of the consultation paper) indicates that IPs' fees are averaging 20% of assets realised. However, this is an average and many smaller cases have a significantly higher percentage of fees and may be nearer 50%. In a burial case with few assets the ratio may approach 100%. The Official Receiver's scale rate averages substantially below 50% and will rarely be commercially viable.

Looking at a (not unlikely) creditors' voluntary liquidation scenario with assets of £12K and 30 unsecured creditors with aggregate claims of £250K, on the current scale the IP's fees would be (assuming say £2K of liquidation expenses);

- (20% x £5K) + (15% x £5K) + (10% x £2K) = £1,950 on realisations
- (10% x £5K) + (7.5% x £2,372) = £678 on distributions
- Total: £2,628

For this, the liquidator would have to perform all of his statutory duties, including investigating the conduct of the company and the directors, realise the assets and make a distribution of 2.9% to unsecured creditors (a creditor owed £20K would receive £589).

Extrapolating this, a case would require assets exceeding £60,000 for a liquidator to charge a fee of £10K. The outcome would be a multi-tiered regime where the majority of liquidations (and most cases with no secured creditor will be liquidations) are treated as burial cases by sole-practitioner IPs, with little incentive to incur costs undertaking investigation work. For any creditors' voluntary liquidation with assets of less than £25K, it is difficult to see how even the smallest regional firms could sustainably do the liquidation work. In all likelihood, we would simply see a large increase in section 98 fees for creditors' voluntary liquidations to compensate IPs for an inability to be remunerated adequately for the post-appointment work.

We do not agree with the proposals for percentage based remuneration but should a commercial scale be required this would need to encompass various criteria to ensure that complexity and duration of any insolvency process were taken into account. It is likely, therefore, that more than one scale would be required which should take into account the degree of difficulty in dealing with different categories of assets, for example:

- Overseas domestic property Most difficult
- Construction debtors
- Plant and machinery
- Low risk trading debtors
- Cash at bank Least difficult

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

All actions against directors and others relating to sections 212, 213, 214, 239, 240, 245 and 423 IA 1986 and the equivalent for bankruptcy should be exempt from the restriction and be chargeable on a time and rate basis. Similarly, any actions against shareholders, advisers and providers of debt funding that might be brought under other legislation or common law, including claims under the Companies Act 2006 or mis-selling type claims.

Impact Assessment questions:

Q21: Do you agree with this estimation for familiarisation costs for the changes to the fee structure?

The impact assessment states that the familiarisation costs for IPs are estimated at £760,000. This has been calculated by estimating that up to 1.5 hours of an IP's time would be needed for familiarisation based on the assumption that the change is not complex to understand and would only need to be understood once before being applied. This does not take into account time spent for staff training and for amending standard documentation, checklists and existing systems and the costs of subsequent implementation.

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?

N/A

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?

If one resolution only is required then there should be no increase. However, if more than one resolution needs to be sought requesting different percentages for different assets, the percentages being based on an assessment of the anticipated amount of work and evaluation of the associated risk to realise the asset then there will be additional costs. There will also be costs to the IP's firm for implementing new documentation and procedures.

There will be further costs should the facts initially given to the IP be deficient or incomplete (a matter over which the IP has limited control) and it becomes necessary to seek an increase in the agreed rates.

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?

No. While some of the principles of the suggested changes are understandable we do not believe that the proposed measures will improve market confidence because insolvency is little understood by unsecured creditors and others who do not work within the profession.

Q28: Do consultees believe these measures will improve the reputation of the insolvency profession?

No. As noted above, while some of the principles of the suggested changes are understandable we do not believe that the proposed measures will improve the reputation of the insolvency profession because insolvency is little understood except by those who work within the profession.

It will always be difficult for people (unconnected with the insolvency profession) who have lost money to be entirely comfortable with any insolvency regime, the extent of work required to be undertaken (including statutory and regulatory requirements) and the level of IPs’ remuneration, the latter notwithstanding that in many cases IPs write off time and recover less than their actual hours logged to a case.

Most fundamentally we do not believe these measures will improve the reputation of the insolvency profession because, as explained elsewhere, we do not believe that they will result in improved returns to creditors or achieve the proposed “value for money” in IPs’ fees.

There are other significant issues to consider when seeking to improve the reputation of the insolvency profession such as addressing the perceived failure of the Insolvency Service to pursue delinquent directors.

Overall concluding comments

As an overall concluding comment we note that the presumption in the consultation proposal appears to be that remunerating IPs on a time and rate basis does not represent value for money whereas percentage based remuneration does provide value for money.

We do not agree with this as the following example shows; a £1million cash recovery on a percentage basis would result in a large fee for the IP which would be disproportionate to the amount of time actually spent. Realising £1million from a claim over contractual construction debts or from a director as a result of extended litigation would consume much greater resource, require a higher skill and experience level and in addition would carry with it much greater risks. If a fee of 10% were applied to both scenarios the IP would receive £100,000 for closing a bank account vs. the same amount for a complex recovery that could take two or more years.

The abolition of time and rate for IPs is dangerous to both the insolvency profession and to creditor returns. Professor Kempson's report suggests that creditors do not engage with IPs because they do not have sufficient information on their rights and entitlements. Given the requirements of **compliant** reporting this is patently not the case; the disclosure of rights and the requirements of SIP9 should give creditors the ability to consider whether the costs are worthy of further investigation. To suggest that creditors do not have this information is disingenuous.

We note that in the impact assessment there is mention of an additional recovery of 0.1 pence in the £ to unsecured creditors or 0.1%. This is unlikely to encourage greater engagement by creditors.

If creditors are not sufficiently interested to review what is sent to them then perhaps what needs to be considered is why they feel that disengagement? Is it, for example because the information is too complicated? Are the reports too long and difficult to understand? Do they give creditors the right information? Reports issued by IPs are now much longer, more detailed and written to a prescriptive regime; the latter to ensure compliance with statutory obligations. As a result they take longer to produce. There is an almost complete absence of proportionality in the reporting regime. The fixed content of many statutory reports means that the core work for a case with £12,000 of assets is little different from a case with £1million of assets and, depending on the asset mix, the statutory costs (in terms of time taken to comply with basic legal and regulatory requirements) could be almost identical. In contrast the audit regime has different requirements according to the size of the business.

Anecdotally and from statistics available on our own cases it seems few creditors are downloading IPs' reports to read. This is an area in which creditors must take responsibility for their own disinterest and one where better creditor education is required. It may be that unsecured creditors are disinterested because their anticipated return is low and they do not want to commit time to reading lengthy reports.

While there are clearly issues of trust with the insolvency profession among the general body of creditors this is being exacerbated not only by incorrect reporting in the general media and social media but also by the relentless regulatory change. While we acknowledge that some change was long overdue, some has done little other than add complexity and cost to otherwise functional processes. This also affects adversely the general public perception of, and trust in, the insolvency regime and profession. It appears that IPs, while being subjected to ever changing and increasing regulatory and statutory obligations, are being penalised through proposals to limit their remuneration due to general negative public perception caused by inaccurate media reporting, creditor apathy and poor understanding of the insolvency regime. It is this that should be addressed.

28.03.2014

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28 March 2014

Dear Nick

IP regulation and fee consultation

This is Compliance On Call's response to the consultation about IP regulation and fees. We will try to be brief because we expect you to receive equally critical responses from R3 and the RPBs that may well use more detail.

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?

Yes, apart from value for money, which is difficult to quantify objectively and therefore difficult to monitor compliance with.

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

No.

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

No.

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?

No.

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

No.

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

Yes.

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?

We have concerns about this as it will mean that the IP affected will have two regulators, their RPB and the oversight body (the Secretary of State). We can see why it is appropriate power to reserve to the regulator of regulators, but the exercise of the power must only be in exceptional circumstances in order to give certainty to those who are subject to the regulatory regime.

It might be more appropriate to include something in the provisions for the Secretary of State to give directions to an RPB, so that the Secretary of State can direct the RPB to make the application, instead of having the Secretary of State circumvent the RPB completely, and only take direct action if the RPB fails to do so within a set period.

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?

Yes. Again we can see why it is appropriate to reserve this power to the regulator or regulators, but again it must only be used in exceptional circumstances when used against those other than RPBs, i.e. where the oversight body (the Secretary of State) effectively starts to act as a direct regulator. We would suggest that an additional step be added in to the process, namely that the SoS must give the RPB notice that they intend to seek such information from the IP etc within a specified timescale in order to give the RPB chance to seek it themselves.

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

No, as we consider that despite the assurances to the contrary that introducing such a measure would be single regulation by the back door without having proper consultation. Once the reserve power is in place then it is the thin end of the wedge and it becomes far harder to resist, or argue against, the actual introduction of the power.

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

No, but there would need to be checks and balances in place in order to avoid the single regulator becoming too dominant, both in its dealings with IPs, and as regards the oversight body. It would become harder for the oversight body to take action against a single regulator because of the difficulty in replacing such a 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?

No, as we cannot see in the impact assessment any consideration of the additional costs to the RPBs of the additional staffing resource necessary to deal with the enhanced monitoring requirements and the likely increase in complaints received if they are extended to permit complaints about quantum of remuneration.

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?

We are not sure what this question means. Is it asking whether the RPBs can deliver the increased monitoring etc, or is it asking whether adding value for money to the list of regulatory objectives will mean that the policy aim of ensuring that IP's fees represent value for money can be achieved?

If it is the former, then the answer is yes, but at a price because of the additional resources required and the difficulty since you are dealing with a subjective issue.

If it is the latter, then it is not even certain to result in lower fees being charged in some cases (see below), but we consider that where it does it will still not satisfy the creditors/vocal lobbying bodies and it will also come at a huge cost to the profession, and not just in the reduced fees being charged.

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?

No, as most of that information is already available and in the public domain. The only new resource would the comparative fee data by asset size and we note that the consultation does not indicate who is to undertake the large amount of work necessary to provide that data, nor the cost of doing so within the impact assessment.

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?

No, but see our suggested alternative approach to statutory scale as set out below.

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?

The inflexibility in that approach will have a detrimental effect on the level of investigations undertaken. If the IP has realised some assets then they will not be able to use those to fund an investigation with a view to increasing recoveries for the creditors and so will have to undertake the investigations at their own risk and using their own funds. And in cases where there are no funds to undertake investigations then the IP will be less likely to do so given that they will have to fund the investigations themselves without any certainty that they will be able to recover their costs, i.e. there is no relationship between risk and reward in such cases. With fees on the statutory scale the IP takes on the risk and the creditors reap the reward.

Similarly, if it is a choice for IPs between incurring costs and expenses in recovering difficult or uncertain assets that they are unlikely to recover in full when being remunerated on the statutory scale, or abandoning them, then incidences of the latter will increase. That will soon become known in the business community and create difficulties in realising assets. If I was a debtor I would just refuse to pay or raise spurious disputes to string the IP along until they gave up as it was not cost effective for them to continue.

Finally, this would change the whole commercial basis for taking on an appointment, as an IP would not be able to take on an appointment and see it through to closure if he subsequently found out that it was an open-ended loss-making job. Thus any such provisions would have to include a statutory fall-back position where if an IP identified that a case could not be administered within the available fee approval, he could either close the case on notice without undertaking further work, or leave office on notice to the Official Receiver with the Official Receiver then taking over in an ex-officio capacity to complete any ongoing administration and closure at the public expense.

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

It will mean that the business model of a significant number of smaller IP practice’s becomes unviable since their cost base is predicated on remuneration being charged on a time and rate basis. In cases where the statutory scale is used then there will be an increased return to unsecured creditors, but only in respect of easy to realise assets – see comments above at question 15 about the impact of the proposed changes on investigations and difficult to realise assets.

In reality, few IPs will use the statutory scale and they are likely to over-estimate any fixed fee or fee scale to ensure that they are not left out of pocket, so that the cost to creditors will rise in the majority of cases.

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?

Yes, both since they should not apply to any case type and since in CVAs and IVAs the arrangement is of a contractual nature based within a simple statutory structure. Since an IP's fees form part of the proposal, the requirement for an IP to obtain the approval of 75% of creditors for a proposal gives creditors a strong negotiating position, which they do exercise in practice.

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?

Leaving aside the point that we disagree vehemently with the idea of IPs fees being restricted to scale at all, then if the system is introduced a prescribed scale should be set and the specific approval of creditors would then be required to be remunerated on a different scale. That would still leave it for individual IPs to be free to develop their own scales for cases based on the existing factors as set out in the legislation – e.g. complexity of case etc.

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?

No, the current statutory scale is definitely not commercially viable for IPs.

Leaving aside the point that we disagree vehemently with the idea of IPs fees being restricted to scale at all, but assuming that the result of the consultation and further consideration of the response received still results in a fee structure based on a statutory scale, then we suggest an alternative scale structure. We consider that in each appointment there is a basic level of cost that an IP will have to incur to administer a case from beginning to end in order to comply with the requirements of the legislation and the SIPs irrespective of the level of assets in the insolvent estate. It is the IP's equivalent of the Official Receiver's case administration fee, albeit that it will need to be set at a considerably higher level. Those costs will vary from case type to case type, with the costs in Administrations being higher than those in CVLs. They will also vary from practice to practice. That base level of cost should be reflected in any statutory scale developed whereby the first tranche of asset recoveries made in any case should be available in their entirety for the IP. Thereafter fees could be charged a scale with reducing %s as the level of asset recoveries increase. We would also simplify matters by just having a scale based on realisations and not having a separate distributions scale. Clearly the %s in the scale would need to reflect the combined nature of the scale.

It should also be open to individual IPs to propose their own scale based on such a statutory scale that creditors can vote to approve as an alternative.

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

Leaving aside the point that we disagree vehemently with the idea of IPs fees being restricted to scale at all, then we consider that an IP should be able to charge time and rate in order to undertake investigations and complex asset recoveries in cases where the IP is funding those investigations or asset recoveries using their own monies. That is on the basis of sharing risk and reward since the creditors would not receive any return if the IP did not undertake the work. Whilst creditors may not receive any return if the IP undertakes the work as the recoveries made may well only be sufficient to meet the IP's fees and expenses, that reflects the fact that it is the IP that is carrying the risk, not the creditors. However, where there are monies in the estate then there has to be a balance for both the IP and the creditors as it would not be appropriate for the IP to use up all monies already realised in undertaking investigations and complex asset recoveries without the specific approval of the creditors. Effectively the system set out in SIP 2 of seeking approval from the creditors and providing an estimate of costs with outcome statements would need to be given statutory authority.

Suggested alternative approach to a statutory scale

We would like to take this opportunity to propose a different approach based loosely on the Scottish system. Our proposal is that in all case types other than CVAs, IVAs and MVLs the IP would first need to obtain a resolution fixing the basis of their remuneration from the committee if there is one, and from the creditors if no committee is appointed. The IP would then report periodically providing details of the work done, what had been achieved and the time costs incurred, and indicate in the report the level of remuneration that they are seeking approval for. Where there was a committee then the report would be made to the committee and the IP would need the specific approval of the committee to enable them to draw that remuneration. The IP would then report to creditors on the remuneration approved and drawn. Where there was no committee then the IP would report to the creditors periodically providing details of the work done, what had been achieved and the time costs incurred, and indicate in the report the level of remuneration that they are seeking approval for. Creditors would then have a finite amount of time to object to the remuneration that the IP proposes to draw, but once that time period has elapsed without any objection the IP would be free to draw it.

Such a system would remove the current "blank cheque" given to IPs that results from obtaining a resolution approving the basis of fees on appointment, and gives greater control over the quantum of remuneration to the creditors. It could also be coupled with a requirement for the IP to estimate their total level of costs when seeking a resolution fixing the basis of their remuneration and to then report to creditors on any reason as to why that initial estimate was incorrect, just as SIP 3 currently imposes such a requirement in CVAs and IVAs.

Impact Assessment questions:

The nature of our business means that we are unable to comment meaningfully on any of these 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?

Yours sincerely

Gareth Limb
Compliance On Call Ltd

Publication of consultation paper proposing ways to strengthen the regulatory regime and fee structure for insolvency practitioners

The RPS response to Consultation.

The RPS welcomes the Consultation and the opportunity to respond.

The Consultation paper sets out proposals to:

1. strengthen the regulatory framework through the introduction of clear regulatory objectives, including providing value for money
2. give the oversight regulator more appropriate powers to deal with poor performance, misconduct and abuse
3. take a backstop power to introduce a single regulator for the insolvency profession
4. align how insolvency practitioner fees are charged with the interests of creditors as a whole, in order to increase better returns for unsecured creditors

The Redundancy Payments Service

The Insolvency Service's Redundancy Payments Service (RPS) makes statutory payments to certain limits under Parts XI and XII of the Employment Rights Act 1996, when it is clear that an employer has either failed to comply with a tribunal award or where an employer has disappeared or demonstrates that financial difficulties prevent payment being made, or is insolvent. The RPS may also become a creditor under subrogated rights when payments are made to employees of insolvent employers. The RPS also attends employment tribunals where the Secretary of State is cited, in its role as protector of the National Insurance Fund. The RPS currently has offices in England and Scotland.

Regulation

The RPS is pleased to see the government's proposals for changes to the regulations which will strengthen the oversight regime, including the potential reduction of the number of regulators, and the decision to increase powers of the Secretary of State in the regulatory process.

This will, in effect, mean stronger powers for the Secretary of State to monitor and regulate practitioners and industry regulators. The RPS particularly notes the independence retained by the SOS to sanction individual IPs directly. The RPS has some caution regarding this for the potential of diluting the authority of the RBs which are to be increased, but welcomes the debate on this matter.

Insolvency Practitioners Fees [excludes Scotland]

Although many Insolvency Practitioners undertake valuable and cost effective work in sometimes difficult circumstances, it has been recognised that more could and should be done by Insolvency Practitioners to report the value of their work in a more clear and simple way, to assist and engage small unsecured creditors.

The current system of draw-down of fees, as and when available by an Insolvency Practitioner, does not provide sufficient checks for unsecured creditors to be able to properly challenge an IP. The system is confusing and bewildering to small creditors, with often no prospect of any dividend.

Under the new proposals it is anticipated that an Insolvency Practitioner's fees will be based on a percentage of property dealt with, or realised, as a fixed fee, except where there is a creditors committee in place, or there are secured creditors who are unlikely to be paid in full.

With the provision of a commercial "estimate" or level of fees upfront at the beginning of the insolvency process, businesses, individuals and unsecured creditors will have greater clarity as to the cost of the charges and are therefore more likely to engage with this process as it will provide them with greater transparency and more effective control.

The RPS also notes that the Regulators will also have the responsibility to deal with complaints where fees do not properly reflect the nature and complexity of the work undertaken. This is considered a positive step given the current final option of legal proceedings.

The Insolvency Service has advised it will work with interested parties to improve the quality of information that insolvency practitioners give to creditors. The RPS would welcome the opportunity to engage in any such discussion.

Deloitte.

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28 March 2014

Dear Sir/Madam,

Strengthening the regulatory regime and fee structure for insolvency practitioners

Deloitte LLP is pleased to respond to the Department of Business, Innovation and Skills ("BIS") consultation paper on Strengthening the regulatory regime and fee structure for insolvency practitioners ("the paper").

Overall Comments

Whilst we have responded to the individual questions where possible, overall we are not supportive of the measures proposed either as regards the regulatory regime or the fee structure for insolvency practitioners ("IPs").

Reforms to the Regulatory Regime

Little evidence has been put forward either in this paper or elsewhere to support the contention that the current system of regulation is not working – only six complaints were made about the recognised professional bodies ("RPBs") in 2013. There is an assumption that the debate over a move to a single regulator should be deferred and the power to implement that change devolved to the Insolvency Service ("IS") as the oversight regulator. We are concerned by the lack of debate and short time available through this paper in which to fully explore such issues, including the suitability of the IS to continue as oversight regulator of this increasingly complex and divergent industry.

As the paper itself notes, there is an ongoing dialogue between the RPBs and the IS to promote and maintain an effective, transparent and robust regulatory regime. We are however aware of instances where the standard falls short and are therefore supportive of measures to improve transparency and consistency of outcome regardless of the RPB concerned.

Whilst we are supportive of any measures that enhance the credibility of the insolvency profession, we do not consider that the proposed regulatory objectives are the way forward as we detail in the responses

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below.

Reforms to IP Fees

We disagree with the proposed reforms to IP fees and note that neither the OFT nor the Kempson report made such recommendations.

Fee based complaints have dropped (on your own statistics) since the 2010 Rule changes which would appear to suggest that there are effective mechanisms in place already.

What has been identified is a perceived unfairness that is the result of lack of creditor engagement to better control fees such as by a cap on rates. Whilst we do not share the views expressed about unfairness, we agree that more can be done to improve fee transparency, for example by:

- Providing short narrative to SIP 9 reporting to explain what was done and whether or not the task added value or was a statutory or regulatory responsibility.
- Providing an estimate of time costs at the outset, with narrative to explain underlying assumptions.
- Increasing creditor engagement amongst the public and involuntary creditor sectors, such as HMRC and rating authorities.
-

We would welcome the opportunity to engage in further discussion on these points.

Please contact Anna Hughes as per the contact details above if you have any queries.

Yours faithfully,

Nick Edwards
Partner
Restructuring Services

Deloitte.

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?

Whilst we are broadly supportive of measures designed to achieve a regulatory system for IPs that holds as its values clarity, consistency and transparency, we have a number of concerns over the objectives as proposed.

The intended outcome of the proposed regulatory objectives is "to underpin a more focused, efficient and consistent regulatory regime". Currently the RPBs are tasked with ensuring that their members are fit and proper persons with the necessary knowledge and experience to practice as IPs. Their effectiveness in this regard does not appear to be in dispute. The consultation cites six complaints against RPBs as referred to the IS in 2013 (the outcome of which is not given) against 748 complaints against IPs. On that basis it is not immediately apparent that there is inherent suspicion or mistrust over the RPBs or their ability as regulators.

Given the large number of RPBs servicing a relatively small IP market, it is however understandable that there may be a real or perceived concern over lack of transparency/clarity on where to direct complaints against an IP or concern that some RPBs may be less vigorous than others.

It is noted that there is appetite amongst stakeholder groups, although less so from within the IP profession, for a move to a single regulator, although this option does not appear to have been explored further, other than to propose reserving power to the IS to appoint a single regulator.

Instead the consultation proposes the current RPB framework remains, but with the additional controls as introduced in the form of mandatory regulatory objectives. Our comments on the proposed regulatory objectives are set out below:

- It is not clear nor has any guidance been offered as to how the RPBs are to interpret or test adherence to, or observation of, the 5 proposed regulatory objectives.
- No comment is made on whether these regulatory objectives are intended to be hierarchical. If they are, which is to be afforded priority where adherence to one conflicts with another?
- There is a potential risk of conflict between the regulatory objectives. The first objective of protecting and promoting the public interest could conflict with the fourth regulatory objective of promoting the maximisation of the value of returns to creditors and also promptness in making those returns.
- The second regulatory objective has been drafted widely with the addition of the words "...and any other principle considered to represent best regulatory practice". This may lead to different and/or subjective interpretation which is contradictory to 2(iii) which seeks to have a system that "delivers consistent outcomes".
- Similarly, subjective terminology such as "*deliver quality services*" as employed in the third regulatory objective, needs further definition – is this the best service, the most cost effective or a combination and how does that relate to providing "*consistent outcomes*" and/or "*represents value for money*".
- While we are broadly supportive of the underlying ethos of the fifth regulatory objective, without some form of qualitative definition this will potentially confuse and further alienate stakeholders and expose IPs to unnecessary complaints further increasing the burden on RPBs. There is significant subjectivity in determining "*value for money*". Will this be measured and reviewed by reference to additional guidelines and if so who would set these guidelines?

We consider that these draft objectives could be used as a basis for dialogue between the IP profession, the RPBs and the IS to formulate a regulatory process common to all RPBs and thus deliver the desired

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objectives of "consistency in the authorisation and regulation of IPs" and that RPBs work to "common standards". This would obviate the likely cost and disruption to IPs (and thus ultimately to stakeholders) of reducing the number of RPBs and instead focus on delivering outcomes through clear, consistent and uniform process.

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

No.

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

Provided the grounds, process and safeguards are clear, no.

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?

No.

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

No.

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

Yes

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?

The proposal requires clarification on what is meant by "exceptional circumstances" and thus sufficient to trigger the power. We have concerns on a number of issues, in particular:

- Is there a risk that IPs might face the possibility of dual sanctioning for the same allegation?
- Is there a risk to the IPs that complainants will use this process to countermand an RPB process and effectively try to force through sanction against an IP by pressing the IS to take action?
- Given that this new power will provide the Secretary of State with the direct ability to sanction an IP if in the public interest, similar to the Financial Reporting Council, does this infer that the public interest objective is deemed more important and in priority to the other proposed regulatory objectives?
- If the ultimate control of sanction is to lie with the IS, what purpose is there in delegating the power of sanction to RPBs in the first place?

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?

No.

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

No

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

No comment other than to suggest that focus might be better targeted at working towards common regulatory standards to be employed by RPBs to achieve the desired objectives rather than wholesale reform of a regulatory regime that is working and working well.

Part 2 – Insolvency Practitioner fee regime

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

We do not consider that sufficient detail has been provided to form a view on this matter.

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?

Adding a value for money objective within the regulatory framework could provide greater oversight to ensure fees are value for money, but as noted earlier this requires more definition and an objective framework for the RPB's to work with.

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?

Potentially, but publishing comparative fee data by asset size, and possibly by sector will need to be put in to context given there are likely to be case specific factors pertinent to the fees charged.

We would support measures to update SIP 9 to focus on information creditors need to assess the reasonableness of fees, but note that a standardised "one size fits all" approach may not deliver the optimal information for creditors. Encouraging use of insolvency case specific websites so that insolvency cases can be compared would also support the development of better informed/more aware stakeholder groups.

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?

We do not agree with the proposal to fix remuneration as a percentage of realisations as the presumed method for setting remuneration and hence make no comment on additional exceptions. A fixed fee basis would be inherently unfair if the basis for charging were to depend very heavily on the quality of the realisable assets rather than the work actually performed.

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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?

As noted above we do not agree with the proposal to limit time and rates as a basis for IP fees to situations with creditor control. We note that this will most likely impact smaller insolvency cases and thus smaller IP practices. Given that the draft (2015) rule changes are likely to result in the removal of creditor meetings it does seem at odds with seeking to stimulate improved creditor participation. To the extent that committees will be required with the sole purpose of being able to fix fees, it will certainly increase costs and arguably unnecessarily if the primary motivation to form a committee is to determine a fee on a time and rates basis.

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

We have a number of comments which are set out below:

- IPs may not take on small cases with limited assets as they are unlikely to be cost effective to do so.
- In difficult cases where fraud or misconduct are believed to have been at play there will likely be limited investigation.
- Where there are potential recoveries or difficult to realise assets these may either be overlooked as too speculative or lead to limited or no work performed and hence reduced recoveries to creditors.
- The proposed basis fails to take into account matters such as statutory reporting, dealing with employees and issues such as pension, Health and Safety or CRC usage. These administrative tasks are required of the IP even though they do not improve the outcome for the creditors but they may protect and promote the public interest (see Q1) for example by mitigating employee claims against the National Insurance Fund.
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We agree there should be increased transparency in respect of IP fees and costs but the overly simplistic approach may result in both reducing creditor returns (IP's not seeking to make difficult recoveries) and not providing a fair fee for the IP.

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?

Yes. There are higher acceptance thresholds in the VA market and also well informed, mobilised creditor groups using 'concert' voting to make or break proposals or force through modifications.

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?

No, as any scale needs to take account of the asset type, company sector and level of difficulty in realising value for the estate rather than having a default setting which is likely to be low and require increased creditor engagement to get a "fair" rate.

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?
No comment.

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Q20: Do you think there are further circumstances in which time and rate should be able to be charged? See comments above.

Impact Assessment questions:

The underlying assumptions on which the impact assessments have been based lack credibility not least in that they fail to take into account any unintended consequences of the proposals. For example, restricting time and rates as a fee basis would drive up the number of meetings called and this would adversely impact on returns to creditors through (unnecessary) increased administrative costs. In the absence of sound empirical evidence we do not propose to comment further.

Strengthening the regulatory regime and fee structure for insolvency practitioners

KPMG Restructuring response to the regulatory and fees consultation paper prepared by The Insolvency Service and issued on 17 February 2014.

Who we are

This response is prepared on behalf of the KPMG Restructuring practice, which is made up of some 620 staff including 38 appointment-takers, 21 of whom are partners and 17 associate partners and directors. In addition to those taking appointments, a further 31 staff have passed the JIEB examinations and 78 the CPI examinations. We are a national practice with 13 of our offices within England, Wales and Scotland undertaking Restructuring work.

We have a strong presence on several of the Technical and Regulatory committees in existence for the insolvency profession, including representation on the Joint Insolvency Committee, the R3 General Technical Committee, the ICAEW Technical Committee, the ICAEW Professional Standards Board, the IPA Council and the ICAS Technical Committee. In addition we have a member of staff on the R3 Education, Courses and Conferences Committee. This demonstrates the commitment we have made and continue to make to the insolvency profession.

As a practice, we take regulation and compliance with legislation and best practice very seriously. We have a strong network of technical, compliance and risk staff to support the client-facing teams, as well as a partner and director panel reviewing risk and compliance issues. Within our central team we have two members of staff who previously worked for the regulators and have a good understanding, from an external perspective, of the regulatory regime.

Why we are responding

We are proud of our profession and the standing of the UK insolvency regime internationally. We do not consider that the comments and assumptions made within this Insolvency Service consultation are fair, balanced or, in large part, substantiated. Much of the information upon which conclusions have been drawn is somewhat outdated and appears to be based upon either qualitative assessments, rather than quantitative support, or unsubstantiated views.

As a result, we believe, for the reasons which are set out in detail below, that a number of the conclusions drawn within this consultation are flawed and do not accurately reflect the actual position. Given these very real concerns, we consider that a more detailed analysis should be undertaken with quantitative assessments made using current data. Until such a review has been undertaken, it is difficult to see how an accurate assessment can be made and clear conclusion drawn upon which to base proposals for change.

In addition to concerns around the data relied upon and conclusions drawn by the consultation itself, it is both surprising and disappointing that no consideration appears to have been given to the potential damage that some of the suggested changes might cause to the profession as a whole. As we have already noted, the UK insolvency profession is highly regarded, and the World Bank report, which has been relied upon when carrying out this consultation, ranks the UK insolvency regime seventh by international standards. This ranking puts the UK ahead of the US and other countries such as Australia, which have been used as examples for potential change within the consultation.

There is a real concern that, by making such radical changes to the fee regime we will see a change for the worse in the insolvency profession. There is a risk that, in what is already a highly competitive and regulated profession, further pressure on the ability to earn fees and receive fair reward for both the personal risk undertaken and highly specialist work performed will result in some practitioners choosing to leave the profession. The proposed reduction in fees, despite an ongoing increase in the work required and the increasing cost and burden of the regulatory regime will, inevitably, lead some practitioners, particularly smaller businesses, to conclude that acting as an insolvency practitioner is no longer a viable business option.

For reasons that we have set out within our response below we do not believe that these proposals set out a fair and reasonable approach; they do not seek to recognise the highly technical nature of the work undertaken; nor do they incentivise insolvency practitioners to demonstrate innovation and specialism. We believe that the changes proposed to the fee regime and structure will create a real risk that the profession will regress. It is entirely possible that the quality and professionalism for which the UK insolvency regime has become recognised will diminish considerably as practitioners seek to make the level of work commercially viable for the fees payable. This clearly cannot be a good thing for the profession as a whole.

Disappointingly, the consultation appears to have completely overlooked the fact that, whilst recognising and complying with the highly regulated nature of the insolvency profession, insolvency practitioners are also seeking to run successful businesses themselves. This can only be possible where it is financially viable to do so and any fee structure proposed needs to recognise this.

Major concerns

We have provided comments on what we consider to be the main areas of concern. We have chosen not to respond to the specific questions raised by the Insolvency Service as part of this consultation, as we consider many of the questions have a narrow focus and do not address the broader fundamental issues.

Part 1 – Regulation of insolvency practitioners

The proposed changes to the regulatory framework seem largely sensible, particularly given that they are based on similar regulatory systems for the legal profession. We welcome clearer regulatory objectives which will provide certainty for the RPBs and a clear framework by which matters can be assessed and RPBs measured. We are, however, concerned that several fundamental points appear either to have been missed or do not appear to have been fully acknowledged and addressed by the proposals as follows:

Adequacy of the Secretary of State to perform an oversight role

There is no evidence that any consideration has been given to the adequacy of the Secretary of State to perform an oversight role for the Regulators. This would seem to be a key consideration when allocating such a role: is the Government comfortable that the Secretary of State has sufficient knowledge, experience, expertise and resource to provide this oversight?

From past performance this seems questionable. No evidence has been provided to date to suggest that changes have been made to address previous shortcomings by the Secretary of State and, as a result, there remain real concerns amongst the profession about the Secretary of State's ability to fulfil such a role.

Number of RPBs currently licensing insolvency practitioners

Whilst the consultation raises concerns around the number of RPBs currently licensing insolvency practitioners, there are no real changes proposed to address this. A reserve power for the Secretary of State to appoint a single insolvency regulator in the future is being proposed but this does not address, at this stage, the fact that there are currently seven RPBs.

Whilst the number of RPBs is perhaps not, in itself, an issue for the profession, the more fundamental point is the disparity in approach of these RPBs; this should surely be something that the Secretary of State and the Government is looking to address. The standard of monitoring and review differs vastly between the RPBs, with some sub-contracting out the review of their practitioners. The oversight role does not appear to be being adequately undertaken in some instances and there needs to be a consistent standard with regard to the acceptable level of technical knowledge and support, the ability and resource to review IPs and the adequacy of resource available to monitor and support practitioners and to deal with complaints. Arguably this should be an area of priority for the Secretary of State and the proposed reforms.

It is appreciated that, arguably long-overdue, steps are now being taken to put in place a regulatory framework by which to measure the RPBs, however, what remains unclear is how the Secretary of State proposes to monitor and enforce this framework. It is noted that current RPBs will not be required to re-apply under the new framework.

Reserve power to appoint a single insolvency regulator

Should a single regulator be considered necessary, it is unclear how the Government or the Secretary of State proposes to address this and make such an appointment. Whilst the desire to have an ability to make such an appointment is acknowledged, it is unclear how this could work in practice and who would be able to fulfil the role. A further important consideration is the differences in regulation between the Law Societies and the Accountancy bodies, which would clearly affect any single regulator appointment.

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

It is currently unclear how this process would work but it would appear to be suggesting that there would be no recourse to the IP in question and no opportunity for that practitioner to present their case to the Court, were such a sanction sought and granted. It is noted that the proposal refers to an appeal to a higher Court, but there is limited detail about the procedure when initially seeking to impose the sanction.

Assuming there is no opportunity for the IP to present their case this appears to be completely unworkable and unfair, in addition to being potentially in breach of ordinary rights of hearing and appeal. Further clarification around the definition of "public interest", the circumstances under which such a sanction might be sought and the proposed process would be helpful. It is not currently possible to make a clear assessment of this proposal given the lack of detail and context provided.

Part 2 – Insolvency practitioner fee regime

Overview

Reliance upon significantly outdated information

This consultation document has largely been prepared with reliance upon the findings of the Office of Fair Trading ("OFT") report prepared in 2010. It was based on data very largely pre-dating the financial crisis of 2008 and subsequent recession, and did not take account of changes to the Insolvency Practitioner's remuneration introduced in April of that year. That report is now a further four years out of date.

The Consultation also relies upon the July 2013 report by Profession Kempson which was a review into IP's fees in order to make recommendations for change to ensure creditors are being charged fairly, as well as to increase confidence in the insolvency regime.

Whilst clearly, in itself, a more recent report, unfortunately it relied upon the earlier OFT Report and the outdated statistics, rather than seeking to challenge it using more recent data. Professor Kempson has acknowledged that "the evidence base is thin" when discussing any allegation of systematic overcharging.

The OFT Report, despite its flaws, did not conclude that overcharging by IPs is widespread or systematic, nor did it conclude that they are exploitative. Upon completion of the review in 2010 no follow-up was required.

Secured versus unsecured approval

In concluding that the current fee regime is unfair, the consultation relies heavily on a statement in the OFT report 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 where secured creditors 'control' an IPs fees."

Leaving aside our concerns already raised about the date of the data being used, it is important to note that the 9% referred is clearly noted to be an "estimate" and there is no evidence that this has been subject to further review or confirmation.

Heavy reliance appears to be being placed upon these findings as evidence of overcharging, but what the report has failed to acknowledge is the fundamental difference between assets charged to a secured creditor and those remaining for the unsecured creditors. Inevitably, a secured creditor will take as security the readily realisable assets, such as real property, leaving the unsecured creditors with 'harder to realise assets' or those assets which require a greater risk to realise, for instance through litigation. The report does not recognise this or apply a weighting for the additional risk that the IP takes.

The OFT Report juxtaposes the buying power of an engaged and experienced corporate, having sophisticated lending and recovery criteria and regimes, using that knowledge to negotiate lower costs, against unsecured creditors, a disparate group, often including a plethora of small creditors who lack understanding of the insolvency process, and who do not engage with it. Those creditors will ultimately benefit from the buying power of secured creditors in 91% of cases; however, given the context that they lost money due to the actions of the corporate and its directors, they are still likely to be aggrieved. Unsecured creditors generally have a misplaced expectation in insolvency that they will recover all of their loss, and any payment that ranks ahead of them is unfair. This remains an issue of education.

Proposed reforms

Enhanced monitoring by regulators – providing value for money

Within the consultation the concept of value for money is undefined. Much greater thought needs to be given to this concept and a clear definition provided so that it can be appropriately understood by both creditors and IPs.

The difficulty with assessing "fair value" is that such an assessment would tend to require subjective judgements and could lead to significant investigation in order to fully understand the issues and complexities of the case and make such a "judgement". It is unclear how the regulators would perform this role and the level of "enhanced monitoring" that might be required to enable them to do so.

It is important to remember that, regrettably, there are certain steps that an IP is obliged to complete within the insolvency process which provide little or no value to the estate: the tasks are largely statutory in nature and must, therefore, be undertaken but they do not directly improve the return to creditors. For instance the IP is obligated to investigate the behaviour of the directors in all cases and submit a return; in a certain number of those cases it will be self-evident that the directors have done nothing wrong and this required work will add no value to those estates.

It is difficult to see that such statutory work could ever be undertaken by anyone other than the IP and, therefore, the "value for money" in completing these tasks will always be an issue for the creditors. It would be equally unfair to continue to expect IPs to complete these statutory tasks, some of which are clearly Government driven, without any payment for doing so.

Increasing creditor engagement

It is disappointing and a source of continued frustration that unsecured creditors generally remain unengaged with the insolvency process as a whole. Given the approval requirements within legislation, it often makes the IP's job more difficult when creditors fail to vote at all on resolutions sought.

In an ideal world, the profession would be able to address any perceived shortcomings through education, which, it is hoped, would lead to greater creditor engagement. We have already expressed concerns, via a number of different Insolvency Service forums, that certain of the reforms proposed by The Red Tape Challenge are likely to lead to less creditor engagement and, in some instances, will serve actively to encourage creditors not to participate. Changes previously proposed in relation to committees and the abolition of certain creditors' meetings were a primarily example of steps likely actively to disengage creditors. It remains to be seen how those proposals will develop and the further changes that will be imposed around meetings and committees.

The 2010 changes to the Rules sought to address the information available to creditors and set out their rights and abilities to challenge fee levels. From the findings of the consultation it would appear that the Insolvency Service have concluded that these measures failed, however, given the concerns previously raised about the outdated nature of the data used in this consultation, it would seem sensible to perform a more detailed and up to date analysis before any definite conclusions are reached and any reform is enacted.

We are concerned that the proposed fee reforms might lead unscrupulous IPs to seek committees more frequently. The new proposals provide an ability to draw fees on a time cost basis where there is a secured creditor or a creditors' committee (which, as noted, is at odds with the Red Tape Challenge proposals) and this approach may lead IPs actively to try to form committees in order to draw remuneration on a time cost basis. Whilst, on occasions where there is a particularly large and/or complex case, we have actively sought a committee to assist us with the oversight of a case, this approach on smaller cases where there is no merit, and importantly no desire, to have a committee will be detrimental. The appointment of a committee inevitably adds costs and further statutory and administrative burdens which, in these circumstances, will clearly have no benefit to creditors. Further consideration needs to be given to this proposal to ensure that any proposed changes do not result in additional unnecessary costs and inefficiencies.

We were pleased to note the active engagement with Government creditors: we have already had a meeting with the RPO to discuss fee approvals and have been seeking to work actively with them in relation to this. At the meeting we held with them in November 2013 we discussed the possibility of fee quotes to assist them in the management of cases and to attempt to meet their desire to engage in the process without adding unnecessary burdens where they had limited rights under the legislation. Unfortunately, despite discussions, we are currently still waiting to hear from them on our proposal; we suspect their lack of response is linked to this consultation.

Simplification of fee structure

As the consultation states, “IPs are entitled to receive a fair fee for the work that they do” and a scale fee (based on a percentage of realisations) would not provide this. The *Cork Report* identified that scale fees “result in poor recompense for the liquidator in relation to the amount of work involved in a complex case and are over-generous on occasions (e.g. where the only asset is a bank account)’. The difficulty with scale rates is that there is no “right rate” for any scale; each case is different and a “fair” rate for one case will not necessarily reflect a fair rate for another.

Another important issue, that we have already touched upon above, is the fact that IPs are expected to do significant work which is not directly related to realisations or distributions and using a scale rate based on realisations would result in such work effectively being unpaid. Again, this cannot be considered fair or reasonable and, ultimately, has the potential to lead to IPs being more selective about the cases they choose to administer and less inclined to pursue and investigate issues where their statutory obligations have been fulfilled. This in turn has the potential to impact the Government and cause increased costs to the taxpayer where cases are no longer economical for IPs to undertake and instead have to be administered by the Official Receiver.

Taking into consideration these issues and contrasting this with a fee based on hourly rates, which have to be fully disclosed and the time accurately recorded, justified and subsequently approved, it is difficult to see how this could be considered to be anything but the fairest mechanism by which IPs should be remunerated. This method of payment would appear fair to both the IP and the creditors and, given the rigorous disclosure requirements and the need for separate approval, is clearly transparent should creditors choose to engage.

Whilst, as the Kempson report notes, there is clearly a risk that this fee basis might be open to abuse, this should not mean that it is completely discounted as an appropriate method by which to remunerate IPs. The same risks apply to other professions which still continue to use time costs as a fair and reasonable basis for remuneration.

Another important point to make is that the use of scale rate fees could reduce the effectiveness of the insolvency regime; with IPs being less inclined to actively pursue delinquent directors or perform additional investigations that might ultimately result in better returns to creditors. Being paid on a set scale does not provide an incentive to carry out work where the certainty of a recovery is not clear (which will be the case for the majority of investigation work where there is potential litigation to seek recoveries) and ultimately would be likely to result in more decisions around whether work is economical to pursue. Whilst there is no suggestion that IPs would not continue to perform the required work and their statutory duties, there is a risk that additional work would be less likely to be undertaken. This would clearly impact the Government's objectives in relation to directors etc.

Interestingly, neither the OFT nor Professor Kempson have established that hourly rates currently charged by IPs are in themselves unfair (particularly when compared to other professionals such as accountants or lawyers). As we have noted already, we would expect the consultation, in reaching such a conclusion, to be able to support this statement with substantial quantitative data; this data is not currently available.

An implication of the new regulatory regime and fee approval processes is that there will be greater interaction with regulators, but the consultation document is silent on who should pay for that additional work. It is assumed that the additional costs of the RPBs will be passed onto all IPs, either through a levy or licensing costs. This will have the impact of further reducing profit margins.

As we have already noted, reducing payments to IPs by tighter control and eroding their profit margin will impact smaller practices and is likely to see some small practitioners withdraw from the industry. Furthermore, if significant players are unable to make a reasonable margin, with other opportunities available to them they may also exit the market.

The combined impact of these two steps will be to reduce competition within the marketplace, which will have an impact on price and the quality of the work that is available. This will be detrimental to the UK's economy in the longer term. As we have noted, the UK's regime is perceived by many to be a model regime, driven in part by the quality of the practitioners and the clarity provided by the law. The process in the UK is not as expensive as some other processes, and there are sufficient safeguards within the UK regime. It would be a shame to see this deteriorate by creating an unworkable and unsustainable fee regime.

Alternatives to proposals and possible next steps

Whilst we still firmly believe that time costs provide the most fair and flexible mechanism by which to remunerate IPs, we understand the concerns being raised by the consultation paper and would like to suggest some alternative proposals that the Insolvency Service might wish to consider:

- **Estimate of fees** – When proposing to draw remuneration on a time cost basis the IP could, at the start of the case (or certainly at the time fee approval is sought) provide creditors with an estimate of the likely fees. This would provide a clearer idea of the likely outcome at an early stage. Should it appear that the estimate provided, and subsequently approved by creditors, might be exceeded, the IP would need to engage with creditors, provide the reasons for any differences and seek approval for any additional fees in excess of the original estimate. This would help to improve creditor engagement and would allow creditors a more active role.

  Interestingly, this is the proposal that we recently referred to the RPO, (see above) as an option to assist them with the engagement and control of fees on our cases.

- **Combination fees** – In line with current legislative provisions for combined fees, a fixed or capped fee could be set for the statutory work on a case, with hourly rates for asset realisation and investigation work. Similarly, and in line with the proposal above, an estimate could be provided for the statutory work specifically and/or the other work being undertaken on a time cost basis.

- **More detailed descriptions of work undertaken** – Lawyers currently provide very detailed descriptions of the work undertaken and, whilst the current SIP 9 reporting goes some way to address this, more detailed reporting of the work undertaken could be provided.

As you will appreciate, creditor engagement would still be an issue for the majority of the above proposals. We do, however, consider that the first option (i.e. an estimate of fees) would encourage creditor engagement and, with some further appropriate education, could become a very workable solution.

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Response of Insolvency Consultancy to the Insolvency Service Consultation: 'Strengthening the regulatory regime and fee structure for insolvency practitioners'

About Smith Cooper

Smith Cooper LLP is a limited liability partnership registered in England under reference OC366011 with its registered address at St Helen's House, King Street, Derby, DE1 3EE. Smith Cooper LLP is regulated for a range of investment business activities by the Institute of Chartered Accountants in England & Wales and is registered to carry on audit work in the UK and Ireland by the Institute of Chartered Accountants in England & Wales.

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Consultation Question Responses:

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?

Whilst the aim of the regulatory objectives and the requirement for the RPBs to reflect them is laudable, I think that in practice these present immense problems and may prove unworkable.

Paragraph 44 of the consultation document claims that 'the Secretary of State is frustrated in his ability to effectively regulate the RPBs'; Yet in paragraph 41 admits that there were only 6 complaints in 2013 about regulators and does not state what the nature of these very few complaints were. As the current system clearly works very effectively it is difficult to understand what problem or issue is being addressed by even more legislation.

The consultation fails to mention the 'Dear IP' guidance notes issued by the Insolvency Service on a regular basis which direct IPs on specific issues.

Paragraph 45 states that there is support for a single independent regulator. All the Regulators are independent except the Insolvency Service. There is no support within the profession to have a single

regulator imposed on them by the Secretary of State. It is disquieting that the Insolvency Service states that they want to take these powers now. In addition a single regulator would create an undesirable monopoly position in the profession.
Paragraph 46 gives examples of regulatory frameworks of other professions which 'have been significantly strengthened in recent years.' One of these examples is the legal profession following the changes in the Legal Services Act 2007. The OFT undertook a review of the impact of the changes introduced and reported in January 2013. This can be found by following the link: http://www.oft.gov.uk/news-and-updates/press/2013/07-13#.UyljVLdF3io The opening paragraph of the press release states: 'The OFT is calling for the legal profession's complaint handling procedures to be further simplified after it published research today showing that only one in eight (13 per cent) dissatisfied customers goes on to make a formal complaint.'

Paragraph 48 states that 'the insolvency profession should act with integrity, fairness and transparency.' This seemingly ignores the fact that Insolvency Practitioners ('IPs') act as officers of the court. The final sentence of that paragraph appears to states that all the current insolvency legislation, regulation, best practice and other guidance is not effective. I find that very difficult to digest and in fact undermines the Insolvency Services own work over the past few decades. In addition, if 'due regard' is to be given 'to the interests of all creditors' in all insolvency processes then the current legislation will have to be fundamentally changed to incorporate that. This will have far reaching implications for lenders and secured creditors in insolvency processes.
Paragraph 51 distinguishes the roles of the RPS to that of The Insolvency Service when it states that RPBs 'must' act in a certain way but the Insolvency Service merely be required to 'have regard' the regulatory objectives.

In response to the specific question asked, I comment first on the objective of 'protecting and promoting the public interest'. What is considered to be in the 'public interest' changes with the Government at the time. There appears to be a lack of acknowledgement that the Insolvency profession is just that. Insolvency Practitioners operate businesses and not public services (or even charities). If the Government's aim is to protect and promote the public interest (whatever that is defined to be at the time) then it is perhaps better that all insolvency procedures are administered by the Official Receivers' ('OR') offices and their staff. Of course there is neither the resource nor expertise to do so; (the OR's offices could not have dealt with the Administration of Woolworths or Lehman's for example). What is protecting and promoting the public interest? This is not defined and is subject to interpretation. Is protecting the public interest saving jobs? Trading on a company at a loss to keep jobs isn't going to make returns to creditors increase. Promoting the public interest - how exactly? Is there an expectation for IPs to launch advertising and marketing campaigns about insolvency and creditors' rights? This is so loosely worded that it can be interpreted to mean anything depending on the current political climate. This is not fair and transparent.

The second objective is already being met by the profession. Indeed it is confusing as to why this is included at all. The Insolvency Service introduced the Complaints Gateway for creditors last year. There has been no time to evaluate that change and yet a further change is already being proposed. It seems that Government departments are not working together. If further change is required then this is not an endorsement for the changes already introduced by The Insolvency Service already.

As regards objective 3 regarding an 'independent and competitive IP profession'; this objective demonstrates how out of touch the policy makers are to think that the profession isn't already highly competitive. The insolvency profession has suffered redundancies and prices have dramatically fallen in the face of fierce competition for work. The Insolvency Services own figures demonstrate how much insolvency has fallen over the last few years. In addition, the current Insolvency legislation does not fit the IP considering the interests of all creditors as it stands (this is specific to certain types of insolvency such as Administrations and not to Administrative Receiverships for example).

The fourth objective of ‘promoting the maximization of returns to creditors’ is again a strange objective to include when the whole purpose of the insolvency regime is to return money to creditors. However what happens when an Administrator takes a lower offer for a business because the cash is in the bank as compared to a higher offer by installments which is insecure in nature? In addition this does not fit with the first objective re Public interest which could mean saving jobs rather than maximising realisations. This objective easily is achieved by increasing the £800 limit imposed on the amount employees can claim as arrears of wages (a limit not increased since 1986) as preferential and increasing the maximum amount and calculation of the Prescribed Part. Both these reforms would immediately increase the returns to creditors without the need of additional regulation, monitoring and legislation.

Finally, the proposed requirement for RPBs to assess whether an Insolvency Practitioner’s (‘IP’) fees represent value for money could prove to be extremely time consuming and costly which will ultimately increase the costs of regulation. This ultimately will result in reduced level of returns to creditors. What is value for money? Ensuring jobs are saved? Delinquent Directors stopped? Maximising returns to creditors? What is value for money on a case the size of Lehman's (and the expertise required) is somewhat different to the value for money on a consumer credit IVA (and the 'expertise' required).

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

There is no detail provided to enable useful comments. As the Insolvency Service has stated, in the consultation document, there have been only 6 complaints in the previous year. As a consequence it is highly unlikely that an RPB’s actions will warrant revocation of recognition as an RPB. This is clearly to be used as a threat to RPBs to determine a type of behavior. Such a threat is unwarranted and unnecessary (as there is no basis for it).

In any event, any RPB subject to a threat of revocation would either mount a challenge or voluntarily withdraw from the market. I cannot envisage a straight forward revocation at all.

I am concerned that inadequate time would be given for an RPB to address any concerns that the Insolvency Service had. The consultation also glosses over the impact that this would have on individual IPs authorized by any RPB which is subject to revocation. The current application and approval process can take months not weeks due to the due diligence required. This factor has seemingly not been taken into account anywhere.

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

I am concerned that this will progress from oversight to direct regulation. RPBs have systems in place to deal appropriately with complaints and other regulatory matters. Consistency across RPBs should be applied to their various processes. The consultation proposes varying time, periods between 14 – 28 days which is ambiguous; clarification and consistency is required.

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?

The time period allowed for representations should be increased to a minimum of 28 days. It is undesirable for there to be no upper limit to the fine. This will lead RPBs, from a corporate governance and financial planning perspective, increasing fees to cover any eventuality. This will in turn be passed on to creditors. It is counterproductive.

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

Time periods should be consistent and extended.

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

Time periods should be consistent and extended.

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?

I am concerned that any such power could be subject to inappropriate political pressure in high profile or media sensitive cases. It is difficult to envisage any circumstance where the Insolvency Service would need to leap frog a Regulator if the Insolvency Service shared relevant information with that Regulator to act upon. If the Insolvency Services proposes to impose a sanction greater than an RPB what would be the grounds for doing so after due process (approved by the Insolvency Service in the inspection visits) has taken place? The number of people involved in an investigation, including committees made up from the profession and lay members, means that the outcome is a fair, reasonable and balanced one in all the circumstances. The Insolvency Service would seek to review this process and seek to impose a further sanction via the Court. This would not only undermine an RPB's (approved) processes but would unduly lengthen the process and add an additional cost burden (in addition to Court costs of prosecution and defense). It is difficult to envisage any advantages in this proposal.

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?

The Insolvency Service already regulates RPBs and inspects IPs it directly regulates. It is not clear why their existing powers are insufficient and this not explained in the consultation document. As a consequence the taking of additional powers appears draconian.

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

No.

Paragraph 45 states that there is support for a single independent regulator. All the Regulators are independent except the Insolvency Service. There is no support within the profession for a single regulator to be imposed upon them by the Secretary of State acting via the Insolvency Service. It is disquieting that the Insolvency Service states that they want to take these powers now.

This would create the unwelcome scenario of a monopoly position. There is competition amongst the existing regulators within the profession and this enables choice for IPs and reduced fees. If a monopoly were to be created then excessive fees for regulation could be charged (which ultimately would be passed on to creditors), training and development services would be restricted and discussion on policy matters would only have the one viewpoint.

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

Paragraph 46 gives examples of regulatory frameworks of other professions which 'have been significantly strengthened in recent years.' One of these examples is the legal profession following the changes in the Legal Services Act 2007. The OFT undertook a review of the impact of the changes introduced and reported in January 2013. This can be found by following the link: http://www.oft.gov.uk/news-and-updates/press/2013/07-13#.UyljVLdF3io The opening paragraph of the press release states: 'The OFT is calling for the legal profession's complaint handling procedures to be further simplified after it published research today showing that only one in eight (13 per cent) dissatisfied customers goes on to make a formal complaint.' It would appear that the changes introduced were any more successful in addressing the previous concerns that existed. The single postbox system introduced was also highlighted stating it was not effectively signposted or easily understood. This is something which the Insolvency Service mirrored with the introduction of the single complaints gateway last year. There has been inadequate time to produce an impact assessment of that change.

The main issue here though is the lack of action taken against the unregulated market surrounding the insolvency profession. The lack of action against delinquent directors who undertake transactions to defraud creditors and operate phoenix companies (amongst other things) causes real concern for creditors and the public alike. Yet these unregulated advisors to such companies, directors and individuals continue unabated and unrestricted. The Insolvency Service is still not seeking powers to deal with the unregulated market surrounding the insolvency profession and I think they are targeting the wrong area.

This also does not sit with the proposal to revoke an RPBs recognition; which would need to be repealed as there would be no alternative 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?

No, the familiarisation costs are massively understated. The assessment of costs contains so many estimates, assumptions and unquantified variables, that it is purely speculative. Whilst the changes are "not difficult to understand" the implications on the IP's business will be far-reaching. It will be necessary to increase resource to establish viable rates for the fixed fees and percentages to be sought.

It is impossible to assess the increased costs to regulatory systems without guidance on how value is to be assessed. Will RPBs be required to undertake a full review of time spent and how this compares to the fixed or percentage fees charged are? Will they be required to undertake additional visits to review IPs files? It is unclear how the estimated cost of £2,715 per case review is reached; This cost this is then subject to a multiplier which is also an estimate (anticipated fee complaints). It is difficult to state whether the cost is accurate or even reasonable.

The financial benefits are estimated as a result of the OFT's estimate of alleged over-changing in administration cases and assumes that a proportion of these funds would be paid to unsecured creditors. This assumption is not supported by any actual evidence that adopting fixed or percentage fees would act to reduce fee levels. In addition, an RPB can sanction the practitioner by way of fine, but that this would not result in an increased return to the unsecured creditors, as this could only be achieved by the repayment of remuneration to the estate. Even if fee complaints were upheld there would not be a financial return to creditors as a consequence.

This proposal is replacing the Court process and moving it to an RPB when there is a fee complaint. The RPB has to act as an independent adjudicator, effectively replacing a judge, to make such decisions. This has huge cost implications for education, training and insurance as well as the time involved in gathering evidence and validating it (as there would be in a Court process). This is significantly different to assessing the validity of any remuneration approval with statute.

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?

The assessment of value for money on a case by case basis will be extremely lengthy and time consuming. The reviewer will have to review the entire case for work undertaken and assess this against the time costs incurred and then fees actually charged. A review of the work done will have to include time charged and fees agreed to be assessed against the necessity of the work undertaken (statutory, best practice and case law) and the outcome of the case. This will be extremely difficult during the administration of a case especially if there is an ongoing investigation into assets when all the costs are incurred before the realisation of the asset. Establishing what value for money is completely subjective in nature and in whose opinion such value should be ascertained? Sometimes costs incurred investigating potential assets prove unfruitful as assets may be uneconomical to pursue or are in fact unrealisable for some reason. Such time incurred will be unable to demonstrate value added for creditors. Does this mean that IPs should not investigate assets unless they are certain of a recovery for creditors? This will lead to more delinquent behavior by some directors.

It is very common for Insolvency Practitioners to write off time costs on their appointments; In fact it is rare for them not to do so. This consideration is seemingly ignored in this consultation.

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?

IPs already provide and publish rafts of information regarding their fees and charge out rates in compliance with SIP 9. The reality is that creditors are simply not interested in receiving pages of information from IPs about their fees. Creditors merely want to know how much they are going to get back and how quickly. Occasionally they may be interested in actions against the directors of a company. The time and resource of the Insolvency Service would be better placed on pursuing delinquent directors.

In almost every corporate insolvency there will be two government agencies who will be significant creditors: HMRC and the RPO. They receive reports in all those cases, so must have the ability to judge objectively the value of what they are receiving, and have the power to lead other creditors (potentially could form a committee if one other creditor was interested) and request further information in cases that require it, and challenge fees in cases where they believe they are exorbitant. And yet they do nothing. Why is this? Why is more legislation being introduced when Government departments don't engage?

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?

No. I don't agree that restricting IP fees in this way will result in a better outcome for creditors therefore extending this right further will create even more problems. IPs will be reluctant to invest time investigating potential assets for creditors unless they know they will be paid for doing so.

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?

Paragraph 113 of the consultation document states: "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". Both Professor Kempson's report and the OFT market study drew conclusions about the effectiveness of secured creditors' control but the OFT's study looked only at Administrations and Para 83 CVLs and Professor Kempson built on this study and therefore concentrated on the effect of IPs obtaining appointments via bank panels. This is a relatively narrow focus which has been extrapolated and stated that this should apply to *all* insolvencies (except for VAs and MVLs). It seems highly unlikely the secured creditors *really* control the level of fees in less significant liquidations or bankruptcies where the mortgaged home is in negative equity.

The bases of liquidators' and trustees' fees are fixed by resolutions of the *unsecured* creditors. As there is little apparent creditor dissatisfaction with the level of remuneration charged on those cases I do not believe this proposal is warranted.

Fixed or percentage fees will not necessarily incentivise IPs appropriately. Percentage fees are a very crude measure and are less transparent and can produce results which do not reflect the work undertaken on a case; it will lead to windfalls on some cases and shortfalls on others. Fixed fees in particular present inappropriate economic motivator to avoid non-profitable tasks and may in turn have an adverse effect on outcomes for creditors. Time costs basis for fee provides transparency, accountability and comparability.

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

The Insolvency Service has repeated the statement from the OFT's market study. **'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' (paragraph 88 of the consultation document).** This ignores legal fees, agents' fees and costs of insolvencies such as insurance, bond premiums etc. In addition the Insolvency Service's own fees (a priority expense payable from the assets in bankruptcies and compulsory liquidations) have been ignored.

It is an incorrect perception of IP fees as the £1bn stated appears to be the *costs incurred on* insolvent estates. The OFT's explanation of how they calculated the £1bn (footnote 11 at http://www.oft.gov.uk/shared_oft/reports/Insolvency/oft1245) mixes up *fees* and *costs*. This statement ignores the actual and real costs of insolvency appointments drawing conclusions that are unsustainable under scrutiny.

The statement that the use of the Schedule 6 scale rate for fees "ensures that there are funds available for distribution and not all realisations are swallowed up in fees and remuneration" (paragraph 117 of the consultation document) is an emotive one and inappropriate in a consultation document. The reference to excessive' fees and charging is a constant theme throughout the consultation document; even though the consultation document acknowledges that Professor Kempson did not interpret over-charging as deliberate.

Reverting to office holder fees being charged as a relatively low percentages of Schedule 6 will not ensure there are funds available for distribution. This objective seems to be the reason for of the fees proposals as Ms Willmott MP explains in her foreword: "[The consultation document] 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"*. This is a misconceived expectation; not every insolvency has enough money to result in a distribution to creditors. There seems to be a fundamental misunderstanding that insolvent companies and individuals have money to pay all the costs incurred in administering an insolvent estate. This simply isn't the case.

If IPs work primarily on fixed fees (estimated at the outset) this will results in an element of cross-subsidisation of cases, with cases where the fixed fee is ultimately profitable, subsidising those where the fixed fee results in the IP making a loss by reference to time given. The use of fixed fees may also make it difficult for RPBs to assess fees and more difficult for creditors to successfully challenge them. If a fixed fee is agreed, would this still be measured against the time costs incurred? Will IPs still be required to maintain time records on each case if time cost charging is prohibited? How does this correlate with the IP Regulations 2005 which require accurate time records to be maintained on cases? If not, what would value be measured against?

There is a risk that insolvency practitioners will concentrate on easily realisable assets which have a more certain outcome. Cases with a contingency relating to an outcome will be difficult for an IP to recover costs and may lead to more cases being administered by the OR's office.

Finally there is a risk that creditors will become confused by a further change in the fee structure following on so swiftly from the change implemented in the 2010 Rules, the impact of which has yet to be assessed.

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?

I don't think that the proposed changes should apply at all. Creditor and member involvement is usually more active in VAs and MVLs and therefore it is unnecessary. Consumer credit IVAs involving regular, fixed monthly contributions from income, already have a percentage basis as the norm.

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?

No. The percentage should be appropriate to the nature of the assets to which it is to be applied, and this will vary considerably. By setting a prescribed scale there is a risk that it will be applied across the board to all cases whether or not the percentages applied are appropriate. Creditors will still not engage in the process. Where assets are easily realised it may in fact lead to a greater return to the Insolvency Practitioner than if a time cost basis for fees had been agreed. If the scale is insufficient the IP will have to seek to have it increased and if unsuccessful will suffer a loss.

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?

No. These rates were set almost 30 years ago, at a time when the regulatory expectations and statutory burdens were smaller. They were also largely abandoned as a default basis for remuneration on the grounds they were not operating appropriately. Corporate structures are much more complicated than they were when the Insolvency Act was first introduced in 1986. In addition in 1986 companies owned physical assets included fixed assets, stocks and debtors. Today it is unlikely that a company has any unencumbered assets; Companies operate from leased premises, stock is subject to ROT and debts factored. To apply a scale that was hardly relevant 30 years ago when a company had assets to today's companies that have very few assets is illogical. It is difficult to envisage them being appropriate today.

In many medium and large cases these days there are cross-border elements either assets in another jurisdiction, or overseas branches or stores, each requiring significant time to deal with in order to discharge the responsibilities required to overseas creditors and employees. If a percentage fee is applied to realisations, then in many cases IPs may just abandon the overseas elements as being too costly to deal with.

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

Yes. In all instances where creditors have actively agreed that this is the appropriate basis. There is a very real risk that if IPs are paid solely on a realisation basis that focus will be on easily realisable assets and little else. In many cases where investigation is required to uncover and realise assets these assets may well be abandoned in future. Creating creditors' committees to approve a time costs basis is unworkable in many cases due to the lack of creditor engagement and general apathy amongst creditors, including crown creditors.

Impact Assessment questions:

Q21: Do you agree with this estimation for familiarisation costs for the changes to the fee structure?

Paragraphs 35 and 43 of the IP fees Impact Assessment states: "We would estimate that familiarisation would take up to 1.5 hours of an IP's time based on the assumption that this change is not complex to understand and would only need to be understood once before being applied… IPs are already required to seek the approval of creditors for the basis on which their remuneration is taken and it is anticipated that at the same time they will seek agreement to the percentage they are proposing to take. We do not therefore anticipate any additional costs associated with this".

No, I don't agree with the estimation and think they are substantially under-estimated. 1.5 hours fails to recognise the need for IP staff to be fully familiarised with any changes and the need to revise standard internal documentation and systems. For IPs to switch to a percentage basis (but only in certain circumstances/cases) will require days – weeks, perhaps months – of organising changes to systems, procedures and templates and a greater time burden per case. The challenges for systems, procedures and staff will include assessing a fair percentage of estimated future realisations to reflect the value of work done. This is an impossible task on Day One. For example, how difficult will book debts be to realise? Will it involve scrutinising and collating records and dealing with objections and delaying tactics? Ongoing monitoring will be required to check if/when fees can no longer be fixed on a time cost basis as the draft Rules state that a time cost basis falls away when "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" (draft R17.19 (1) (b)). IPs will need to revert to creditors when a revised fee basis needs to be sought with the potential for court applications if creditors don't approve the revision.

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?

Not applicable as I am not a secured creditor.

Q23: To what extent do you expect the new fee structure to reduce the current level of overpayment?

I do not agree that there is a 'current level of overpayment' or that sufficient empirical evidence has been presented in order to accurately formulate any such calculation.

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?

No. A proper assessment of the appropriate percentage should be conducted and a reasoned explanation to creditors will need to be provided. The provision of any additional, non-standard, information is likely to ultimately increase the cost of insolvency processes. Cost of this type may be the unavoidable consequence of any reform of the way in which fees are authorised and the basis upon which they are charged.

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?

No, the familiarisation costs are grossly underestimated. Whilst it is accepted that the changes themselves are "not difficult to understand", the implications on an IP's business will be far-reaching and it will be necessary to expend resource in establishing viable rates for the fixed fees and percentages to be sought.

The increased costs to the regulatory systems are almost impossible to assess in the absence of guidance on how value is to be assessed. Will a full review of time spent and how this compares to the fixed or percentage fees charged be required? Will site visits be required to review IPs files?

It is unclear how the estimated cost of £2,715 per case review is reached and this cost this is then subject to a multiplier which is also an estimate (anticipated fee complaints). It is impossible to confirm whether the assessment of cost is accurate, or even reasonable. It is also noted that the financial benefits are estimated as a function of the OFT's prior estimate of alleged over-changing in administration cases and assumes that a proportion of these funds would necessarily be paid to unsecured creditors if the proposed fee arrangements were implemented. However, this assumption is not supported by any actual evidence that adopting fixed or percentage fees would act to reduce fee levels. In addition the RPB can sanction IPs by fining them but this would not result in an increased return to the unsecured creditors as this could only be achieved by a repayment of remuneration to the estate.

The assessment of costs contains so many estimates, assumptions and variables that it is purely speculative.

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?

I have concerns about the accuracy of the impact assessment due to the number of assumptions on which it is based. Any attempt to add weight to the relative costs would only further distort the scenario.

The likely financial impact upon creditors is tiny in the context of the all the unsecured creditors and amounts owed in all the insolvency processes (the impact assessment suggests unsecured creditors will benefit by 0.1p in the £ (paragraph 52). The impact on Insolvency Practitioners due to the major revision of systems, procedures, documents and reports will be substantial.

Q27: Do consultees believe these measures will improve the market confidence?

No not at all.

Q28: Do consultees believe these measures will improve the reputation of the insolvency profession?

No, in fact they risk undermining public confidence by failing to properly manage creditor expectations. The dissatisfaction with fee levels by creditors is not a commonplace issue within the profession. The majority of insolvency professionals realise assets promptly, progress cases, investigate directors' conduct and pay dividends to creditors when possible. Reporting requirements ensure that creditors are advised in significant detail of the actions of an IP and the progression of a case. Creditors are more concerned about phoenix company's and directors effectively dumping debt and started again the following day in the same business and premises debt free. In addition the unregulated advisors surrounding the insolvency profession is confusing to creditors and they do not know or understand the difference. The Government would be better placed focusing its limited resources on regulating the unregulated.

Yours faithfully

Dean Nelson
Licensed Insolvency Practitioner, Partner and Head of Business Recovery & Insolvency

IP regulation and fee consultation question response sheet
(Consultees may wish to respond just to those questions that are of relevance to them)

Name: Zolfo Cooper (firm wide response)
Organisation (if appropriate): As above
Contact Details: Jeff Naylor (jnaylor@zolfocooper.eu)

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?

We believe that the regulatory objectives and the requirements for the RPBs to reflect them are appropriate in the main. However, we are concerned that the proposed requirement for RPBs to be made responsible for ensuring that the fees charged by IPs represent value for money will prove unworkable, and introduce a further level of cost that will ultimately serve to reduce the level of returns made to creditors.

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

There is very little detail to comment upon. We believe it unlikely that a RPB would exhibit the extremes of behaviours to warrant revocation of recognition. It appears far more likely that before a situation had reached the point where the Secretary of State took such action, either the RPB would withdraw from authorisation of IPs or its IPs would migrate to other authorising bodies making such a withdrawal inevitable. If such a step was taken, we would be concerned that the RPB's IPs were given adequate notice to migrate their authorisation to another 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?

This question is best addressed by the RPBs themselves

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?

This question is best addressed by the RPBs themselves although if such fines were eventually passed on to the license holders by way of an increase in membership costs the fine would eventually be borne by creditors which ought not to be the intention.

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

This question is best addressed by the RPBs themselves

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

This question is best addressed by the RPBs themselves

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?

Our initial thoughts regarding the need for the Secretary of State to impose sanction directly on an IP are that there would be limited circumstances in which sanction would be necessary:

- Where the RPB had investigated the IP and found no evidence of misconduct, and the Secretary of State considered that the RPB's decision was incorrect,
- The Secretary of State had further evidence not considered by the RPB in its investigation or disciplinary hearing,
- The Secretary of State believed that the punishment imposed by the RPB was insufficient in the circumstances.

The circumstances outlined in the consultation document are rather different, being where the Secretary of State considers that the RPB is acting too slowly or felt unable to act. The proposal is that the Insolvency Service will take control of the complaint, investigate and take direct action via the court to seek sanction against the IP. We are concerned that in these circumstances the timescale may not be shortened, and indeed may be lengthened, and made far more costly to both prosecute and defend.

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?

If it is proposed that the Secretary of State (acting through the Insolvency Service) will investigate the actions of IPs, then it is right that they should be given sufficient powers to do so.

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

The current number of authorising bodies (eight) does appear excessive compared to the number of licenced insolvency practitioners (c 1600). The number of bodies creates a number of risks, including the following:

- Duplication of technical support, regulatory and compliance functions, leading to inefficiencies. If there were fewer authorising bodies, the largely fixed costs of supervising and regulating IPs would be spread over more individuals, in theory giving scope for savings which could cut the costs of IP licencing – costs which ultimately have to be passed on to creditors.
- Lack of consistency in interpretation of policy, regulation of IPs and imposition of disciplinary sanctions. Consequent risk of "regulator shopping" by IPs to seek the authorising body with the least rigorous regulatory regime.

However, if a single insolvency regulator is imposed, this too has consequent risks. A monopolistic provider of authorisation would create the following risks:

- Abuse of monopoly position in charging excessive fees to IPs
- Lack of competition may restrict provision of training and other support services to IPs which authorising bodies provide at present to enhance their service.
- Alternative viewpoints on matters of policy or development of statute may be stifled.

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

The consultation document cites “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 200717 and regulations made under it; and the regulation of statutory auditors within the framework of the Companies Act 2006.”

It is our contention that neither of the above regulatory systems has been any more successful in addressing the matters which the consultation sets out as its stated aims, being:

- 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.

Considering the legal profession first, the OFT published research in 2013 showing that only 1 in 8 dissatisfied customers goes on to make a formal complaint, those dissatisfied customers making a population of 460,000 or one in seven of the three million people who each year use the legal profession. A copy of the OFT press release dated 18 January 2013 is attached, claiming the Legal Ombudsman operation of a single post-box system for complaints is not effectively signposted or easily understood, which mirrors the current position in the insolvency profession with the Insolvency Service’s complaints gateway.

Similarly, the regulation of statutory auditors has not been an unqualified success, with the Financial Reporting Council having implemented changes to determine sanctions against audit firms without challenge by those firms’ supervisory bodies in December 2013.

Perhaps the critical distinction between the provision of legal or audit services and provision of insolvency related services is the size of the “grey market” which exists outside the scope of the regulated insolvency profession. Many of the matters which cause genuine concern and anger amongst creditors and the wider public –

phoenixism, transactions designed to defraud creditors, pre-packs sales designed to exploit unsecured creditors, are marketed openly by unregulated entities. This grey market is not subject to control by any of the authorising bodies, and would be similarly outside the control of a single regulator. Unless this grey market is addressed by government agencies, its activities will continue to taint those of the regulated profession.

Part 2 – Insolvency Practitioner fee regime

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

Where a fee complaint has been received, the RPB should in theory be well placed to assess the validity of the remuneration charged by the IP. The process of court application, and validating costs to the court is a time consuming and costly process; if such an assessment is to be undertaken by the RPBs, it should be designed as a cost effective and streamlined process rather than a simple substitution of the RPB for the court as an adjudicator.

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?

We believe that the assessment of value for money delivered by the IPs on a case by case basis will be an extremely difficult and lengthy process, which will necessitate reviewers evidencing all the work done on the case, and then presumably assessing the work done against either:

- the results achieved – literally the value added, or
- the necessity of conducting the work.

There is a problem in assessing work performed against the first criteria, as it would apply a hindsight based test to work. For example, if work was undertaken in good faith, in expectation of achieving the realisation of an asset, but no realisation was achieved because the asset proved unrealisable, or uneconomic to realise, then strictly there is no value added from the work. If work is to be assessed on this basis, there is a risk that IPs and their staff may only seek to realise assets that they are certain can be recovered and which will generate a fee, which may lead to reduced realisations in general. It may also discourage IPs and their staff from investigating the transactions leading up to their appointment if they do not feel that there is a certainty that they can recover such costs

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?

In theory, publishing information to assist creditors will be helpful, in practice however, our experience is that IPs’ fees are not a critical concern for creditors, compared to other issues such as transparency and a swift payment of any dividend payable to them.

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?

We do not agree that the restriction of the time cost basis of charging to cases with creditors' committees or where there is a shortfall to secured creditors will enhance the outcomes to creditors. We are concerned that overall realisations may fall as IPs will not be willing to input costs they cannot recover, and that the overall outcome to creditors may be diminished.

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?

We do not believe that the proposal is warranted, given there is little apparent creditor dissatisfaction with the level of remuneration charged on our cases, and creditors' priorities are placed elsewhere. Applying a percentage to asset realisations and distributions is a crude measure that was used as a fall-back where a proper agreement of fees could not be achieved with the creditors. To use it as a first resort will lead to windfalls in some cases, and shortfalls in others, simply based upon the type and ease of recoverability of assets. The use of time charged as a metric to base remuneration upon provides transparency to creditors, comparability, and accountability. By removing this option, creditors will have less understanding of the basis on which remuneration has been charged, rather than more.

As a further point, in almost all corporate insolvencies there will be two government agencies who will be significant creditors: HMRC and RPO. They receive reports in all those cases, and so must have the ability from their extensive and lengthy experience of insolvency to judge objectively the value of what they are receiving, and have the power to lead other creditors (potentially they could form a committee if one other creditor was interested), and request further information in cases that require it, and challenge fees in cases where they believe they are excessive. However, in almost all cases, they do not participate. A change in their attitude to engagement as creditors would benefit both the aims of consistency and cost control, without causing the unintended consequences of the consultation proposals.

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

There is a risk that IPs will adapt their behaviour, becoming more risk averse and only realising assets where there is absolute certainty that it will be successful. They may also seek to select cases where the application of a percentage rate to asset realisations and distributions provides the greatest fee. Conversely, cases that have few assets or where there is a contingency relating to their realisation may be less attractive, as the IP may not be able to recover the cost of the insolvency process from the applied percentage rate.

In addition, by removing the ability to charge time costs where there may be a dividend to unsecured creditors, another blow may be unwittingly struck at the rescue culture. Trading on in insolvency, whilst seeking a purchaser for the business and assets, requires a significant investment of time from the IP and his staff. There will be a significant enhancement in the value of the realisations if a sale as a going concern can be achieved, for the benefit of the creditors. However, if the IP decides to trade on and is unable to achieve a sale of the business, under the proposed fee structures they may have to write off much of their time costs incurred. With no guarantee to the IP that their investment of time can be recovered, the decision to trade on, or to seek either a pre-packaged sale or simply to close the business and sell the assets may be tipped in favour of the latter.

There is also a real risk that creditors will be confused by a further complication in the fee structure. We do not believe that it will enhance creditor engagement.

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?

In voluntary arrangements and MVLs, creditor (or shareholder) engagement is typically greater, and there is no need to change the basis of remuneration for those processes.

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?

By setting a prescribed scale, there is a risk that it will be applied across the board, whether or not the percentages applied are appropriate, as creditors are still unlikely to engage in the process. Because of the lack of engagement, where assets are easily realised, it may result in greater returns to the IP than would have been the case had a time cost basis been applied. If the scale is insufficient, the IP will have to seek to have it increased, and if unsuccessful will have to bear a loss. It would be preferable for the IP to propose the percentage to be applied in any relevant cases.

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?

It is impossible to suggest a "one size fits all" approach to commercial insolvency. In particular, corporate structures are much more complex and varied now than at the time when the Insolvency Act was introduced. The assets physically owned by an insolvent estate in 1986 and requiring realisation by an IP would have included property and fixed assets, stock, and debtors. Now it is likely that a company may not own the property it operates from, its stock will be covered by reservation of title, its debts may be assigned to a lender, such that its realisable assets may be minimal. To apply the same scale to a company which has very different characteristics to the above seems illogical.

In addition, many medium and large corporate cases will incorporate an overseas dimension, whether that is foreign customers whose debts will need to be collected, or overseas branches with assets, employees and liabilities that need to be dealt with. The additional risks and costs posed by operating in a different jurisdiction, with the risk that assets may not be recovered may lead IPs to decide against speculating costs that they may not recover if remuneration is fixed by reference to a statutory scale.

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

There is a very real risk that where IPs are paid solely on a percentage of the realisations, and are effectively incentivised to focus on realisations alone, that some IPs will focus their efforts only on assets they know can be realised, and will not perform anything further than the most perfunctory of investigations.

In many cases where investigations are required to trace and recover assets, the IP will have contacted creditors to seek their approval to the costs of seeking to recover the assets, and agree some form of contingency to the charging of time costs. Removing the option of the IP's firm being paid a proportion of the realisations should assets be recovered and realised will lead in many cases of assets being abandoned. Your suggestion that a creditors' committee could be created to approve time costs will in many cases be unworkable, if creditor's are unwilling to take an interest in the fees being charged by the IP it seems unlikely that they could be expected to volunteer to give their time up to negotiate fees with the IP.

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?

We do not believe these measures will improve the market confidence.

Q28: Do consultees believe these measures will improve the reputation of the insolvency profession?

We do not believe that the proposed measures will improve the reputation of the insolvency profession. We do not recognise the creditor dissatisfaction with fee levels, as an insolvency practice that prides itself upon prompt case progression, returning funds to creditors as quickly as is possible we believe that creditors understand that there is a cost to undertaking insolvency procedures. By transparent explanation of our actions to creditors, taking action on cases to maximise the returns to creditors and backing this with swift distribution of dividends, we believe we deliver real value to creditors.

In our experience, creditor concern is focussed upon transactions which do not appear transparent and honest to them, particularly for example the purchase of the assets from the insolvent estate by the company's former owners or management. IPs who do not provide detailed explanations of such transactions anger creditors, as does the unregulated "grey market" that associates itself with the insolvency profession. It is difficult for the layman to distinguish this activity from the regulated element. Until action is taken to deal with those who bring the profession into disrepute without being accountable to the authorising bodies, improving the reputation of the profession will be an uphill task.

OFT Press release-

Consumers reluctant to complain about legal profession, says OFT

07/13 18 January 2013

The OFT is calling for the legal profession's complaint handling procedures to be further simplified after it published research today showing that only one in eight (13 per cent) dissatisfied customers goes on to make a formal complaint.

The low level of complaints was found to be largely due to uncertainty about how or where to complain and scepticism about whether complaining is worth the effort.

The research also shows that around 460,000, or one in seven, of the three million people using the UK's legal profession each year are dissatisfied with the service they receive.

The findings form part of wider research commissioned by the OFT to understand how recent changes to the regulation of lawyers, following the Legal Services Act in 2007, have impacted on consumers.

Currently, for complaints not resolved by the provider, the consumer is often asked to distinguish between complaints about the service provided or the conduct of the provider before directing it to the appropriate body. Complaints about the conduct of a lawyer can be sent to one of 10 approved regulators, depending on the legal profession involved.

The Legal Ombudsman currently operates a single post-box system, receiving complaints not resolved by the provider before forwarding them to the relevant statutory body as appropriate. However the system is not effectively signposted by lawyers or easily understood by consumers and the OFT is calling for the system to be actively promoted as standard by all in the sector, including by the other regulators.

The research also looked at progress in authorising alternative business structures, where legal services can be supplied by a one stop shop as part of a package with other, non legal, services, such as accountancy and property services. The research found approval processes for these new businesses to be slow with only around 70 out of more than 150 applications for non-traditional legal service firms approved to date. The OFT is calling for regulators to speed up the process for approvals and to make sure there are no unnecessary barriers preventing businesses from entering the market to deliver legal services to consumers in new and innovative ways.

Mary Starks, Senior Director of Services, Infrastructure and Public Markets at the OFT, said:

'We are encouraged by the recent reforms, which have improved the regulation of legal services and removed unnecessary barriers to firms offering new business models to consumers. However our research shows that there is still room for improvement. Too many consumers are unhappy with the service they receive, yet are put off pursuing complaints by the complexity of the system.

'A better approach to handling complaints would not only support individual consumers' right to redress when things go wrong - together with competition from alternative providers it would also drive a more customer-focussed approach by law firms, something our survey results suggest is still needed.'

The OFT has invited the legal profession, regulators and consumer groups to a roundtable at the OFT next week to discuss complaints handling and other research findings, with a view to addressing problems in this market.

NOTES

1. Research conducted by the OFT in 2001 found restrictions on the types of organisations that could operate in the legal services market, which restricted entry by new firms and limited competition. In particular restrictions on multi-disciplinary partnerships were identified. The OFT argued that these restrictions on the structure of organisations providing legal services were an unnecessary barrier to entry and expansion within the market.
2. The Legal Services Act in 2007 introduced independent regulation in place of self-regulation by the professional bodies representing lawyers, an independent complaints handling system, and removed legal barriers to alternative business structures (ABS) entering the market.
3. Europe Economics was commissioned by the OFT to conduct wide research into the impact of reforms in the legal services market. Read the full report (pdf 3.5Mb)
4. This research included a YouGov online omnibus survey of 2246 adults living in the UK in November 2012 looking at their satisfaction with legal services and their use of the complaint process.

5. Since the research was completed in November 2012, the number of alternative business structures approved has increased to around 70.
6. The Legal Ombudsman's jurisdiction is limited to complaints about the service provided. Where complaints are about professional misconduct, jurisdiction lies with the approved regulators and other statutory regulators if appropriate. The distinction between service and conduct may not always be clear to consumers.
7. The reform of legal regulation is at different stages in Scotland, Northern Ireland and England and Wales. While Scotland has made some moves towards the system adopted in England and Wales, there remain key differences both in terms of the market structure and the regulatory framework. Meanwhile Northern Ireland has experienced limited change in the regulatory framework over the last five-10 years. Chapter 1 of the report gives more detail on the on the different stages of reform across the UK nations.

IP regulation and fee consultation question response sheet
(Consultees may wish to respond just to those questions that are of relevance to them)

Name: Lucy Law
Organisation (if appropriate): Mazars LLP
Contact Details: 07794 031249

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?

Yes. However, it is unclear what is driving the proposed changes. Setting out a process for a new RPB to be recognised seems to be at odds with the over-riding objective of reducing the overall number of RPBs.

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

Timing of any revocation action needs to be considered with regard to the annual subscription of its members and the continuation of their licence/refund of the subscription and what happens if funds are not available for refunds.

On-going regulatory / complaints – unclear what would happen here? Presumably follow IP to new body but in the interim is everything put on hold?

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

No comments

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?

No information concerning the likely quantum of any financial penalty has been disclosed, just that it would be commensurate to the breach and likely to deter future misconduct. It would be helpful if an indication of the likely amount could be disclosed.

Presumably any penalty will be passed on to the IPs as a levy. This will have the effect of making it more expensive for an IP to practice.
Any levy should only be recoverable from the IP in the year following the penalty. This would allow the IP to consider moving to another RPB before the penalty hits them. It would be inappropriate for an IP to suffer financially because the RPB had acted inappropriately.

The proposed 3m period for the RPB to pay penalty seems overly generous.

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

No comments

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

No comments

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?

We do not believe it is appropriate to enable the Secretary of State to take direct action against an IP where the IPs RPB has considered it would be inappropriate to take action. The Secretary of State would, under the proposed new regime be able to take action against the RPB. That is considered to be sufficient. If the RPBs procedures are slow or inappropriate for dealing with the IPs misdemeanour, then that is what should be changed.

It should be for the RPB to investigate the actions of an IP, not the Secretary of State.

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?

See response to above. We believe it would be inappropriate for the Secretary of State to require information direct from the IP unless it relates to proposed action against the RPB. The Secretary of State should only have power to require information in connection with proposed action against the RPB.

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?

We would welcome a reduction in the number of regulators but believe one regulator may be counter productive as having a minimum of 2 encourages competition and choice. Within this firm we have IPs regulated by 3 of the RPBs (previously 5) and believe it would be helpful to reduce the number to allow more consistency of reporting / regulation / technical standards. Currently for example, SIPs have to be agreed by 7 or 8 different parties which causes excessive delays. Additionally, each RPB appears to put their own emphasis on certain technical debates and we have to be mindful of complying with subtly different guidance.

Part 2 – Insolvency Practitioner fee regime

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

We do not have any specific objection to this in principle. This would of course be subject to the RPBs taking a consistent approach to the fee reviews – or even appointing one outside agent to undertake the review to ensure there is consistency of approach. The IP must be allowed a fair route to challenge any decision without the requirement at that stage for court involvement.

Of possible concern is the public perception of this. Whilst taking the process out of the Court's hands it should open it to a wider audience (by reducing the cost), it does leave us with a self-regulation regime. Will the RPB err on the side of caution as not wanting to upset its members and potentially lose income from membership fees by taking too hard a line on the concept of "value for money" – something that a court review would not have to consider.

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?

Yes. However, the concept of "value for money" is somewhat subjective. There is more to value for money than the cost. Investigations into directors' conduct may be time consuming and result in disqualification action being brought (for example) but may not result in any financial benefit to the insolvent estate / return to the unsecured creditors. Would the time spent, which invariably would be by a more senior member of the team, be considered "value for money"?

The concept may be more easily determined on smaller cases, however, on the larger cases (for example Lehman brothers) it would be almost impossible to review the work undertaken in sufficient detail to be able to pass any sort of judgement. It is unclear how this sort of review would fit into the proposed regime and how it would be delivered by the regulators.

The additional costs incurred by the regulators in dealing with the additional burden of complaint handling of fees may be substantial. Is it intended that fines would be imposed to cover the costs where appropriate?

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?

We have no objection to the proposal to publish additional guidance / information and welcome any opportunity to improve transparency in this area. However, we are concerned that creditors are already provided with a huge amount of information and adding to that burden is likely to have the reverse effect.

We would welcome a review of reporting generally and rather than having to include negative reporting (there is no prescribed part in this case because…. This did not form part of a bigger transaction….) a user-friendly succinct report that is applicable to the specific case and is capable of providing the information that the creditors want/need to know would be ideal.

It should be noted that when we place progress reports on our website for creditors to download we have the ability to monitor the number of creditors that actually view the reports. On average we have about a 5-10% hit rate. Therefore, it is vital that we seek a better way of engaging with creditors. Providing more and more information to creditors is not necessarily the answer.

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?

Whilst there is logic in adding an exception where there are one or two unconnected unsecured creditors making up a simple majority by value, the more exceptions the more the risk of the IP inadvertently getting it wrong and the more complicated the process. Will this improve creditor engagement in the process? On day one, it may appear that one creditor has over 50% of claims, but what happens if another creditor appears that was not disclosed previously? Another meeting, another fee resolution?

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?

We do not consider it is appropriate to restrict the use of time and rate to just these scenarios. It would be preferable to seek ways of obtaining creditor engagement in the process.

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

The fee structure on small to mid-range cases will probably convert to a fixed fee basis as % realisations will not be sufficient to cover the costs. Investigations will suffer and legal action will be less likely to be pursued. Case progression will deteriorate. The risk for the profession will be that rogue IPs (almost eradicated from the profession over recent years) will set up boutique firms offering "pile it high sell it cheap" mentality which will, we believe, adversely affect the profession's reputation.

If there are insufficient funds to investigate directors, unfit directors will continue to operate and ultimately the creditors will be worse off when they suffer more bad debts.

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?

Certainly should not apply to MVLs. The IP should be able to agree the basis of remuneration with the members on whatever terms are appropriate for the parties. The members are always engaged in the process on MVLs. We do not understand why it is considered that IVAs and CVAs are "closely controlled by creditors". It is however accepted that most IVAs are controlled by creditors and the majority are completed on a % of realisations basis, as a result of the specific engagement of the major creditor groups. However, this is not the case for CVAs (or PVAs which we assume would have the same exclusion). We do not believe there is any evidence to support the assertion that creditors are actively more engaged in the CVA process compared with any other corporate insolvency process.

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?

If a % of realisations is to be adopted it must be flexible enough to allow it to be flexed depending on the circumstances of the case to ensure it is fair to both the IP and the creditors.

We do not consider that a % of realisations should be the default position.

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?

No. We do not consider that the statutory scale is commercially viable for IPs.

Any proposal would need to incorporate a front-loaded sliding scale, similar to the ISA statutory costs scale. For example, 100% of the 1st £5,000, 50% of the next £50,000, 20% of the next £100,000 and 10% thereafter. In reality, unless there are realisable assets in excess of £10,000, a reputable IP will be unable to take on the case if no alternative funding is being provided.

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

We think that time and rate should continue to apply in all circumstance.

Impact Assessment questions:

Q21: Do you agree with this estimation for familiarisation costs for the changes to the fee structure?

1.5 hours drastically under-estimates the number of hours that will be required. If IPs are required to change to a % basis on some cases (but not others) it is likely to take several days to make changes to all of our standard templates.
Other issues to contend with are:

a) attempting to estimate what a fair % of future possible realisations is on day 1 when there is no real feel for what actual realisations there are going to be
b) what constitutes a realisation? Does a VAT refund?
c) ensuring that fees are not taken incorrectly – the draft legislation states that as soon as an officeholder becomes aware or ought to have become aware

that assets will be sufficient to pay the secured creditor in full, he is no longer able to take fees on a time cost basis. When ought an officeholder have become aware?

d) If for what ever reason we need to change the fee basis (be it because the secured creditor will be paid in full, or because additional investigations are required), we will need to seek approval from the creditors – this will in itself increase fees and waste estate funds. What happens if creditors don't approve the changes requested –court applications and more estate funds wasted.

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?

n/a

Q23: To what extent do you expect the new fee structure to reduce the current level of overpayment?

We do not consider that there currently is a level of "overpayment". In the majority of cases that we undertake we do not recover our time costs in full. This may be because there are insufficient realisations in a case or because we actually want to pay a return (or an increased return) to unsecured creditors and forgo part of the fee that we could recover.

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?

No. This will inevitably add a cost to the IP as consideration will have to be given to the level of % recovery; the inability to use standard letters/documents in the same way and the training required to ensure the IP and his/her staff understand the impact and consequences of such consideration.

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?

We do not agree with the assumptions. We do not have any data on how the changes will impact on 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?

We agree on the basis that it is likely that the benefit to creditors will be very small and the cost to IPs is likely to be very high.

Q27: Do consultees believe these measures will improve the market confidence?

It is not accepted that the market confidence needs to be improved. There are relatively few fee challenges either direct to the court or to the IP. Whilst it is accepted that creditor engagement could be better, we would prefer to concentrate on ways to improve this rather than overhauling the fee legislation so soon after the 2010 rules.

Q28: Do consultees believe these measures will improve the reputation of the insolvency profession?

No. The risk will be that case progression will suffer, investigations will not be completed satisfactorily and creditor committee's will be the norm, with creditors' represented by other IP firms.

From: Christopher Garwood <cgarwood@wilkinchapman.co.uk>
Sent: 28 March 2014 12:21
To: Policy.Unit
Subject: Strengthening the regulatory regime and fee structure for insolvency practitioners

My name is Christopher Garwood.

I am a solicitor who has specialised in dealing with insolvency matters for more than 35 years

I have been authorised to act as an insolvency practitioner, and have done so for more than 25 years

I have also been involved in the authorisation and regulation of insolvency practitioners for more than 25 years

I chaired the "10 Years On" working party established by the IS and RPBs to examine the effectiveness of regulation of IPs under IA86

I was a founder member of the Insolvency Lawyers Association and am one of its Past Presidents

I am a member of R3

I am a Deputy Bankruptcy Registrar

I am responding to the consultation in my personal capacity and on behalf of Wilkin Chapman LLP in which I am a partner

Part 1 – Regulation of Insolvency Practitioners

Q1 YES

Q2 It is essential to ensure that if recognition is withdrawn remaining RPBs are subject to an obligation to accept into 'membership' those who had been authorised by it and would otherwise cease to be authorised with detriment to the insolvencies in respect of which they had been appointed

Q3 No

Q4 No

Q5 Yes

Q6 No

Q7 No

Q8 Only that as to any power to seek information from a solicitor who has acted for an IP legal professional privilege must be preserved and protected

Q9 No. If at any time it might be thought by the SOS that the designation of a single regulator might be beneficial the power to do so should only be conferred on him subsequent to proper consideration by Parliament subsequent to appropriate consultation after publication of detailed proposals as to how it was perceived that a single regulator would be established, funded and operate in practice and full explanation of the basis on which it was perceived that it would be more efficient and effective by reference to the proposed regulatory objectives. The ability to give effect to a power to designate by secondary legislation without prior justification of the decision to do so is not acceptable especially, as acknowledged, no 'impact assessment has been prepared. It is wrong in principle that powers should be conferred on government without any due consideration of whether and if so when the exercise of them might be justified and in such a way that they can be exercised without any justification required

Q10 The 'functions' as listed are a simplistic statement of the obvious. No proper consideration can possibly be given other than if or as and when there might be an intention to designate and detailed examination would then be required

Part 2 Insolvency Practitioner Fee regime

Background

What creditors unsurprisingly look for is to receive as much as possible as quickly as possible. How much they get depends on how much is realised for their benefit and at what cost.

Other than as to a small number of them (those with considerable knowledge and experience of such matters) they however have no ability assess whether one IP has achieved better realisations than would another and indeed an IP who believes he has cannot demonstrate it has been so. Creditors therefore have no ability to assess the 'value' of what has been done. Therefore they tend to assume realisations will be/ have been the same as if another IP had acted and focus on the level of the costs as to which they assume (not always correctly) that other than as to the IPs remuneration they would have been much the same whoever had acted

By when they become aware of the total amount of remuneration it is however the case that they are stuck with the basis for calculation of it to which they (or the majority of those who troubled to vote) agreed to. If that has been a percentage basis or a fixed amount it could of course be that the remuneration has ended up being a lot more than could be justified be reference to time spent but at least they can easily see that it has been calculated in the way provided for and if they are unhappy with the result not difficult for them to appreciate that if they didn't 'participate' in the fixing of the basis the lesson to learn is to do so next time.

The problem is however that an although he will have a better idea than creditors IPs don't really know at the outset (or indeed for some time thereafter how much time will have to be spent by themselves and their staff in doing what is required to be done and what will therefore be the cost to their firms of the doing of it. Therefore they are invariably inclined to propose to creditors their remuneration should be by reference to time properly spent.

To creditors this generally appears fair and appropriate ie unreasonable to expect the IP to act for their benefit on a percentage basis which may not enable him even to 'break even' and hardly motivated to do his/her best to maximise realisations if a fixed fee and avoids the possibility of him making an excessive profit at their expense.

A 'time cost' basis however results in an entitlement to remuneration which bears no relation to 'benefit to creditors' in terms of what they get back and does not incentivise the IP to ensure what is done is done as quickly and cost effectively as possible. Rather indeed looked at simply in terms of earnings and profit the incentive is the opposite. Not suggested that as a result IPs deliberately maximise time spent and do not trouble to have things done at the lowest fee earner cost level possible but it may happen in some cases and in a much greater proportion there will be an inevitable tendency not to be overly concerned as to cost effectiveness.

If when face with remuneration calculated in this way which they perceive to be excessive they must however accept it unless they are prepared to bear the cost of an application to the Court to require the IP to seek to justify the amount claimed to it. For most creditors however the cost will be far more than the potential benefit because the benefit (if there is one) will be shared amongst all creditors and if there is no benefit in reduction of the IPs remuneration they not only bear their costs but also may be ordered to pay those of the IP or if not they will be payable from funds otherwise available for distribution reducing their dividends.

In such circumstances challenges to remuneration are rare and the perception (and in some cases the reality) is that IPs, as a result get away with charging substantially more than could ever be justified.

How often and to what extent it might be so is not the point which is that the perception results in the matter of costs being a subject of constant debate and enquiry (which undermines confidence in insolvency procedures, practitioners and regulators.

Over and over again the perceived solution is 'more regulation' eg requirements to keep better records and provide more information compliance with which simply adds to time properly and necessarily spent thereby adding to costs in all cases and increasing rather than addressing the problem.

Q11 A 'cheap and cheerful' alternative to application to the court to challenge the amount of remuneration claimed is obviously desirable and through the pool of their members RPBs could provide this. The danger of it being provided by RPBs is that there may emerge a perception that they favour their members. That would be wrong as one feature of all professions is that it serves the interests of members generally to enhance and uphold the reputation of their profession but it is very important indeed to recognise this perception may emerge. Perhaps therefore any assessment by RPBs should be limited to cases in which the amounts are relatively modest although in practice it might tend to be so anyway with those challenging greater amounts preferring to do so through the Court the jurisdiction of which should remain than if the creditor(s) challenging the amount and the IP concerned might have agreed to accept the RPB assessment as final and binding. RPBs must not be allowed to develop complex procedures Emphasis must always be on 'cheap and cheerful' with it being made clear to all concerned that if they are seeking the levels of in depth scrutiny as provided for in the PD they must go to the Court. It would be best if RPs got together in the same way as they have in other regulatory aspects (eg JIC) to establish a common costs assessment process

Q12 Obviously 'value' should be the over-riding objective but as is all too obvious from when this aspect is addressed by the Court in applying the PD it is an elusive concept. Creditors can understand the concept of 'value' as a proportion of assets realised and/or distributed but what if they are paid in full and fees borne out of a surplus. Debtor or shareholder perception very different and what of the 'value' to the public interest. I only or predominantly 'value is measured by reference to monetary outcome will IPs devote the required time to their wider responsibilities. Cert5ainly adding "value" to the regulatory framework (although it should be added) isn't going to enable RPBs to deliver more effe3ctive regulation unless there is a clear statement of what it means. Sound bites don't assist anyone

Q 13 That anything worthwhile can be achieved by steps designed to increase creditor "engagement" by bombarding them (at a cost to them) with yet more information is a delusion. Even more so the bizarre concept that publishing something on the internet communicates it to anyone other than those already 'engaged'. Statistics show that only a tiny proportion ever access such information and whether it is sent or posted for them to access the sheer volume (and often complexity) is such that they don't consider it or if they attempt to do so they don't understand. The more regulators have expanded the range of information required to be sent the less the engagement of creditors than before.. The suggestions made serve no useful purpose other than the reference to an "information sheet" ie what creditors should be sent Is succinct information which they might then consider and which tells them how to find out more

Q14 No

Q15 No. I agree with the principle. It should however be specifically provided/made clear in proposed rule 17.16 that there is not simply one opportunity to have recourse to a meeting of creditors if IP is 'dissatisfied'. What the relevant provisions should envisage and encourage is that the IP is entitled without 'approval' to a percentage of realisations and distributions (or rather in my view) a basic amount plus such percentages just as OR charges an initial fees and is then in addition entitled to percentages. If at any stage he feels that a greater amount and/or greater percentages is justified he can convene a meeting of creditors explaining to it why. If they agree but then subsequently he feels yet more can be justified he can convene a further meeting and so on but perhaps with a restriction that no more than one such meeting a year perhaps a requirement that he must wait until the next progress report is due as it is by reference to his progress report that he would seek to justify and creditors would be able to form a view. If at the outset fells more will be appropriate he can convene an initial 'remuneration meeting'

An 'approve as you go' procedure of this nature will have the benefit that instead of bombarding creditors with mountains of information they wont look at the IP will have to communicate effectively and successfully to get any agreement to anything more than the ‘scale’ (or subsequently any more than such greater amount and/or percentages as to which creditors have agreed) and by communicating effectively creditors will indeed be increasingly ‘engaged’ and also better informed

The scale contemplated as the default scale is however unrealistic other perhaps than as to high asset value insolvencies of a straightforward nature with two adverse consequences.

First is that in low value cases the cost of time spent is a significant proportion of realisations and the scale wont cover it. These are however the very cases in which it would be difficult to persuade creditors to agree to more because doing so would have a much greater impact on their dividends and surely what must be avoided is a resultant proliferation of applications to the Court or alternatively an absence of IPs prepared to accept low value cases leaving them to be dealt with by the IS as to bankruptcies and compulsory liquidations or simply left un-dealt with at all as to CVLs unless or until a creditor might incur the cost of petitioning with employee claims not dealt with for perhaps some time if at all, assets dissipated and conduct not investigated. Hardly consistent with the public interest and also the IS has limited resources so detriment to creditors or loss to the taxpayer depending on whether things left undone or done at public expense. Certainly no chance the IS could deal with an increasing volume of low value cases at a cost within what it would receive in return under the scale

Second is that even to have a chance of a higher and sufficient fee the IP would have to incur the cost of seeking to persuade creditors to agree failing which of application to the Court. Obvious detriment to creditors in cases in which getting little anyway

Scale must surely therefore be at a commercially viable level albeit taking into account that in some cases of higher value it will result in an entitlement to more than could be justified by reference to time spent. I suggest therefore a basic amount plus the percentages proposed. The only viable alternative would be higher percentages and that would in higher value cases often result in disproportionately higher amounts.

If the proposition of a basic amount is accepted there should be consultation with the profession as to what it should be, so also if instead there should be increases in the percentages to achieve viability. Caution however required in such consultations because firms will tend to respond by reference what they say it currently costs to deal with such cases and as they usually do so on a time cost basis they are not currently directed by self interest to cost effectiveness. The object is surely to push IPs to work ‘to a price’ rather than (as mostly at present) determine the price themselves. Foolish however to think that those without any experience of doing the job can assess what amount plus what percentages might be commercially viable for cost effective IPs and therefore in the best interests of creditors by rewarding them sufficiently to do the job as it should be done

Further comments.

As a solicitor IP I have no problem with 17.14(9) but surely just as if a solicitor IP instructs his own firm creditor approval should be required so also if any IP instructs his own firm eg accountant IP instructs own firm to give tax advice

What is the contemplated purpose of 17.23(2). Surely not to prevent an officeholder being funded by a creditor who wants the job done but cant find anyone willing to take it on because of limited assets

Q16 Generally I anticipate it will result in lower fees and better returns at the lower value end of the ‘market’ because firms will have to be cost effective or will be forced out of it but caution as to how low the scale is set as danger of eventually reducing competition after initially increasing it

Q17 Agree

Q18 Yes and it must be so not least because otherwise a proliferation of applications to the Court

Q19 Clearly not. I suggest as above the answer is not however to change the scale but to include in addition a fixed amount. Alternative would be to increase percentages and widen bands at lower levels

Q20 Time is a measure of cost not a determination of value so the concept of so called 'time cost' (a euphemism for time charged) is never an appropriate starting point. Relevance of time and cost of it (rather than self selected hourly rates) is to justification of amount not how to arrive at it

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IP regulation and fee consultation question response sheet
(Consultees may wish to respond just to those questions that are of relevance to them)

Name:Michael Young
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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?

It is impossible to comment on this, the assessment of costs has made sweeping assumptions on the level of complaints anticipated, the reality is that the number of complaints received concerning fees in the industry is extremely low.

We suggest a better reflection would have been to consider the number of fee complaints actually received by IP's in the first instance and how these were addressed. It is appropriate to ascertain the strength of creditor views in this area that are actually expressed in the field, combined with an independent check on the reasonableness of those views.

Following the rule changes in 2010 creditors have an 8 week window to object to fees charged to an estate, we would suggest that consideration could be given to increasing the power to creditors at this stage may be more appropriate without necessarily requiring the costly intervention of the courts.

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?

Measuring value for money is subjective and it is difficult to see how the various RPB's in their capacity will be able to ascertain on a like for like basis whether value for money has been achieved. However, broadly we are in agreement that the RPB's currently monitor compliance with best practice and ensuring fees drawn have been properly approved, thus a more detailed over-sight in this area would improve confidence.

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?

No, the creditors are already provided with a significant amount of information on charge out rates, the ability to approve the fee basis and how to challenge the level of fees. Creditors very rarely engage in this process and providing more information is unlikely to encourage active participation in the process.

We agree that currently creditors do not engage in the process despite the number of tools available to them, IP's and creditors would benefit from greater creditor engagement.

The consultation notes that government creditors have a role to play and we think is the area where more attention should be given. If creditor ability to communicate with each other were improved they would be in a position to exert more influence utilising the existing tools available.

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?

We consider the fixed fee/percentage basis of approving of an office holders remuneration is flawed. Indeed it is arguable that this is easier in a CVA/IVA/MVL to agree a fixed fee when the work the IP is likely to undertake is largely known prior to appointment, unlike most other forms of insolvency.

Having different bases for different types of work is confusing both within the profession and to the creditors.

The consultation has discounted different methods of charging for different aspects of the case as adding more complexity and difficult to define. The current proposal is far too simplistic and will result in IP's being unwilling to accept assignments where asset levels are low or not readily realisable (ante-cedant transaction/ assets where ownership is disputed etc).

A fixed fee basis will likely to lead to a lower level of service and will penalise the recovery of more difficult assets.

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?

We believe the conclusions drawn on the reasons why fees on secured creditor controlled work appear lower than those cases where the fees are in the hands of the unsecured creditors is flawed. Blended rates are often agreed with secured creditors which is normal in the industry and part the agreement of securing a place on bank panels where a regular flow of work is derived. Furthermore when a secured creditor is involved there is often good communication between the IP and the secured creditor which enables approval and agreement of strategy to be established promptly thereby enabling certain cost savings.

It is inappropriate to draw the conclusion that costs are inflated when control of costs rests with the unsecured creditors. A substantial proportion of work is undertaken by IP's where full recovery of time costs is not made, this is in respect of cases controlled by both secured and unsecured creditors. This is generally due to asset realisations being insufficient to pay all or sometimes any fee.

As a profession we accept this is part of the business risk in accepting appointments. Taking appointment over cases where there are "potential" assets if robust investigations/proceedings are taken against rogue directors and others is part of an IP's work. These types of cases often have high time costs and are often undertaken with a commercial risk to the IP. The change in fee structure as proposed will result in IP's not being prepared to accept these assignments or be willing to undertake sufficiently robust investigations within an appointment which could result in recoveries being diminished; a reduction in return to creditors and a reduction in sanctions being taken against directors.

A percentage basis for agreement of fees is only likely to be attractive if the value of the assets is substantial, this does not in any way relate to the amount of work required in realising the asset and is likely to result in a lower return to creditors than the current time cost basis.

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

IP's fees will be reduced but this is unlikely to result in a higher return to creditors as we anticipate recoveries are likely to also fall.

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?

We think it will be confusing for all stakeholders to have a different approach across different types of insolvency.

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?

If anything consideration could be given to some sort of fixed basis to deal with statutory compliance issues. This is known at the outset of a case and the time taken should be broadly comparable across the industry. A percentage based on realisations is unlikely to result in a fair result to creditors as this would only be the preferred option if the value of the assets is significant. We would anticipate that if creditors engaged in the process they would reject this basis.

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?

No this is not viable. The starting point is not that in all cases the creditors will get a return. Any return to creditors is after certain costs are met which must include the IP's fees. There is a substantial amount of compliance matters that all IP's have to conduct in every case regardless of case size/asset values or creditor numbers in a low asset value case even these minimum costs would not be recovered utilising a scale rate.

Should this continue to be explored we would suggest it more appropriate to consider fixed fees for statutory work/some sort of commercial scale for known readily realisable assets with the ability to agree time costs for all other aspects if appropriate.

As commented on in the consultation this is complex and in fact a mixed bases of charging fees is already available, perhaps consideration could be given to addressing SIP9 in expecting the IP to document why the basis/mix of bases he has put to creditors is appropriate in the circumstances.

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

The existing basis of charging for time and rate is appropriate in the majority of circumstances; the hours involved in any assignment are always uncertain. We would suggest more thought should be given to initial capped time costs based on an estimate provided at the time the fee basis is approved. At this point the IP can set out his assumptions made in setting an initial capped fee and thereby agree a budget to work to, if circumstances change the IP should then have the option to revert to creditors for approval of additional fees or approval to undertake any additional work identified as needed. This is in fact already an option for creditors and is included in Professor Kempson's review. It would be more helpful if "creditor panels" were created or HMRC took a more proactive approach in this matter in working with the industry to ensure the perception that IP's are over-charging is eradicated and where this is indeed found the IP's involved are made accountable.

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?

We do not believe that there is a level of over-payment. The proposed fee structure is likely to reduce the overall IP fees at the expense of recoveries and action against rogue directors.

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?

No

Q28: Do consultees believe these measures will improve the reputation of the insolvency profession?

No

EXECUTIVE SUMMARY

1. BIS/ the Insolvency Service is not benefiting from the £1b per annum income generated by those involved in the insolvency industry (OFT June 2010), despite the operations being state and court functions. The Insolvency Service/ Official Receiver is left with NINA cases (no income, no assets);

2. There has been no independent investigation on the close relationship between the banks (often secured creditors) and the IPs, the relationship revealed and described as strong by the OFT, and driver to the IPs being attracted to the business; in particular there is no empirical data on loss to the economy of businesses and people being "pulled down" in pre arranged transactions (including "pre packs"), with "victors" not held to account, and "losers" voiceless;

3. This lack of investigation is a spectacular omission given:

    a. the 2010 empirical evidence based work of the OFT;

    b. the work of the House of Lords on the responsibility of the auditors in the failures of the banks, due to the auditors reports which knowingly omitted to say that the banks depended on bail-outs to be able to be classified as "*going concerns*" (to Ian Powell, PwC Chairman, who purported this was a "liquidity" problem, "*we do not believe you*");

    c. the work of the Parliamentary Commission for Banking Standards concluding in December 2012 that "*the extent of corruption and collusion beggared belief",* a statement which incorporates the IP industry, which facilitates the capital shifts by techniques of leverage, in favour of financial capital and away from productive capital, at the expense of pension funds and employment;

    d. the work and evidence of Neil Mitchell re RBS endorsed by the Tomlinson work;

    e. the January 2012 evidence of PROSPECT, supported by PCS, that the heart of the service is investigation, in reliance on *evidence*, carried out by experienced people, working in the same office, a methodology that was reported to Parliament in evidence sessions as not being followed by senior management making decisions in BIS. Money spent on Atkins (a private sector consultant) over the next for months has not produced any productive outcome that is plain to the public.

    f. that an approach to the conduct of the discharge of the state's obligations to protect based on financial modeling on sample sizes which are too small to be a basis for extrapolation is ill conceived but has not been abandoned. The nature of the obligation is that each case is unique and neither capable of being "modeled" nor subject to "workflow" or any form of automation beyond internal time sheets for management information purposes.

g. that efficiency and effectiveness has seemingly been destroyed by separating an undocumented process into mechanical tasks, based on legacy IT ("ISCIS") which has not been written off, rather by-passed by the operations as being an encumbrance, and which excludes:

   i. record of thought processes,
   ii. rapidly accessible computer event logs and back ups,
   iii. record of responsibility and experience by way of first input,
   iv. mandatory retention of key records, including envelopes, emails, records of telephone calls,
   v. mandatory business acceptance and compliance protocols,
   vi. authorization by way of input of experienced sounding boards recording fulfillment of previously agreed tasks,
   vii. audit trails, including ***full investigation of the initiator of transactions***,
   viii. regular independent checking by internal inspectors,
   ix. line management escalation, suspicious activity reporting, issue resolution,
   x. rapid uncontested access to personal data; freedom from complaints departments and from referral to the information commissioner
   xi. the assumption of RIPA rights and data controller privileges which do not apply,
   xii. prolific use of transient employed and contract labour from agencies in particular in key spots such as:
      1. BIS Legal's discharge of BIS's statutory obligations to bring prosecutions of criminal activity and discharge of its obligations to the courts to report on what it has done, including filing for the compulsory winding up of criminal activity operating behind a front, including of an LLP business as those of the IPs. BIS has instead become a stepping stone in the build-up of a personal CV of transient labour and not investigator and prosecutor of first resort, protecting the public, their pensions, the public purse, and productive labour and capital;
      2. matching of IPs, backed by pre arranged financial muscle of the banks, with whom they have their primary relationships as revealed by the OFT, on special lists which the IS has failed to require to be made public (***why?)*** , with those targeted, unbeknown to them.
   xiii. Reliance on IPs to make reports after liquidation of irregularities, when it is all far too late and in any event they are not financially independent;
   xiv. by permitting forms to be manufactured for use in courts which are not court forms, created by private businesses supplying the legal industry, treated in a cavalier manner by court officials as they have no status. These are processed on the say so of the aggressor party using a network of private investigation firms. Often the form does not reflect the substance.

4. The enforcement and prosecution authorities, including BIS/ the Insolvency Service, have not caught up with complex relationships and arrangements, facilitating those without a licence, using those with a licence, to benefit from the outcome of transactions and arrangements, they themselves could not execute on their own. The justice system is similarly in arrears;

5. Seemingly unwittingly, the service has allowed itself, to become effectively, an exchange, where property and estates are traded, using high speed traders, the IPs, to the benefit of the big banks and those who support them.

   These IPs carry no indemnity (they perceive that do not need it, they are protected by the banks and underwriters) in regard the value of the estates traded, inclusive of intangible and contingent rights. They facilitate the ability to remove value and access, for a period, to enable encumbrances to be bifurcated and pushed onto the public market, whilst value is retained. The principle is as good in the case of Reichmann ($20b shed ie pushed on to the public), whilst he returned to go round again; as the reported manufactured fall of Lehmann Bros, paving the way for subsequent bail-outs, and returns to market, the public absorbing the loss in the meanwhile. It is seem in estates of married couples, where value is shifted before divorce. It is repeated in the willingness to serve time rather that allow proceeds of crime to be disgorged.

   Accordingly the service is exposed to allegations of "*rigging*", comparable to those reported to have been made by author Michael Lewis on CBS, "60 Minutes", that "*he believes the US stock market is "rigged" by exchanges, big banks and high-speed traders".* 1.4.14 fox business, Matt Egan, article FT: Goldman Sachs to exit NYSE floor in historic move.

   The service has no defence in the event of such allegation being made. This is because it is operating a web site with a bill board which is neither RIPA nor POCA compliant. This tells the world that X has been made bankrupt, and Y (IP) and his firm (other IPs), traders with no indemnity and a veneer of limited liability, have taken over. In one advertised case, Y and those with Y, are operating under licences at least from BIS, IPA, ICAS, ICAEW, SRA.

   The world is informed that this group (and those complicit) now control X's estate, and anyone wishing to participate in the public liquidation may do so, by observation or so long as they are prepared to call themselves a creditor and act collectively to X's exclusion. X is informed by Y that Y has a "duty", implicitly statutory, to "realize" X's assets, and has given notice in the crown dependencies. This is where the court is presided over by those with an honorary "QC", having served in Jersey government, as attorney general.

The Land Registry inform X that X's property is no longer unfettered (contravention of Land Registry Act, human rights etc), relying on a secret letter and instruction from Y, that is not provided, and hacking into the Land Charges register, which properly ought to be protected from hackers by air space. Land Registry cannot explain these events, although public records show the 2012 row between staff supported by PCS, and management over post opening. This is exacerbated by "policy" throughout BIS and its agencies to destroy criminal evidence (envelopes and email trails).

This is a problem most acute in the Land Registry, where a person merely has to call himself a "conveyancer" (any SRA licencee is apparently entitled), to gain pecuniary benefits. These are automatically entitled to plant tokens on another's property without proper application, notification, statements of truth, and the paperwork hidden by the Land Registry.

With paperwork dispatched from centres separate from where the transaction is processed, eg the surrounds of Plymouth; no matching of outgoing and incoming records and customer help lines elsewhere, as Durham ("*oh yes, we have heard of the Land Charges register but we do not know anything about it, it was foisted onto us*"); calls recorded unless they are crime and suspicious activity; a former banker, brought in apparently to prepare for privatization, as "Chief Land Registrar"; the Insolvency Service prosecution investigations (Plymouth), months in arrears in dealing with the underlying unlawful transactions, and in truculent and phone closing or putting to one side mode, creating a paper trail for an internal audience; the chaos creates the circumstances in which fraud is bound to flourish.

The final nail is that the RPB responsible for X's licence (ICAEW in this case), having hired a person licenced by another RPB (SRA), and put them in a decision making post (Z), has effectively neutralized the power of its own bye laws, rendering the licence wholly meaningless.

The RPB thereby is operating management and compliance systems which intercept the true position from reaching the board, turned the RPB into yet another litigation vehicle, and demonstrated to the world that the body that licences people to maintain proper records, has failed either to do it, or to support the Insolvency Service in maintaining theirs. Who issued the D Notices in such a case and is it left to a contractor from the staffing agency as the one who facilitated Y being matched to X in the first place?

Z informs X that X's licence is revoked as X is no longer a member (the Insolvency Service web site says so), and X can no longer draw on members services (ethics and technical etc). X is discredited including as witness to CIB and Companies House from September 2005 in this instance.

The point is a simple one. If Y, an individual licence holder, is operating as part of transactions, where property of another, as X, is at risk of moving, then the market clearing price and terms for that transaction must be that Y faces the same exposure personally, including damages and consequential.

A system under which Y can operate with NO INDEMNITY to X, and no tangible asset backing assurance that is readily realizable, is bound to fail, even if is artificially held up for a period of years by the Insolvency Service's matching services, gifting the estates of the unwitting public to operators with no indemnity, but effectively indemnified by the bullying of the banks.

No single RPB has pointed out to BIS the fatal flaws of the attempts to create or preserve RPB's and that remoteness of BIS/IS from the trader; through LLPs; RPB's; collusion and arrangements, does not compensate for the absence of full indemnity or a simple path for prosecution, and filing for compulsory winding up of the vehicles operating in the space, with commensurate restraint and confiscation orders on prosecution, the obligations of the state, albeit the entitlement of the victims as well. ***Why not?***

No single RPB has contributed to inputs to Ministerial briefings, that in processing terms, the estate of a solvent not bankrupt person/company/business; one which is not bankrupt but is insolvent; one with contingent and intangible assets, one without; one in which value has been removed according to the rules to facilitate legal shedding of encumbrances, whilst preserving "reputation" (financial clout); etc must all be treated identically, and that process must be factory tested before exposure to the public. An OR investigator was recently asked "*if the Queen is said to owe £760, which is said not to be resolved, would you expect her to be bankrupted, Sandringham Castle sold (having forced her out), and the change returned?"* The answer was "there would be other "creditors". Yes" and the phone closed. ***Why not?***

If the process does not work in cases of mistaken identity, identity theft, then it does not work at all and has no resilience. If the IP can be on a list without full realizable indemnity, the list cannot and should not exist. With these two unassailable objections, the "system" can be predicted to operate perversely and in prima facie contravention of court rules on notice and right to be heard (and the rest). ***Why has no RPB pointed this out? Why has no RPB pointed out that they are as exposed to criminal indictment and damages as the BBA, now sued with the banks it licenses on LIBOR Barclays, Lloyds, RBS, HSBC)? Why should members paying subscriptions be forced to pay for the heavy legal expense of keeping this £1b per annum business going, and the costs of belated and hopeless attempts to salvage the reputations of those controlling the RPB's? Is this not the same as Building Societies and their members being saddled with the compensation schemes in regard bankers defaults?***

6. Unprosecuted criminals are not pursued either for prosecution or for confiscation of the proceeds of crime (PAC 21 March 2014); prison terms are preferred. Fraud is running at £52b per annum, with criminals foregoing 26p in each £100 retained. How much is referrable to the activities of the banks shoring up their balance sheets before hidden losses are exposed, at the expense of the public, facilitated by the IPs?;

7. BIS has no explanation for the lack of complaints and criminal investigations referred to the Companies Investigation Branch (oddly re-branded "enforcement"), with no answer to the suggestion that potential referees/witnesses/victims are put off by lack of confidence of the process and certainty of outcome. In particular the decision making path between CIB/BIS Legal/ BIS prosecution investigations is obscure. The apparent involvment of "policy" in this path is not explained and may not be understood internally;

8. The overt reliance on private sector IPs to identify wrongdoing in liquidations/receiverships etc for investigations and D Notices, is also unexplained. It has led to daily BIS Notices of such notices, disqualifying small players for years, in circumstances in which one is wondering what impact it would have had on GNP if they had simply been left and resources better spent: spend of £100m to recover £133m is troublesome.

9. The excessive reliance on outsiders has been observed by the PAC, statement 1 April 2014, concluding that the Department had no clue what it was doing:

A statement from The Rt Hon Margaret Hodge MP, Chair of the Committee of Public Accounts:

"It is clear to me the Department for Business, Innovation and Skills undersold the taxpayer when it privatised Royal Mail. The share price closed up by 38% on its first day of trading which could have netted the taxpayer an additional £750 million.

I am frustrated the Department made a critical error by incentivising its private advisers to sell the shares on time at the expense of price - effectively setting itself up to fail. The private advisers recommended not increasing the selling price before the first day of trading. With the sale 24 times over-subscribed this proved to be bad advice, with investors not taxpayers benefiting.

The fact the share price has increased by 72% since the Department sold the taxpayers' share tells me the Department had no clue what it was doing. I look forward to discussing this second class performance further when the Department appears before us on 7 May."

10. This emphasis on speed of processing without regard to the transaction being processed, and whether what is being given away to the private sector, the banks and those profiting from them, including the IP industry, is properly available to be given away, has characterized the work of the Insolvency Service and the Official Receiver, although it is hard to say from when and there are on figures quantifying damage and consequential done.

The result is that the Insolvency Service and Official Receiver have built up an operating model, presuming the existence of an estate which is changing hands (as though being liquidated). In this model the only "exam question" is the way in which this estate is carved up amongst those benefiting. The right to life, liberty and other aspects of human rights are excluded from consideration. In other words, the positions of administrators and trustees in bankruptcy (the Official Receiver), have disappeared from the process, and "receivers" including management receivers, are treated as absolved from all responsibility for their own actions and omissions. The analogy becomes with the person charged with administering a lethal injection to a person facing a death penalty. That person gets paid for that task, but faces no sanction or consequences if the person killed is later pardoned.

The IPs and those benefiting and representing them, have sought to place themselves in the same category as the administrator of the lethal injection, by carrying no indemnity, being financially supported by undisclosed arrangements, that the targets know nothing about, and prepared to argue only about the declared income, including those whose hours they seek to bill and who carry no licence themselves or otherwise are inept (eg PwC having to re employ the Lehmanns derivatives team as they did not know how a bank operates, or accounts).

So far they have has the support of the court, (Brandon Barnes v Eastenders v CPS), where the courts could contemplate the estate being not liable, but could not stomach the thought that CPS (which had given no indemnity) would not pay the IP who had executed on orders that should not have been given, ie "as though" the administrator of a lethal injection, an not the IP he was from BDO, vendor of tax services, who could for himself assess the risk of investigators having relied on paperwork from abroad, without exercising their checking powers and going in to look themselves.

In these circumstances, even if the underlying case were unassailable, it was a high risk step to take, and the prosecutor could be predicted to back off, "*for reputational reasons*". However this pre supposes, in terms of his payment, and potential requirement to account for damages and consequential, that the court treat him merely as the administrator of the lethal injection, and not a person required to take a position on a proper appointment. As holder of a licence performing a statutory function, he ought to properly be held to account on the fact of the appointment. The Supreme Court has heard the matter but yet to deliver a judgment.

Finally in a market where licensing arbitrage is prevalent, the RPB model does not work. The reliance on a Memorandum has been tried between police and Law Society (2004) and de-commissioned without replacement. Therefore no useful purpose could have been served in attempting resurrection of a failed/abandonned and withdrawn model, which had no bite, even on the drawing board.

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

1. No. The concept of "*regulation*" means "*self-regulation*", stated in shorthand. A person carrying a licence from a statutory body which includes "*self regulation*" in its bye-laws, requires that person to "*self-report*" on their own wrongdoing (including by omission, and passive acquiescence with the wrong-doing of others, including their business) and the wrongdoing of others, failing which they face sanction and loss of licence.

2. RPB's are often staffed by those who hold such licence. Where these individuals are on notice of wrongdoing, they must report (police, Trading Standards, CIB, SFO, Prudential Authority, FCA, NCA, courts, auditor, UK and overseas), as well as the designated person in their organization (eg for ICAEW, Head of Staff, Michael Izza).

3. By 2005, Companies Investigation Branch of the DTI, was informing that it was predictable and predicted, that "*self-reporting*" would not work, and that twenty five years earlier, the DTI on notice of wrongdoing merely had to inform the relevant organization, and the matter would be resolved.

4. Therefore for clarity and consistency, the regime should be referred to as "*self-reporting*" and not "*regulation*". A failure to do so causes acute widespread confusion. This is in particular amongst barristers who have metamorphosed to decision making jobs in the civil service, including budget holding posts. These frequently mistakenly believe that there is no obligation to prosecute and petition for compulsory winding up where the offender carries a licence ie an offender is let off according to the licence he carries not the offence he commits. This compounds the hurdle they already face in attempting to convert to being a civil servant bound by the code, and possibly managing public money without financial training and experience. This requires intellectual independent including in deciding to do work themselves (for which they may not have the correct accounting, budget, technical leadeship experience) or ship it out to particular groups in which they are interested and on whom they may have come to depend, as a pseudo-platform of support.

5. Second, for each harm done (in the simplest case, tangible assets change hands when properly they ought not), there are losers. Those losers may not be an organized group. They may have a supply chain with competing vested commercial interests, such that suppliers are acting against them, including with the benefit of information and access to records. relationships and funds. They are therefore not free to "*punch their weight*" to protect themselves, their estate, dependents and indeed may continue liable, including criminally, for what they do not control and may not know about.

6. In law such losers must file in court to secure relief and the wrong doer must file an admission, otherwise the court may make a finding of contempt. If a wrong-doer has not self reported, he is unlikely to file an admission. This is the corollary of "*self-reporting";* the same person who must self

report must file an admission (“*dis-application of privilege from self incrimination”,* Senior Courts Act). The symmetry must work regardless of the actions/omissions of prosecutors.

7. The prosecutors have turned the single Code Test for Prosecutors *(“evidence plus suspect equals prosecute unless there are informants working/entrapment, colloquially ‘the public interest’* ”), one tool with one goal (curtailment, disgorgment), with no discretion to achieve the required protection of the public, into two separate tests, the second of which is that there is no prosecution unless a *“public interest*” case is made. The effect of the second is to neutralize the first. This properly requires a manifesto to regularize. The consequence is that the licensee is stuck with the reporting obligations under mandatory reporting rules; has no support from the prosecutors; and must secure his own civil relief in the courts.

8. The sole question which then arises is whether the wrongdoer has the financial weight to meet damages claims, whether there are indemnities in place that can cover quantum, and who in fact will face the exposure including the firm and its members, including where the corporate veil is no protection where business was recklessly or knowingly entered. RPBs are either wholly or largely irrelevant in this process.

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

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9. I have evidence borne out of experience plus observations on that experience. First an RPB must meet certain criterion in order that it can continue to licence. As matters stand, the key requirement for those who have passed certain exams and had training records signed off, is that they should (a) pay the annual subscription; (b) complete an annual CPD declaration recording training. This latter is not reviewed by a competent licensed person. There is no obligation to have learned anything and the declaration can be completed merely by attendance at events and paying the fees. This is not a solid basis for assessing what is happening or indeed whether the person has (self) reported, as required in the period. The RPB cannot be expected to deliver what it cannot control.

10. Second the recognition of the RPB must be an evaluation of the organisation as a whole including its capital base and capital adequacy for the risks which it assumes. Assurance work including audit is high risk since the introduction of limited liability partnerships. These operate in contravention of the Companies Act (lack of independence) and permit opportunistic arbitrage for those who operate in the regulated market (FSMA 2000) by virtue of themselves not being bound by the same rigour. They have not been held to account. One contingent fatality coming home to roost (eg tax including VAT on incorporation) and the business is at an end.

11. It is necessary to evaluate the whole, looking beneath the “audited” accounts, to get to the true position. Typically “for reputational reasons” contingencies are not accrued or reported; settlements are not revealed, nor are claims; and financing arrangements including members

agreements; underwriting arrangements; banking agreements facilitating contract values being converted to appropriations and pensions payments are not fully set out. In such circumstances financial resilience cannot be established with any degree of certainty. Even where the RPB set out to carry out such an assessment and even where it persuaded the LLP to provide information beyond the historic and largely superceded companies house filing (pre supposing the RPB had those on its payroll capable of such evaluations), the result could only ever be uncertain.

12. Third, such oversight is meaningless unless it identifies who it sets out to protect (the public) from who (the licencees and their firms). If protective measures require revealing more information that is required by statute such that the public are warned, the RPB will not succeed as those they licence have no statutory obligation to respond.

13. Fourth those requiring the protection are all those with an interest in the “protected” estate, widely defined, be they owners, interested persons, contingent beneficiaries, creditors, debtors, HMRC, prosecutors, regardless of the specific task which the insolvency practitioner may offer to carry out. Unless the RPBs impose capital adequacy, compliance vetting and scrutiny of indemnity, it would be meaningless to impose sanctions, since this will afford no protection in the event of supplier collapse.

14. Fifth, the RPB’s themselves are now at financial risk in regard the defaults of those they licence, including globally. The circumstances are the same as those of the BBA, sued by the US Federal Deposit Insurance Corporation, as reported this month in the Telegraph:

Telegraph 14 March 2014 (agencies)

“The US Federal Deposit Insurance Corporation sued HSBC, Barclays, Lloyds Banking Group, RBS and the British Bankers' Association over the manipulation of the Libor benchmark interest rate.

The regulator, which filed a lawsuit against 16 global banks, said the manipulation caused "substantial losses" to 38 US lenders that were shut down due to insolvency during and after the 2008 financial crisis.

The FDIC said the accused institutions cheated the closed banks in US dollar Libor-based swaps and other agreements through the manipulation of the rate between 2007 and 2011.

"The Panel Bank Defendants fraudulently and collusively suppressed USD Libor, and they did so to their advantage," the suit said.

"BBA participated in the alleged scheme to protect the revenue stream it generated from selling Libor licenses and to appease the Panel Bank Defendants that were members of the BBA." The FDIC said it was seeking full damages for losses incurred by the closed banks, punitive damages, and damages for violating US antitrust statutes.

15. It is inevitable that where BIS/the Insolvency Service (“the IS”) relies on the RPBs, which are not under its direct management control, the repercussions of the uncovered risks they face becomes an exposure to BIS/ the IS. A further aspect of the financial and economic risk to the

RPBs (and therefore BIS/ the IS) is:

a. the political risk (eg US suing and imposing sanctions on non US banks and businesses, as BP as well as US banks trading outside the US, as JP Morgan);
b. the implicit pressure on prosecutors for "tit for tat" retaliation and the lack of appetite for such, all with the associated reputational risks to the RPBs, and therefore BIS / the IS. There is pressure for LIBOR to effectively be set in the US; London has slipped from the global financial centre of the world, Edinburgh has slipped in the rankings;
    i. uncertainty re Europe, continuing unity with Scotland;
    ii. tensions between Parliament and the executive, as over the "opt out" provisions of certain European laws, and "done deals";

Extract: Joint Report from the European Scrutiny, Home Affairs and Justice Committees 26.3.14

> *" 5. We are taking the unusual step of agreeing a Joint Report because we are deeply disappointed by the Government's position. Put simply, the House should have an opportunity to have a debate – and vote – on which measures the UK should seek to rejoin before negotiations begin. Presentation of a 'done-deal', once the negotiation process has been completed, is a poor substitute. "*

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    iii. pressure over giving away what belongs to the electorate and the tax-payers, benefiting private agents, as the expense of the public;
    iv. …..NAO
    v. PAC
    vi. OFT June 10
    vii. PROSPECT Jan 12
    viii. Excessive reliance on consultants rather than identifying the underlying issues and dealing with those (Atkins, retired academic)
    ix. Failure to learn, or take advantage of work of others
    x. Loss from fraud
    xi. …….
    xii. ……..

16. As matters stand, individuals (insolvency practitioners "IPs") are offering to take on appointments (or accepting offers), without indemnity in place on the value of the estate. Mismanagement, ineptitude, reckless or knowing defaults (in particular in appointment acceptance) will give risk to potential damages and consequential. By definition, this exposes the firms and its members, made worse by the lack of in-detail mandatory business acceptance by that firm.

17. In essence the business of the IPs firm is betting its continued existence on an uninsured (and uninsurable) risk not coming home to roost or alternatively, if that happens, switching the debate to the subject of fees and not liability for damages in the appointment which should not have been

offered/accepted . *Brandon Barnes v Eastenders Cash & Carry PLC & Ors & CPS UKSC 2013-0006,* hearing 2/2014 decision to be handed down any time.

18. The anomaly between the fact that an individual is appointed, and the business carrying the exposure has not been resolved. No constructive suggestions have come from the RPBs, nor is there any evidence that they have actively canvassed those of their licencees with experience in addressing such manifest and predictable gaps. The omission in collecting coal face evidence includes those who are buyers of audit services and who may have something to say about such activities if they knew about them. How can an auditor be independent, if he is on a framework to provide restraint and confiscation services to the prosecutors as management or enforcement receiver or even expert witness/forensic accounting services?

19. The position of the auditors of these businesses has been excluded from consideration, and therefore the obligations of the FRC and its monitoring and sanctioning of these auditors. There is no rapid response team in BIS for organised vandalism, as the pulling down of RSM Tenon (201-5851/3 Companies Court) and its re-incarnation branded "*as though*" part of the Baker Tilly group.

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

20. The Secretary of State (SoS) cannot efficiently intervene in the operations of the market in the manner suggested or at all, unless to correct a market failure.

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?

21. I have evidence on the approach to formulating the appropriate question and the response. First if RPBs are to face penalties, the question is "who pays?". A snapshot of what has happened over the last decade, taking ICAEW as an example, records:

- soaring subscriptions and active promotion and sale of faculty membership, conferences and activities priced beyond the reach of ordinary members;
- the introduction of "associated membership" eg to lawyers, who do not face ICAEW
- a conversion of the RPBs, as ICAEW, to commercial enterprises pursuing the vested interests of those who control them including in the devising and selling of tax avoidance product. A recent example is the lobbying (advertised by Michael Izza on his CEO blog) of the foray into the Supreme Court in the name of and on behalf of ICAEW as intervenor for ICAEW licencees (who require no licence to give tax advice) to be able to benefit from legal professional privilege, as solicitors do (who also require no licence to give tax advice). The applicant was nominally Prudential whose counsel was instructed by PricewaterhouseCoopers LLP.

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

22. Yes. I have evidence on the approach to formulating the appropriate question and the response. The first step is to establish whether the existing RPBs are fit for purpose, and to ensure that they are compelled to bid for re-listing, essentially as supplier permanently required to re-tender to the SoS. This is a simple process and well known to central government and the local authorities. Senior civil servants with an impeccable pedigree in investment, procurement and policy have been required to obtain a certificate or not qualify in re-tendering for their current post; and in local authorities local citizens advice bureaus have been compelled to go through the same with their staff, closing them down, including the relationships, records, staff as a pre cursor to being seen to re-tender, bringing in a new supplier. The burden is on the RPB's to prove "independence" to secure continued the status. The presumption is that they are not, as evidenced recently in Europe, when a joint bid for advisory work was rejected for lack of financial independence.

23. The first test is therefore that the RPB's must be intellectually, financially independent from the licencees, ie commercial and intellectual independent, and not a lobbying vehicle for vested interests. These are attributes of the individuals making the decisions whose names, licencing body, track-record and experience must always appear. If the work is outsourced to, or done on a joint basis with, those licensed by them, individually and/or corporately, the independence test will not be met. Put simply you cannot one day be acting together to make money and the next filing for compulsory winding up on the grounds of fraudulent trading, tax evasion, false accounting and reporting, manufacture and retail sale of unlicensed tax evasion product etc. If the RPB cannot deliver to the SoS the evidence to facilitate such filings, it has no ultimate reason d'etre in the protection of the public from its licencees, individuals and corporates.

24. Complexity is inherent and self evident where there is no independence. If an individual IP in licensed firm (1) does a deal which benefits himself in which others lose, carries no indemnity to cover damages and moves to licensed firm (2), which does not know, using other IPs, with different RPB's to his own, but including those licensed by the SRA, another RPB, which RPB will deliver those complicit, including their auditors, to BIS prosecution, and what is left of HMRC prosecution, after decision making and prosecution teams were hived off (2005), and later merged with CPS?

25. The general law does not have this complexity; given evidence and suspect, there must properly be a prosecution under the Criminal Law Act 1977 (conspiracy) at the least, with the right of direct cause of action, damages by the losers, and now, after the example involving the BBA, including the RPBs themselves.

26. The position has become more acute now that litigation product has been devised, that enables indictment in the crown courts to be averted, by the expedient of pre-emptive civil action on a spurious topic in the civil courts. The product is enforced by massive damages claims in particular for damages to reputation caused by the purported errors of prosecutors.

27. The (arbitrage) product manufacturers and vendors rely on gaps in UK statute, for example absolute privilege, as exists in Ireland (Defamation Act 2009, s17). This protects witnesses, counsel, prosecutors, particularly for mistakes, including if privileged reporting, which is accurate reporting, repeats the mistake.

28. The position has been made dire by the approach of serial prosecutors, who have characterised the prosecution backlog in existence on assuming office as "*legacy*", actively closed it down, and incorrectly reserved the decision making capability of their office to themselves personally, "*as though"* it were an elected or inherited position.

29. Over the years, the accumulated backlog of unprosecuted offences turns from a tidal wave to a tsunami as unresolved wrongdoing compounds itself. The only outcome is that either the wrongdoer or the victim (often a key witness or their successor) is "*eliminated*". The criminal justice system, which lags behind events, cannot cope, not least because it was created on a presumption that an "*adversarial system*" works best and has withstood the test of time (Peter Murphy, Blackfriars Crown Court, Rebekah Dawson re wearing the niqhab in giving evidence).

30. This was without regard to modern litigation financial instruments and derivatives, that turn the adversarial system into a litigation weapon used perversely, such that a target is wiped out using their own resources and standing in the judicial system (marketed and sold as the "novel use of CPR" – website Reynolds Porter Chamberlain LLP, properly subject to compulsory winding up from 4 July 2012, real estate litigation, whose members include ICAEW associates, allowed to advertise on the ICAEW web-site). The techniques/tools, which would needs to be licensed by the appropriate body, and their VAT status defined, rely on exclusion, and false publicity of an image, on publicly accessible websites as the London Gazette (TSO, Deutsche Poste, auditor PwC), under a contract with The National Archives, MoJ. This does not impose POCA and RIPA compliance, sanctions, query resolution response times, which are an otherwise implicit contract term, in particular by a private sector supplier to a government department.

31. Other websites carrying false data now include the MoJ website, BAILII and barristers websites, as Maitland Chambers. This sports judgments never delivered by leading senior judges, which could never properly be given, after the true position has been established, based on made up facts, but attributed to the target. The "defence" is that such chambers are a series of sole traders and the website belongs to "no-one". Payments from IP firms licenced as IPs auditors and so forth by RPBs, laundered through lawyers, licenced by RPB's, permit this activity, helped by prosecutors', responsible for prosecutions under the Bribery Act 2010 (from 1 July 11), refusal to prosecute on grounds of the committal of an offence, rather who the offender is.

32. The judiciary are unimpressed. In a speech to *Justice*, 3 March 2014, Lord Chief Justice Sir John Thomas, reflected on the fraud that he had seen as counsel in the commercial bar thirty years ago that

had not been prosecuted, regretting the lack of current path to remedy the situation, which by definition, includes resolving the consequence of thirty years of accumulated backlog:

"*Fraud investigations and trials*

1. *May I take fraud trials first. Thirty years ago, I was a member of a Justice Committee chaired by Beryl Cooper QC. The Committee considered fraud trials at the time the Government had announced the establishment of the Committee chaired by Lord Roskill to look at the way in which fraud was prosecuted. Although a practitioner at the commercial bar, I saw as much if not more fraud than would a person practising at the criminal bar; I had also been heavily engaged in the legal issues arising out of a series of scandals then involving the insurance market. Many of those scandals involved conduct where the allegations were of serious criminality. Prosecutions were few and those that were brought failed.*

2. *Forty-five recommendations were made by us – many of them practical, such as those directed at improving the quality of investigations and the trial process. We strongly urged the continuation of trial by jury. However, when Lord Roskill reported in 1986, amongst the many recommendations was a recommendation that consideration be given to trial by judge alone or by judge and assessors.*

3. *In the Lord Merlyn Rees lecture I gave at the University of South Wales in 2009, my conclusion was that despite all that had been done since the Roskill Report in 1986, we still had very serious problems. Indeed Lord MacDonald QC had a month or two before my lecture, observed that "our system for regulating markets and for prosecuting market crime is completely broken". I touched on some of the issues, including the real difficulties with disclosure and the question of the mode of trial – jury, judge alone, a tribunal of a judge and two or more laymen, judge and assessors. Since then there have been further changes, including the recent introduction of Deferred Prosecution Agreements and the many attempts at improving the process of disclosure, but there are still major problems in disclosure that seem to indicate that the issues are getting worse rather than improving.*

9 Is it not time that Justice looked at these issues again? Thirty years is a very long time since the committee of which I was a member. Circumstances have changed and so may have views. Fraud investigations and trials are still far too slow and immensely expensive; not enough prosecutions are brought despite the reenergised Serious Fraud Office under David Green QC. It is vital for the health of our economy and the pre-eminence of London that those who commit financial fraud or engage in bribery and corruption are tried in a criminal courts and severely punished. Should we not look radically again at disclosure and the mode of trial?
I will not express my own views on either subject. It would not be right to do so until there is a carefully considered report which can form the basis of a considered view. I would simply say that reforming at least one of these would make a significant difference and ensure that on the resources available, there would be rigorous pursuit of more prosecutions for fraud, particularly fraud in the financial markets, and for bribery and corruption. "

33. The Insolvency Service, BIS, is radically attempting, including belatedly and with retrospective effect, to seek to impose on RPBs, what in essence are its own statutory obligations, as an organ of the state, which self-evidently and, by definition, can never become the problem of an outside body.

34. In particular, its approach does not take into account the impact of Limited Liability Partnership Act 2000, which has created the current toxic litigation vehicles trading as "*LLPs*" none of which are trading on a stand alone basis, with independently audited accounts. The exception is a start up, with accounts compliant with the Companies Act and an auditor who is not an LLP.

35. These LLPs came into existence as a result of lobbying by vested interests, claiming they sought parity with those they audited (or supplied other services) but without the constraints and controls

binding the latter group. The sole commercial purpose was to create business opportunities through arbitrage, such that a company quoted on an exchange *("regulated"),* could have a certificate or report on the financial resilience of its balance-sheet by a vehicle, or vehicles, which were not subjected to the same controls as they were (prospectus, trading track record, reporting).

36. The predictable, and predicted consequence, was that it was no longer possible to view a company on a standalone basis. This was because it came bundled with its lawyer, auditor, financier, and the supply chain referable to these. It was a short step to an auditor reporting solely on matters of which he was on notice, neutralizing the status quo, whereby the reporter was ***implicitly*** bound to ***look*** in order to put himself in the position where he could make an adverse report (eg as to whether there were sufficient records in order to ascertain the financial trading position of the enterprise) and disclaim an opinion, if necessary. It was a shorter step to bury evidence of default with a bank or insurer ("*big boys, they can look after themselves*" Tim Pope, Head of Audit Risk, PwC, July 2005), and tip off a player, with lower standing in the rankings, to secure the evidence as held by CIB, FSA, FRC, ("*independent expert in assurance"),* and use it, bundled with the witnesses, those with a valid claim, to discredit them, and obtain purported court orders to be used effectively as

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

37. 1….
38. 2….

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?

39. 3….
40. 4…..

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?

41. 5….
42. 6…

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

43. No. Thus far the SoS has omitted either to prosecute, file for compulsory winding up, disgorge tainted profits of financial offenders; secure restraint orders; confiscation orders; etc, or recover anything worth reporting.

44. BIS has presided over what the NAO has estimated as £52b annual fraud with under 26p recovered in each £100 retained (17.12.13); £1b taken out by IPs per annum (OFT June 2010)

without quantifying the loss to the economy of what has been closed down, or the secondary damage from the excessive return to financial capital as opposed to capital invested in productive activity. This is in terms of increasing the concentration of global wealth amongst a shrinking number of individuals, at the expenses of whole generations being excluded from the opportunity to develop gainfully. This malaise is one way with no "natural" mechanism for adjustment, as economic cycles, and is set to continue, unless and until political will determines otherwise.

OFT: June 2010
" 1.5 Each year IPs earn approximately £1bn in fees from corporate insolvency processes, in doing so realising about £5bn worth of assets, and distributing some £4bn to creditors. IPs can also advise on business restructuring and continuity prior to insolvency and are part of the widerbusiness restructuring market.
Market failure and harm
1.6 We find that most IPs compete by building and maintaining strong relationships with secured creditors, such as banks."

45. At the very least
    a. the £1b "*earned*" (or taken out) per annum (possibly more since 2010), is money which properly ought to accrue to the SoS, since the function it represents is a statutory function;
    b. there ought properly to be:
        i. a distinction between "*artificial*" transactions (manufactured bankruptcies /administrations) and "*real ones*";
        ii. a seperation between acts of aggression (eg local authorities, who cannot be challenged, unless they blatantly exceed their powers or act procedurally dishonestly and are caught out) including manufactured debt as solicitors "bills", acts of exclusion, surrogacy, other tools of leverage, and circumstances compelling the protection of the state (eg trustee services) and the rest;
        iii. a regular report on the quantification of the loss to the economy of pulling down people and businesses, including loss of opportunity as well as the ongoing economic damage of permitting self generated "bankruptcies" in circumstances in which there would be no entitlement in law to invoke the protection of the Insolvency Act 1986. This requires a properly evaluated balance sheet including intangible and contingent assets and those controlled or accessible, which technically have fallen out of account;
        iv. an individually licenced pool of labour, much the same as a licence to carry out MOT inspections, an electrician, an IT contractor or the former DTI inspectors (accountants, counsel etc), on which the IS/BIS can draw, to work under its supervision and direction without the baggage of:
            1. a "firm";

2. business models in which one licenced person can cover for a labour pool which is not (whose proper market price is therefore zero or negative if those involved receive free training and exposure to interesting work which others cannot access);
3. circumstances which are not subject to financial indemnity and which will result in change of ownership at the least, and more likely, abandoned rights and loss of intangible and contingent assets as well as loss of opportunity;
4. having to face a decade or more climbing the ladder to get to the ECHR, only to be told that UK domestic law exists on paper, Strasbourg's preferred construction of "*effective",* and that the ECHR will not "*interfere"* in the domestic operations of the system ("*bottling out").*

46. In other words, an effective operational model based on a competitive labour market, supplying into the SoS for mandatory state regulated activity (entitlement to protection, and obligation on the state to deliver it) is the only mechanism for delivery of human rights. This is important because where human rights are breached, the IP will not be paid from the victims assets, and he and his firm will face the full consequences of damages and consequential. In such circumstances, he may have indemnity from private operators. It is doubtful he could secure such from prosecutors (management receivers etc) or expect the court to require the CPS to pay, when on reasoned diligence he ought not to have accepted the appointment.

47. The SoS must now address (belatedly) these matters, including as set out in the press release by the PAC on 21 March 2014 (attached below). Importantly BIS is not explicitly mentioned, despite having experienced prosecutors, the Companies Investigation Branch, and being instrumental in paralysing or blocking police, SFO, FSA (as was) and Trading Standards prosecutions, as being the front line prosecutor (Martyn Hopper, former head of enforcement, FSA, March 2005, as partner in Herbert Smith).

48. The press release answers the question of one body, the **Criminal Finances Board**, although it is not the one envisaged by the IS. BIS/IS ought properly to worry that:

a. they are not mentioned (*why not?);*

b. they have given away £1b of business a year, retaining for themselves loss making activity; and

c. instead, hounding and harassing the public (including by threats of securing warrants for their arrest by police) to secure unencumbered assets which the IPs can work to their benefit as they see fit, to the exclusion of its rightful owners.

This harassment is apparently a malicious attack in response to not signing blank documents "*TO*

WHOM IT MAY CONCERN" entitling them to take control over bank accounts, tax files, other privileged/personal/financial data, in order to remove the entirety of unencumbered valuable estates from their rightful owners, for the sole purpose of giving such as a present to an IP. Such IP (and his firm and members of it) carries no indemnity for his activity stated by him as "*my duties are to realize your assets*", as the IP lays claim to valuable properties registered at the Land Registry, willingly colludes with serious cross border wrongdoing, thereby inter alia exacerbating trauma and permanent disablement resulting from such malicious attack.

49. BIS/IS is "the state" and "officer of the court" for all purposes and its staff recognise that fact. Evidence to Parliament on 24 January 2012 is appended in full in this return as it cannot reasonably be paraphrased without diluting the impact, sincerity and inside knowledge of those in the service for periods measured in decades (Tony Butcher, President PROSPECT, Insolvency Service Branch to Parliament January 2012). There is no readily accessible evidence showing that what was provided to Parliament in January 2012 (or came from the OFT in June 2010) has been translated into a work plan, complete with management information, sustainable funding including the proceeds from crime prosecutions and associated confiscations and securing that the £1b per annum currently accruing to IPs is earned by BIS/ the IS and not those outside the service, whilst "NINA" (no income, no assets) is left inside.

50. It must also be right that, if this consultation is to make meaningful contribution to the evidence gathering process started in 2010 by the OFT and enhanced by the PROSPECT (and PCS) evidence, that the points already raised explicitly or implicitly are addressed. Briefly, these are:

a. the dearth of criminal prosecutions, in particular of LLPs, with the consequent lack of recovery of proceeds of crime;

24 January 2014

Q66 Nadhim Zahawi: *So, could it be that the levels of complaints have also decreased because of a perceived lack of confidence in the process?*

Tony Butcher: *I do not know why there is a lower number of complaints. The Insolvency Service, within the relevant directorates, is making inquiries and has put people on to specific reporting to find that out. They have not reported yet as far as I know.*
Specifically in regard to the number of criminal referrals, I know that that has been noted and is being investigated. It is ongoing, so I do not know what the answer to that is.

b. the shipping out to IPs of lucrative activity, whilst retaining in-house activity that results in notional "*bad debts*" (NB this is false accounting, because the receivable should not be set-up in the first place if the prospect of recovering is not good/likely). Such practice is financially irrational;

c. evidence based decision making: the employment of a retired academic in March 2013

51.

52.

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

9….
10….

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

11….
12….

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?

4….6
5….

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?

4….6
5….

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?

No, correct figure is zero. IP should not accept appointment unless competent, informed and independent (ref, three Deloitte IPs involved in illegally pulling down RSM Tenon group in August 2013, and those from FRP Advisory LLP trying to cover up on them by parallel action started in the bankruptcy court and abandoned.). Authority: OBG v UK ECHR

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?

No, trust is like innocence. Once gone it is irrecoverable. The disapplication from the privilege from self incrimination in the courts, and under the Land Registry Act, Thefts Act and Fraud Act is more useful, as would be a rapid path to contempt proceedings and damages where the IP did not carry full indemnity with reference to estate value including contingent and intangible claims.

53. *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.*

This is not acceptable. There ought properly to be a presumption that an RPB is not on the list, and that it comes off (or is suspended), on the earlier of an event or one year (ie no concept of automatic "renewal". A triggering event for automatic exclusion or suspension would need defining, but must include either capital depth or funding/indemnity arrangements to withstand events as indictment as has happened to the BBA, when joined with those it licences, and the full consequences of loss of independence.

It is almost impossible to imagine any meaningful function for an RPB. This is in particular since "*the extent of corruption and collusion beggars belief*" Andrew Tyrie, Parliamentary Commission on Banking Standards, December 2012

APPENDICES & EXHIBITS

Memorandum of Understanding SoS & RPBs

21 December 2011: press: excessive charging by IP industry

21 March 2014: Criminals choosing jail rather than pay confiscation orders (PAC)

24 January 2012: Coal face evidence to Parliament, Tony Butcher, President PROSPECT, Insolvency Service branch

1 April 2014: D Notice advertised by the Insolvency Service

22 March 2013: ICM letter in reply to Insolvency Service consultation recording the limited time to reply meaningfully and the hopeless position of those with an interest who are not the drivers to the process

March 2014: Feedback on points of Ministerial misbriefing in forward to current consultation.

INSOLVENCY REGIME - MEMORANDUM OF UNDERSTANDING
BETWEEN THE SECRETARY OF STATE
FOR BUSINESS, ENTERPRISE AND REGULATORY REFORM AND
THE RECOGNISED PROFESSIONAL BODIES
MEMORANDUM OF UNDERSTANDING
- Foreword -

Pursuant to the Insolvency Act 1986 the Secretary of State is empowered to recognise certain professional bodies (known as the Recognised Professional Bodies) for the purpose of authorising suitable individuals to act as insolvency practitioners.

To underpin the insolvency regime the Secretary of State has agreed a set of principles with those Bodies for the purposes of achieving consistency in the authorisation and regulation of insolvency practitioners. The Secretary of State when exercising authorisation functions as the Competent Authority will abide by these principles.

Each Body is monitored by the Secretary of State for adherence to these principles.

Where reference in this document is made to a Body's members, the reference is only to those members authorised to act as insolvency practitioners.

MEMORANDUM OF UNDERSTANDING - Agreed Principles -

1 GRANTING OF AUTHORISATIONS

Each Body recognised by the Secretary of State will grant authorisations only to suitable applicants and will work to common standards in considering those applications.

2 MAINTENANCE OF AUTHORISATIONS

Each Body will ensure, through monitoring and other activities, that the authorisations it has granted remain valid.

3 ETHICS AND PROFESSIONAL STANDARDS

Each Body will apply an ethical code or guide to its members, and will seek to ensure that those members work to common professional standards that are reviewed and, where possible enhanced, to enable creditors and others to receive an efficient service at fair cost.

HANDLING OF COMPLAINTS

Each Body will have in place an accessible, effective, fair, and transparent procedure for dealing with complaints against members.

SECURITY AND CAUTION

Each Body will have in place appropriate mechanisms to ensure that its members comply with legislative requirements for security (in England and Wales) or caution (in Scotland), and to ensure that potential claims arising from the fraud or dishonesty of an insolvency practitioner are identified and made.

DISCLOSURES AND EXCHANGE OF INFORMATION

Each Body will freely share information with the Secretary of State and the other Bodies to assist in the proper performance of their regulatory duties.

RETENTION OF RECORDS

Each Body will retain members' monitoring reports and records relating to complaints for sufficient time to allow the Secretary of State to be satisfied that the Principles set out in this Memorandum are being met.

REPORTING TO THE SECRETARY OF STATE

Each Body will furnish the Secretary of State with sufficient information to enable the Secretary of State to be satisfied that the Body is meeting its legislative and otherwise agreed obligations. Such information will also enable the Secretary of State to maintain a comprehensive database of currently authorised insolvency practitioners.

MEMORANDUM OF UNDERSTANDING - Detail -

1 GRANTING OF AUTHORISATIONS

The purpose of this section is to ensure that the Bodies work to common standards in considering applications for authorisation from those individuals eligible under section 391(3) of the Insolvency Act 1986.

(A) The Body will only grant authorisations to applicants who demonstrate:

(i)That they are fit and proper persons to act as insolvency practitioners. In this respect, the Body will have regard to, amongst other things, Regulation 6 of the Insolvency Practitioners Regulations 2005;

And in the case of applicants who have not previously held an authorisation:

(ii) That they will have acquired the necessary and relevant insolvency experience required to satisfy the Body's bye-laws and rules, and regulations (experience includes regulatory and advisory work experience as defined in the Insolvency Practitioner Regulations 2005), and

(iii) That they hold a pass in the Joint Insolvency Examination set by the Joint Insolvency Examination Board or, in the case of eligible applicants from other member states of the European Economic Area that, up to and including 30 September 2007, they have passed an aptitude test demonstrating a level of knowledge equivalent to that attested by a pass in the Joint Insolvency Examination. From 1 October 2007 eligible applicants from member states of the European Economic Area will need to comply with the requirements of The European Communities (Recognition of Professional Qualifications) Regulations 2007.

(B) When considering an application from an applicant who is the holder of or has held an authorisation, the Body will in addition to the matters in 1(A) have regard to the following in relation to the applicant:

(i) The contents of monitoring reports in its possession,

(ii) The applicant's regulatory and disciplinary record,

(iii) Evidence of appropriate continuing professional development,

(iv) Evidence of continuing knowledge of and experience in insolvency practice (which expression includes regulatory and advisory work experience as defined in the Insolvency Practitioner Regulations 2005), and

(v) Any other information in its possession including, but not limited to, that relating to complaints, statutory compliance, compliance with bye-laws and, rules and regulations of the Body.

(C) The Body will ensure that there is an adequate system in place to substantiate information provided by applicants in relation to their applications for authorisation.

(D) If it is known that an applicant is a member of another Body, enquiries should be made of that Body before a licence is granted; the communication after the event should be to confirm (to the Body that previously granted a licence, if any) that one has been issued.

2 MAINTENANCE OF AUTHORISATIONS

The purpose of this section, in conjunction with the details contained in the 'Principles for Monitoring', is to ensure that the Bodies work to common standards in carrying out monitoring and other activities to certify that the authorisations granted remain valid.

(A) To secure the integrity of insolvency practitioner authorisation, the Body will neither:

(i) Permit an authorisation to continue in force for a period of more than three years from the date on which it is granted, or

(ii) Knowingly grant to an individual an authorisation contemporaneously with one from another Recognised Professional Body or Competent Authority.

(B) Where a practitioner undertakes appointments as nominee or supervisor of Individual Voluntary Arrangements and the practitioner passed the Personal Insolvency Paper of the Joint Insolvency Examination before December 2007, the Body will ensure that the practitioner has demonstrated knowledge of non-statutory debt solutions to the extent of that covered by the current syllabus of the Joint Insolvency Examination Board.

(C) Where a person is no longer authorised for whatever reason, the Body will:

(i) Notify the Secretary of State as detailed in 8(D)(i) or 8(D)(ii) and, with such assistance from the Secretary of State as may be appropriate, take all necessary steps in relation to all appointments held by the former practitioner to secure the expeditious appointment of a replacement practitioner unless, either by insolvency type or individual case, it is agreed otherwise by the Secretary of State,

(ii) Consider seeking to transfer recently closed cases, and

(iii) Seek, by its membership rules or otherwise, to obtain the agreement of the outgoing IP to transfer cases, deliver up all relevant paperwork and attend upon the successor if required.

(D) The Body will ensure that its authorised practitioners are subject to monitoring so as to enable the Body to make an objective assessment of the conduct and performance of the practitioner and to ascertain whether the practitioner is and continues to be fit and proper.

(E) The Body will:

(i) Ensure that all monitoring activities, including visits to practitioners comply with the Principles for Monitoring as agreed between the Secretary of State and the Recognised Professional Bodies,

(ii) Ensure that adequate resources are available to undertake the monitoring function and that it is carried out by individuals with appropriate training and skills,

(iii) Have an appropriate system for considering, reviewing, and evaluating monitoring reports. It will ensure that those engaged in these functions are both independent of and seen to be independent of, the subjects of the monitoring reports, and

(iv) Ensure that prompt and appropriate action is taken when it becomes aware of serious concerns in relation to a practitioner's fitness.

3 ETHICS AND PROFESSIONAL STANDARDS

The purpose of this section is to ensure that the Bodies ensure their members work to common professional standards that are reviewed and, where possible enhanced, to enable creditors and others to receive an efficient service at a fair cost.

(A) The Body will apply its professional and ethical code or guide in relation to the activities of its authorised practitioners, ensuring practitioners follow the appropriate codes of integrity, objectivity, professional competence and due care, confidentiality, professional behaviour, due skill and courtesy.

(B) The Body will with the Secretary of State and the other Recognised Professional Bodies participate in the development of professional and ethical standards, and best practice guidance, for insolvency practitioners through the Joint Insolvency Committee.

(C) The Body will issue to the practitioners it authorises the Statements of Insolvency Practice, approved by the Joint Insolvency Committee (once adopted by the Body), as required practice and the Body will also arrange for appropriate best practice, ethical, and technical guidance to be made available to its practitioners.

4 HANDLING OF COMPLAINTS

The purpose of this section is to ensure that the Bodies work to common standards, by having in place an accessible, effective, fair, and transparent procedure for dealing with complaints against members; that complaints are progressed expeditiously; that complainants are made aware of the findings of their complaints in a timely manner, and that the Bodies employ practices that will assist the Secretary of State function of monitoring the Recognised Professional Bodies.

(A) The Body will ensure that:

- (i) Guidance explaining its complaints process is published and easily accessible for any person wishing to make a complaint against one or more of its members in relation to both formal appointments and other engagements that may result from the member's authorisation,

- (ii) All complaints are progressed expeditiously and impartially, and that appropriate review procedures are in place to facilitate this, and

- (iii) Those investigating and considering complaints are independent of and seen to be independent of the subjects of the complaints, and that all complaints are investigated by individuals with appropriate training and skills.

(B) The Body will send a written acknowledgement to the complainant within ten working days of receipt of a complaint.

(C) Within fifteen working days of the conclusion of the complaint the Body will send a letter to the complainant setting out:

- (i) its findings in respect of the complaint
- (ii) an indication of proposed further action, if any.

And will include details of available options should the complainant be dissatisfied with the Body's findings.

(D) Where an insolvency practitioner ceases to be authorised by a Recognised Professional Body during the course of a complaint investigation, and becomes authorised by a second Body, the first will, where it retains its jurisdiction to consider the practitioners conduct, complete its investigation (including any disciplinary and appeal hearings) and upon request, notify the second of the heads of complaint that were being investigated, its conclusions and any regulatory or disciplinary sanction imposed.

5 SECURITY AND CAUTION

The purpose of this section is to ensure both that insolvency practitioners comply with the legislative requirements as regards security (in England and Wales) or caution (in Scotland) (the bonding requirements); and that mechanisms are in place to ensure that potential claims under bonds are identified and made.

(A) The Body will monitor the performance of its practitioners in relation to the bonding requirements of the Insolvency Act 1986, detailed criteria in respect of which are prescribed in the Insolvency Practitioners Regulations 2005.

(B) The Body will have a system to record the receipt of enabling bonds and renewals of such bonds. It will also take all reasonable steps to identify instances of non-compliance by practitioners in relation to cover schedule returns and take appropriate action where there is evidence of non-compliance with the prescribed requirements.

(C) Where the Body has reasonable grounds to believe that a claim may be made against the bond of one of its authorised practitioners the Body will take such steps as are necessary to ensure that an investigation is carried out and where appropriate will process or arrange for an authorised practitioner (or by agreement with the Secretary of State, another suitably qualified person) by assignment, to process any claim arising under a bond or bonds.

6 DISCLOSURES AND EXCHANGE OF INFORMATION

The purpose of this section is to ensure that information is shared freely between the Recognised Professional Bodies and the Secretary of State, to assist them in carrying out their regulatory duties, including those outlined in this document.

(A) The Body will not enter into any agreement, contractual or otherwise, with one or more of its practitioners that would prevent or hinder compliance with this section.

(B) Subject to the terms and conditions set out in the remainder of this section, the Body will disclose relevant information in its possession to the Secretary of State and other Recognised Professional Bodies where:

   (i) It is requested to do so by the Secretary of State, or

   (ii) Where it appears to the Body that information should be so disclosed to enable the Secretary of State or other Body to carry out their regulatory duties.

(C) Where the Body receives a request of the type described and it believes such information to be subject to a statutory or other legal restriction the Body will use its best endeavours to secure a waiver of the restriction from any person entitled to grant such a waiver, otherwise it shall consult the Secretary of State on the nature of the restriction.

(D) The Secretary of State will:

   (i) Disclose to the Body such information as appears necessary for the purpose of the exercise of the Body's functions under Part XIII of the Insolvency Act 1986,

   (ii) Disclose relevant information to the Body where it appears that information should be so disclosed to enable the Body to carry out its regulatory duties, and

   (iii) Record authorisation information as detailed in 8(D)(i) to 8(D)(iii), as the case requires, the individual and the Body by name, together with the date of notification and make the list available to the Recognised Professional Bodies on request.

(E) Where documents are supplied in any form to the Body by the Secretary of State in the course of any disclosure pursuant to paragraphs 6(D)(i) and 6(D)(ii), the documents are to be returned by the Body to the Secretary of State on an agreed date (as may be extended by the Secretary of State) in the form in which they were supplied. Copies of such documents are only to be made with the consent of the Secretary of State.

(F) Any relevant information received by the Body from the Secretary of State or another Recognised Professional Body will be used only for the purposes of the exercise of the Body's functions in relation to Part XIII of the Insolvency Act 1986. No disclosure of that information to any Body or person other than in pursuance of such purposes is to be made by the Body without the consent of the Secretary of State or, as the case may be, the other Recognised Professional Body.

7 RETENTION OF RECORDS

The purpose of this section is to ensure that monitoring reports, and records relating to complaints are retained for a sufficient period to enable the Secretary of State satisfy himself that a Body is complying with the terms of the Memorandum of Understanding.

(A) The Body will retain monitoring reports, and records relating to complaints (against both members and the exercise of the Body's regulatory functions) until the conclusion of the next regulatory inspection carried out by the Secretary of State or for a period of five years from the receipt of such reports and/or complaints, whichever period is the shorter. Such records are to be kept in original form or other accessible storage medium.

8 REPORTING DUTIES TO THE SECRETARY OF STATE

The purpose of this section is to furnish the Secretary of State with sufficient information to enable a contemporaneous database of authorised insolvency practitioners to be maintained, and to provide information about complaints that may be useful in evaluating and formulating policy objectives.

(A) Changes in Byelaws

The Body will notify the Secretary of State of changes in its byelaws and rules and regulations in relation to insolvency practitioners. Where changes solely affect insolvency practitioners, the Body will consult the Secretary of State in advance of any changes being made.

(B) List of Authorised Insolvency Practitioners

The Body will supply to the Secretary of State a list of the practitioners it authorises as at 1st January and the date of the expiry of their current authorisation and enabling bond, by 31st January of each year.

(C) The Annual Report

The Body will supply to the Secretary of State an annual report in an agreed format, providing details of licensing activities undertaken in the previous year, by 31st March. The Annual Report submitted by each Body to the Secretary of State will include the following details: -

(i) The number of applications for authorisation received, how many were granted, and how many refused,

(ii) The number of authorisations
(a) Revoked
(b) Lapsed,

(iii) The number of matters considered on appeal subdivided to show whether the original decision was confirmed or reversed,

(iv) The number of complaints in hand at the beginning of the year; the number received during the year; the number dealt with and the balance in hand at the end of the year,

(v) An analysis of the nature of complaints received during the year,

(vi) An account of how the complaints dealt with during the year were disposed of including the numbers considered by the Investigation and Disciplinary Committees and providing details of revocations and lesser penalties imposed, and

(vii) The number of monitoring visits carried out subdivided to show the results of those visits.

(D) Reporting duties throughout the Year
The Body will supply to the Secretary of State, at the time set out, the following:

(i) Details of individuals whose authorisation has lapsed (if not immediately renewed) within one week of the Body becoming aware of the lapse,

(ii) Details of individuals whose authorisation has been revoked, within one week of loss of authorisation being effected. Where a practitioner is not authorised and the practitioner appeals this decision, the Body should report this under 8(D)(ix),

(iii) A list of all individuals to whom it has granted a first authorisation to act as an insolvency practitioner, no later than the end of the week following the week in which it granted the authorisation,

(iv) A list of all individuals whose applications for authorisation to act as an insolvency practitioner it has rejected, no later than the end of the month following the month in which it rejected the authorisation, and

(v) Where any Head of Complaint remains under investigation twelve months after the date of issue of the acknowledgement, the Body will bring that matter to the attention of the Secretary of State no later than the end of following quarter after the expiry of the twelve month period.

(vi) The Body will provide such further information as the Secretary of State may from time-to-time require, relating to its activities as a Recognised Professional Body, having previously been given reasonable notice of any such requirement.

The Body will promptly notify the Secretary of State when:

(vii) It proposes to withdraw a practitioner's authorisation on the grounds that he/she is no longer 'fit and proper' to retain their authorisation, no later than the end of the month following the month in which action is commenced.

(viii) Disciplinary or regulatory action has been taken against a practitioner, no later than the end of the month following the month in which action is effective.

(ix) A practitioner has lodged an appeal against disciplinary or regulatory action that would fall into 8D(vii) or 8D(x), no later than the end of the week following the week in which the appeal is lodged. Other appeals can be notified to the Secretary of State at conclusion.

(x) It becomes aware of any significant change in a practitioner's circumstances, including matters that might impact on the creditors of an insolvency procedure where the practitioner is office-holder, or affect the ability of the practitioner to accept new appointments (including restrictions imposed or lifted), no later than the end of the week following the week in which the Body becomes aware of the change.

(E) The Body shall promptly notify the Secretary of State when it comes into possession of information that might affect the register of insolvency practitioners maintained by the Secretary of State no later than the end of the week following the week in which the Body is advised or otherwise learns of the change. Such matters include but are not limited to:

A change of the practitioner's name, A change of address, and A change in the practice name.

Telegraph 21 December 2011: **Insolvency profession told to tackle excessive fees**

A Government review has concluded the profession should be given a chance to improve before it loses its ability to self regulate

Ed Davey, the BIS minister, said creditors expected more from insolvency professionals

By Richard Tyler

5:58PM GMT 21 Dec 2011

The insolvency profession must tackle practitioners charging excessive fees and poor complaint handling or lose its system of self regulation, the Government has said.

A year long review has found the insolvency regime working “reasonably well” but that “a great deal more could be done to improve [its] effectiveness”, Ed Davey, the Business Department minister, has said.

The department intervened after receiving evidence from the Office of Fair Trading that suggests that unsecured creditors “do not always get the returns they might expect”.

“I believe that confidence in the insolvency regulatory regime plays a vital role in ensuring that markets operate fairly and efficiently, by ensuring that in the event of insolvency as much is fairly returned to those extending credit as is possible,” said Mr Davey.

He favours a single regulator to replace the nine professional bodies that regulate and license practitioners, but has given the profession time to get its own act in order to avoid “such significant change”.

But the Government will focus on improving “handling complaints, including on excessive fee charging, and achieving consistent and transparent sanctions”.

Vernon Soare, a director at the Institute of Accountants in England and Wales, said: “The rise in insolvencies during the recession put insolvency practitioners under the spotlight so it is little wonder the profession has come under closer scrutiny.

“However, the results of the Government consultation reveals a system that works, which reflects a profession that does a good job often in difficult circumstances. In the current climate, we don’t believe the time and cost associated with establishing a new single regulator is feasible.”

The Insolvency Services regulates the professional bodies.

Criminals choosing jail rather than pay confiscation orders

21 March 2014

The Public Accounts Committee publishes its report on confiscation orders which finds that criminals are choosing jail instead of paying up to £490 million in confiscation orders.

Report: Confiscation orders
Report: Confiscation orders (PDF)
Public Accounts Committee

The Rt Hon Margaret Hodge MP, Chair of the Committee of Public Accounts, said:

"Crime should not pay, but we found too many criminals who are subject to an order to confiscate the proceeds of crime choosing to spend extra time in prison rather than paying up. £490 million is owed by criminals who have served or are serving more time in prison for non-payment. This suggests these sentences provide little deterrence and that the sanctions are not working and need toughening up. The idea behind confiscation orders is to hit criminals where it hurts – in their pockets – so that serious and organised criminals do not profit from the misery of others. However, poor implementation has meant not enough confiscation orders are being made and not enough is being done to enforce them once they have been made.

We found that:

- In 2012-13 the authorities, through confiscation orders, collected only 26 pence in every £100 of criminal proceeds generated in that year;

- Very few confiscation orders are sought and made. In 2012-13, nearly 680,000 offenders were convicted of a crime, many of which had a financial element, yet only 6,392 confiscation orders were set; and

- Departments spent £100 million administering confiscation orders, yet confiscated a meagre £133 million.

- Assets held by the big time criminals were frozen too late. This allowed criminals to salt away valuable assets, putting them in the hands of spouses, using complex financial instruments, buying houses and expensive cars and hiding them overseas.

Too often the small time criminal is pursued whilst the big time criminals get away. Ninety per cent of orders of less than £1,000 are enforced whereas only 18% of orders for over £1 million are enforced.

All this shows what a shambles exists and how poor the performance of all the agencies involved is. It is unclear who is responsible and accountable for what.

There is no sense of urgency and little understanding of what works. Information is not shared across agencies, and out-of-date systems make it difficult to communicate across Government.

We are talking about big sums here, with the National Fraud Authority estimating that £52 billion was lost to society through fraud in 2012-13.

The departments need to get a grip urgently and step up their performance so that criminals stop benefitting unchallenged from the proceeds of their crimes."

Margaret Hodge was speaking as the Committee published its 49th Report of this Session which, on the basis of evidence from the Home Office, National Crime Agency, Director of Public Prosecutions and HM Courts & Tribunals Service, examined their performance in investigating, imposing and enforcing confiscation orders.

Confiscation orders are the main way through which the Government carries out its policy to deprive criminals of the proceeds of their crimes. The intention is to deny criminals the use of their assets and to disrupt and deter further criminality, as well as recovering criminals' proceeds.

The Home Office leads on confiscation policy, but many other bodies are involved including the police, the Crown Prosecution Service and HM Courts and Tribunal Service.

The overall system for confiscation orders is governed by the multi-agency Criminal Finances Board. The annual cost of administering confiscation orders is some £100 million. In 2012-13 the amount confiscated was £133 million.

Poor implementation of the confiscation order scheme has severely hampered its effectiveness. Confiscation orders can be a powerful mechanism for recovering criminal proceeds and combating and deterring criminal activity. The Proceeds of Crime Act 2002 provided powers for enforcement agencies to use confiscation orders, but over 10 years later the Government only collects 26 pence out of every £100 generated by criminal activity.

Many bodies are involved with confiscation and there is a lack of clarity over who is responsible, with no clear direction, failure to act promptly, weak accountability and no understanding of what makes good performance and delivers value for money. For example, there is limited understanding of the extent to which confiscation orders have disrupted crime.

The Criminal Finances Board has failed to address these issues since its creation in 2011, but we welcome the fact that it is now chaired by a Minister and is drawing up a new improvement plan.

Recommendations

Recommendation: The Criminal Finances Board should develop and implement its improvement plan urgently. This plan should include well-defined objectives and success measures so that practitioners can prioritise criminal cases and orders and be able to understand and measure success beyond amounts collected. The plan should also include project milestones that the Board can use to assess progress. Not enough confiscation orders are imposed.

Law enforcement and prosecution agencies are missing opportunities to impose confiscation orders with only 6,392 imposed in 2012-13 when 673,000 offenders were convicted of a crime, many of which had a financial element. Each agency uses different criteria to determine when to use confiscation orders and there is a widespread lack of awareness among staff within these agencies of the relevant legislation, and seeking orders is too often given a low profile.

To increase the numbers of confiscation orders and provide better guidance, the Crown Prosecution Service is developing common criteria to assess whether pursuing a confiscation order is appropriate and cost-effective.

Recommendation: Law enforcement and prosecution agencies need to agree and apply a common set of criteria to ensure that they consider consistently and properly all crimes with a financial gain for confiscation orders.

Not enough is being done to enforce confiscation orders once they have been made, especially in higher value cases. Enforcement bodies are much more successful in collecting proceeds from low-value orders than high-value ones, with an enforcement rate of nearly 90% for orders under £1,000 compared to 18% for orders over £1 million.

In high-value cases, the specialist financial investigators required are often brought in too late; bodies do not collaborate or share information effectively and quick action to 'restrain' (freeze) assets is often not undertaken.

Only 1,368 restraint orders to freeze assets were imposed in 2012-13, down 27% from 2010-11. Only recently have the National Crime Agency, Crown Prosecution Service, Serious Fraud Office and HM Courts & Tribunals Service jointly identified 124 high priority cases for additional enforcement activity.

Recommendation: Law enforcement agencies should work together to ensure that financial investigators are brought in early in high value cases and use restraint orders quickly to prevent criminals hiding their illegal assets. The Crown Prosecution Service and National Crime Agency should also report to the Criminal Finances Board on the enforcement progress of its priority cases.

The incentive scheme to encourage the many bodies involved to confiscate proceeds of crime is opaque and ineffective. The existing scheme simply rewards bodies for the amount of money they collect, ignoring the other key policy objectives of asset denial and crime disruption.

The scheme also fails to reflect the relative contribution and effort each body makes, with the Home Office receiving 50% of confiscated assets despite its having no operational role. It is not clear how monies received under the incentive scheme are used with only 62% of the organisations involved producing returns in 2012-13. We therefore welcome the Home Office's decision to review the scheme.

Recommendation: The current incentive scheme for bodies involved in confiscation orders should be revised to ensure it is aligned with the success measures and objectives set out in the new Criminal Finances improvement plan and to link effort and reward. The Home Office should also ensure that there is proper reporting on the use made of scheme funds.

The bodies involved with confiscation orders do not have the information they need to manage the system effectively. The focus of the management information available to enforcement and collection agencies on confiscation orders is on how much has been imposed and how much has been collected.

They lack detailed information on how much different enforcement activities cost, how successful different activities are and how much is realistically collectable in different cases. Without such information enforcement agencies cannot tell which orders they should prioritise for most impact on criminal activity and which approach to enforcing them will be most successful or cost-effective.

Enforcement teams also have to rely on dated ICT systems that are not interoperable, leading to errors and time wasted re-keying information between systems. For example, an estimated 45 hours a week is wasted on HM Courts and Tribunals Service's Confiscation Order Tracking System (COTS) alone.

Data quality is further compromised as financial investigators and Crown Court staff provide incomplete and inaccurate data to enforcement units.

Recommendation: All the bodies involved in confiscation need to develop a better range of cost and performance information to enable them to prioritise effort and resources to best effect. They also need to improve their existing ICT systems and their interoperability, as well as cleanse the data they hold.

The sanctions imposed on offenders for failing to pay confiscation orders do not work. Offenders who do not pay their confiscation orders face a default prison sentence of up to ten years, which follows their imprisonment for the original offence.

They must also pay more as the amount outstanding accrues 8% interest. But many criminals, particularly those with high-value orders, are willing to serve a prison sentence rather than pay up and around £490 million is outstanding for offenders who have served or are currently serving default sentences. The Government plans to strengthen the prison sentences for non-payment, but it is not yet clear how this will be implemented in practice.

Recommendation: The Home Office, in conjunction with the Ministry of Justice, must set out how, and by when, it will strengthen the confiscation order sanctions regime. The Joint Committee on the draft Modern Slavery Bill might include this in their deliberations.

24 January 2012 Extracts BIS Evidence plus

Examination of witness, Tony Butcher, President, Prospect (Insolvency Branch)

Q66 Nadhim Zahawi: So, could it be that the levels of complaints have also decreased because of a perceived lack of confidence in the process?

Tony Butcher: I do not know why there is a lower number of complaints. The Insolvency Service, within the relevant directorates, is making inquiries and has put people on to specific reporting to find that out. They have not reported yet as far as I know.

Specifically in regard to the number of criminal referrals, I know that that has been noted and is being investigated. It is ongoing, so I do not know what the answer to that is.

Q67 Nadhim Zahawi: Do you think the service could do more to explain how it prioritises the cases which are targeted for enforcement action?

Tony Butcher: If the insolvency practitioners who input on company disqualifications—if we are talking about that—are not aware of what our prioritization is,

17. In October and November 2010, it became clear that the reduction in case numbers handled by the Insolvency Service was both significant and likely to continue. As a consequence, the Service introduced a range of cost reduction measures, including a reduction in staffing levels.15

18. When we took evidence from Tony Butcher, President of Prospect (Insolvency Branch) in early 2012, he told us:

As you can tell from the figures that the Insolvency Service has provided, we will be losing a third of our workforce in just over a year. By the very nature of exits, they are likely to be of experienced staff in quite senior positions—the sort of people who are relied upon to pass their wisdom on to the generations of new entrants, which has meant that this year there has been a very big impact.16

13 Q

He added:

The business planning they have done for the next year is predicated on a certain level of cases coming in. If those cases do not come in, they have to deal with it and go through the same thing again, probably.17

Reorganisation of office locations

22. When the Insolvency Service first began its consultations on a new Delivery Strategy in 2010, it raised the issue of the inflexibility its structure and its geographical organisation.

The Service recommended concentrating its back-office work in fewer locations while maintaining a network of local offices across the country for necessary face-to-face customer work. The consultation proposed reducing the number of offices from 35 to 25.

23. The Service told us that the business case for this reduction was based on “reducing the amount of management you need, because you would have larger groups of people in fewer locations, and making better use of accommodation so you are not paying for accommodation you are not using”.23

24. Tony Butcher, representing Prospect (Insolvency Branch), questioned this approach in terms of both cost and efficiency:

We do not feel that taking away—I am not going to say work—functions from a locale will have any long-term benefit. You lose the local knowledge, and you lose flexibility.24

He went on to argue that:

The Insolvency Service has put forward a costing for the delivery strategy, essentially for closing and rationalising offices and moving individuals, of £33.5 million. That is what is known as a big-bang cost, that is, if everything happened on the same day and went smoothly. The Insolvency Service management has conceded that the reality is that it will not be a big bang, because there cannot be a big bang. There will be double-running. Therefore the £33.5 million costing must be incorrect. We cannot see any long- or short-term benefit.25

The funding model of the Official Receivers' Office

34. The Official Receiver deals with 3 types of cases:

• **Debtor petition bankruptcy cases** (in which the debtor petitions for their own bankruptcy). To do so they pay a court fee of £175 and a deposit of £525. The deposit fee was raised in June 2011 from £450 to £525, having been £345 in April 2008.

• **Creditor petition bankruptcy cases** (in which a creditor petitions in respect of monies owing to them). The deposit paid is currently £700.

• **Compulsory liquidations**. The deposit paid, currently £1,165, is used to fund the administrative cost of the case and the investigation into the company's affairs and the directors' conduct up to the point of the Secretary of State authorising the issuing of proceedings.

35. A notional fee of £1,625 is charged to each bankruptcy estate to cover the costs of administration but where, as in the majority of cases, no assets are realised there are insufficient funds to recoup this fee from the petition deposit alone.

36. The funding model allows for cross-subsidisation between cases where there are asset realisations. That said, given the falling bankruptcy case numbers and the lack of assets available for realisation, means that there is now a significant gap between fees and income.

37. In evidence to us, the then R3 President, Frances Coulson said of the funding model for the Official Receiver:

Its funding model is predicated on being funded by the fees that are paid in terms of bankruptcy and winding up. Strangely, that works when there is a lot of formal insolvency, but when there is not, self-funding does not work. 32

29 The Insolvency Service Annual Report and Accounts 2011–12, p.15
30 Q

38. Tony Butcher, President of Prospect (Insolvency Branch), supported Ms Coulson's assertions, stating that in a large number of cases "there are no assets or only minimal assets, which will not contribute to paying the administration fee that we are supposed to charge and recover".33

He added: Effectively, we have to recognise that the very nature of the Insolvency Service is that it is going to be unable to recover its costs, because it is dealing with insolvent businesses. […] In the present economic cycle, if case numbers go up and asset values do not, then the notional loss increases even though there is a need to have more resources to process and investigate more cases. That is built in to that funding model. It is thoroughly illogical.34

39. In its written evidence to us, Prospect argued that the Service should be paid for from the public purse “with realisations and fees providing a contribution to mitigate the costs of carrying out the statutory functions”. It went on to state that The creditor and debtor should not bear the entire cost, much like a burglar and their victim are not expected to pay for the police investigation.35

40. **Funding for the Official Receiver Service relies on a fee-generated income model. It is clear from the evidence we received that this model is unreliable in the current economic climate. We recommend that the Insolvency Service work together with the Department for Business, Innovation and Skills to look at alternative funding models that are sustainable and not wholly reliant on unpredictable levels of casework and asset values.**

54. The trade union, Prospect (Insolvency Branch), submitted evidence to us that challenged the Insolvency Service’s claim. It argued that the 11 per cent budget cut in June 2010, together with the voluntary exit scheme had resulted in the Insolvency Service being “unable to meet its internal target for the progression of disqualification investigations”.51 It

48 The Insolvency Service Annual Report and Accounts 2011–12, p.38

49 The Insolvency Service Annual Report and Accounts 2010–11, HC 1388, published on 18 July 2011. See also Insolvency News ,*Cuts see Insolvency Service probes plummet by 40%*,12 October 2011

50 Ev 65–66

51 Ev 77

The Insolvency Service **19**

also asserted that there had been a significant decrease in live company investigations, with some cases abandoned for lack of resource.52

55. The following table was provided by Prospect to demonstrate its case:

Disqualification timeliness of investigation		**Expected 2011–12**	**Actual YTD**
OR Cases -	% within 15 months of order	80%	50%
OR Cases -	% within 19 months of order	100%	83%
IP Cases -	% within 10 months of allocation	90%	unavailable
IP Cases -	% within 19 months of insolvency	100%	40%

Data source: November 2011 IED internal performance report

56. In evidence to us, Tony Butcher, the President of Prospect Insolvency Branch, reiterated the Union’s view that budgetary and staffing cuts had severely affected the Service’s investigatory and enforcement work:

The important thing to look at is how fast we are able to do our work. What we submitted was that there has been a significant impact on the ability of The Insolvency Service to progress work that was in progress. The reality of the way that staff—the disqualification investigation teams especially—had to deal with this loss of staff was that, with staff who were lost, their cases got transferred to the people who were already there or who had come in. Those cases were done or were work in progress. The cases in progress have progressed, but the cases behind lagged, and have not been done. This means that this year and next year will be when the overall impact will be noticed.53

Witness: **Tony Butcher, President, Prospect (Insolvency Branch), gave evidence.**

Q54 Chair: Good morning, Tony and thank you very much coming to speak to us today. For voice transcription purposes, could you just introduce yourself?

Tony Butcher: My name is Tony Butcher. I am the president of the insolvency branch of Prospect. We represent what might be called the professional examining staff and directors—up to director level— in the Insolvency Service.

Q55 Chair: I shall start with a fairly general question—well, perhaps it is not that general. Has Prospect been consulted on the service's delivery strategy?

Tony Butcher: In some respects, there are two answers to this, a quantitative and a qualitative answer. In quantity terms, yes, definitely. We have no objection or complaints as a trade union, and the staff cannot have any either, to the engagement, as it was put in the submission by the Insolvency Service, which started at about this time last year and was rolled through until November, which was post the date upon which the service made a decision on what it called the delivery strategy. It started in meetings with both trade unions, including PCS, before the directing board had come to any conclusions, when it was constructing its report and doing its analysis. It showed us the results of it and told us what it intended doing. It did it. It then took on board the recommendations from the trade unions that the service personally take ownership of it and not hide on the fifth floor of our headquarters, but go to each office to explain it and themselves, not only while the consultation period was going on, but also after the decision had been made. On those terms, the service has engaged and consulted with not only the trade unions but also all members of staff.

In qualitative terms, that is where there may be a difference of opinion between the trade unions and our senior management. One of the things that is drummed into you when you enter the Insolvency Service is "never assume", and always to test assertions that are made. When the delivery strategy was in its consultation stage and all the options were laid before trade unions and staff, in a roadshow of office visits, the staff then put on their professional heads and asked the directors the same sort of questions that they would ask directors of failed companies, that is, testing the assertions made on the basis of the options. What rather sticks in the throats of members of staff and members of the trade unions is that we do not feel that, to coin a phrase from 10 minutes ago, change has been based on evidence.

When questioned, a lot of the basis of the options, and then the decisions, was founded on assumptions. We challenged those assumptions and we still do not feel that we have got satisfactory answers.

In the original terms of reference, there is no reference at all to delivery strategy so we did not concentrate on that in our submissions. There is quite a lot of literature and analysis that has been done. Can I suggest that, if the Committee wishes to see this, we can provide it to you very quickly, by email? It goes into the detail that I have just been referring to.

Q56 Chair: That would be helpful. My next question was: how do you think that the Insolvency Service has managed this period of change, but I think that, to a certain extent, you have pre-answered that.

Could you summarise what you think have been the flaws in the consulting?

Tony Butcher: For the delivery strategy? Essentially, it is not evidence-based. A lot of assumptions were made on individual office requirements. The most obvious one that people noticed was that a blanket assumption was made on the number of face-to-face interviews that each office would be required to do. It did not take into account local variances. It also did not take account of the reality of the number of face to- face interviews that had occurred over the preceding decade, or certainly in the last two or three years. It was based on a coefficient, based on expected inputs of bankruptcies and company liquidations.

Q57 Julie Elliott: In your view, what will be the impact of reducing local offices and focusing on a more regional call centre type of operation? In particular, representing, as I do, a northern constituency, there only one seems to be one office in the north of England and none in the north-east and Cumbria.

Tony Butcher: The Insolvency Service's decision to reduce its estate, which is effectively what it is, and effectively centralise certain functions, is something that we fundamentally disagree with. The Insolvency Service has, over the past 20 years—I have been in it for over 20 years—changed vastly from the monolithic entity of 20 years ago. It has reacted to all the pressures that have come on all Government services to reduce cost, such that it has streamlined its operations within the local offices. We do not feel that taking away—I am not going to say work—functions from a locale will have any long-term benefit. You lose the local knowledge, and you lose flexibility. The one reason why the Insolvency Service has put forward the delivery strategy as it has is that it is saying that it needs flexibility to deal with the fluctuations in case numbers. We have done that locally in the past. In the individual local offices, it allows the office manager—effectively the Official Receiver—to use their resources in the way that they see fit at that office.

The Insolvency Service has rather undermined itself in the delivery strategy, because in moving towards the end product—how it will be in four or five years' time, which is something we cannot see because we do not know where things will be, we just know what they believe the organisational structure should look like—it has stated that it will not be moving people.

It has stated that the work can be done where people are now. Our view is that, if it can be done where people are now, why do you need to move them? That has a very large cost and a very large impact on the efficiency of the service and its ability to perform its functions. The Insolvency Service has put forward a costing for the delivery strategy, essentially for closing and rationalising offices and moving individuals, of £33.5 million. That is what is known as a big-bang cost, that is, if everything happened on the same day and went smoothly. The Insolvency Service management has conceded that the reality is that it will not be a big bang, because there cannot be a big bang. There will be double-running. Therefore the £33.5 million costing must be incorrect. We cannot see any long- or short-term benefit.

Q58 Julie Elliott: How will it work, moving into these regional hubs? What practical problems do you think will arise?

Tony Butcher: There will be an internal problem in the sense that the staff who will be moved and corralled into certain functions in a centralized location will be expected to form the core of the examining staff who do the investigation, because of the career structure. They will be corralled into at most eight places, whereas the investigations will be in another 17 places in addition to those eight. The insolvency-examiner role is a very complex one. It takes a long time to learn it because, if you think about it, you are dealing with everything. We deal with the whole social and economic interaction. The Insolvency Service has broken down the examining role into three levels, which we think is a false dichotomy—well, it is a trichotomy—in that, if you are investigating a failure or bankruptcy or a big company, you cannot know one third or two thirds of an offence, allegation or technical matter. You have to know everything. So you learn from your colleagues around you and from doing cases. There is a benefit for the whole, which includes what is classed as the administration of a case, to be in the same locale as the investigation of the case. Almost by osmosis, you will find things and note things. It is also an informal audit check.

Q59 Julie Elliott: There have been some significant redundancies in the past few years. What has been the impact of those redundancies and voluntary exits on the staff working for the service?

Tony Butcher: We have not had redundancies, we have had voluntary exits. We lost 474 posts in April last year. There are another 108 offers at this point, so we are likely to lose another 100. As you can tell from the figures that the Insolvency Service has provided, we will be losing a third of our workforce in just over a year. By the very nature of exits, they are likely to be of experienced staff in quite senior positions—the sort of people who are relied upon to pass their wisdom on to the generations of new entrants, which has meant that this year there has been a very big impact. In our submission, we pointed out that the Insolvency Service may look as though it has produced the same amount of work as it had done in the past, in terms of the output being measured by disqualifications or bankruptcy restrictions, but that is a lagging indicator, because when an investigation occurs for a bankruptcy, it takes a year, and for a company it can take two years, or maybe even longer, before you get the outcome—the order or the undertaking, or the hearing of the case.

The important thing to look at is how fast we are able to do our work. What we submitted was that there has been a significant impact on the ability of the Insolvency Service to progress work that was in progress. The reality of the way that staff—the disqualification investigation teams especially—had to deal with this loss of staff was that, with staff who were lost, their cases got transferred to the people who were already there or who had come in. Those cases were done or were work in progress. The cases in progress have progressed, but the cases behind lagged, and have not been done. This means that this year and next year will be when the overall impact will be noticed.

***Q60 Julie Elliott*:** What impact has it had on staff morale? How is staff morale at the moment?

Tony Butcher: I think it is fair to say that they are all uncomfortably numb. They have been buffeted by many events. We touched on the delivery strategy that comes from a problem with the funding model for the Insolvency Service. We can go back and back, and there have been a lot of pressures on the Insolvency Service generally in the past two or three years, which have resulted in short-term decisions having to be made very quickly by the management. This has of course impacted on the staff morale, if morale is a word that we can use. The innate professionalism of the staff has resulted in the work still being carried out to a high level. But it cannot carry on that way. We can all pass on anecdotes of individuals. I do note from my contacts around, and especially at relatively senior levels on the investigation side, that the pressure is telling. They have had to assimilate not only one set of new investigators but a second set, with possibly a third set coming along, in various places where they did not have people before. Rather than managing people in one place, they are now managing new people in three, four or five places. It has put a lot of pressure on a lot of senior people. Individually, they are just about coping.

Q61 Julie Elliott: Finally, you mentioned 100 people waiting to exit the service. Are you expecting any more redundancies after that, or do you think that that is the end of this restructure?

Tony Butcher: What happens next is for management to answer. The business planning they have done for the next year is predicated on a certain level of cases coming in. If those cases do not come in, they have to deal with it and go through the same thing again, probably.

Q62 Margot James: The 11% cash cut in the investigations budget—how has that affected services?

Tony Butcher: What happened was that we immediately lost 40 short-term appointees. I was about to say, traditionally—in effect, it is traditionally—but since 1992, when the Public Accounts Committee criticised the Insolvency Service for a lack of investigatory effort, 20 years ago, we were given resources by the previous Government to investigate properly. The Insolvency Service brought in some contractors, mainly Antipodean and South African solicitors. So we brought in that talent. They have an innate knowledge and capability, but they do not have the technical knowledge so we relied on our internal managers, of whom I ended up being one, as an example, to produce work. Since then, which is 20 years ago, the investigatory effort was mainly staffed in the disqualification unit by short-term contractors.

There has always been a long-term plan to reduce that and have our own staff do it, which is a good thing. We are now at that point, and it has been forced and rather rushed by events, of which that was the major catalyst or starting gun. The impact of this was that some very experienced staff, who were dealing with some quite difficult cases, had to go.

Q63 Margot James: When was that?

Tony Butcher: That was in June 2010. It was quickly followed by the VES or exit scheme. That was predicated, not on the budget cuts in 2010, but on the problems in the Official Receivers, with their income streams. It had an impact on the investigatory effort, as we submitted in our written submission.

Q64 Margot James: The investigations unit has been accused of targeting the easy-win cases. How true is that?

Tony Butcher: The investigatory effort of the Insolvency Service starts with its case-targeting, in that the parameters determine what cases are looked at. If there would be any change of the scoping of what the Insolvency Service regards as worthy cases for investigation, it would be at that point. What happened with case-targeting was that a change in directorates and management coincided with many other events. The director, I understand, drew up what is called a public interest grid, so that they could target cases that were appropriate. I do not have specific knowledge myself of that, but I am sure that if the Committee wishes to know more details of it they can ask the Insolvency Service for it. It is a public interest grid and it scores cases. If there were to be any changing of the parameters it would be there.

Do we perceive it? In my job, I am at the other end, where the cases have been investigated and it is about to be decided whether we should disqualify someone.
I see the end point and the fruits of it. The case mix is no different from what I have seen before, so I cannot honestly say that we have seen a different case mix.
That is not quite the answer to your question, but if there were to be a change in the scoping, it would be at the case-targeting stage—once it has passed for investigation, it is investigated thoroughly, or as thoroughly as it can be.

Q65 Nadhim Zahawi: We have received evidence that the staff making the decision to refer complaints for further investigation are of junior grades. Is this true, and if so, do these staff have adequate training?

Tony Butcher: As a branch and as members of the Insolvency Service, we would hold to the Carltona and Philips principles of differentiating between investigators and prosecutors, and also of the right people making the decisions at the right grades. When the change in that case-targeting occurred, we did make inquiries about the appropriate people making the decisions. I cannot tell you that I have got a definitive answer to give you. I cannot give you that because we did not get a definitive answer. We do know that the change in case-targeting resulted in a change of processing, which I understand included the idea that now when "D" returns or complaints come in, they are measured against the grid to which I referred. So the actual mechanics of that is something that I would suggest that you can ask in detail from the Insolvency Service management team themselves.
The perception of staff is that, because there was such a large set of changes, especially in that area, that gave rise to suspicion. There was a perception that there was an introduction of people at a lower grade to do some part of the work. As to whether that was simply to do with bureaucracy and not a qualitative decision—I am sure that that is something that you would wish to ask the Insolvency Service itself.
I think that you might be referring to Mr Clough's submission. He used to work for what was called the Companies Investigation Branch. I have made some specific inquiries about that, in terms of how that section has been rearranged. In effect, it is different labelling of what already existed. The critical point for us in relation to how the Insolvency Service has been able to perform is that it coincided with the budget cuts I referred to, plus the VES scheme that resulted from the Official Receivers having to cut the number of staff. It is to do with people leaving and new people coming in and needing to be trained. It is part of the lagging indicator that I referred to and the lagging problems. It is because we have had to move so many people around to do so many new things, all at the same time.

Q66 Nadhim Zahawi: So, could it be that the levels of complaints have also decreased because of a perceived lack of confidence in the process?

Tony Butcher: I do not know why there is a lower number of complaints. The Insolvency Service, within the relevant directorates, is making inquiries and has put people on to specific reporting to find that out.

They have not reported yet as far as I know.

Specifically in regard to the number of criminal referrals, I know that that has been noted and is being investigated. It is ongoing, so I do not know what the answer to that is.

Q67 Nadhim Zahawi: Do you think the service could do more to explain how it prioritises the cases which are targeted for enforcement action?

Tony Butcher: If the insolvency practitioners who input on company disqualifications—if we are talking about that—are not aware of what our prioritization is, that would suggest that there is a need for it.

Q68 Ann McKechin: Tony, your union has expressed concern about the current funding model for the Official Receiver Services. Could you quickly outline what your main concerns are?

Tony Butcher: Seven or eight years ago—within the last decade—the way in which the Official Receivers were funded changed. Before then, in essence, the Insolvency Service went to its parent department and said, “This is how much money we need to do what we need to do”, and it got it, or thereabouts. But then it was changed. Now, Official Receivers have to effectively break even and get in as much as they spend, which is why there is a so-called notional loss.

We think that that is fundamentally flawed. It is completely irrational. The clue is there in what we are called: we are called the Insolvency Service. We aredealing businesses and individuals who have not got any money or assets. We are going to deal with a lot of cases where there are no assets or only minimal assets, which will not contribute to paying the administration fee that we are supposed to charge and recover. The reality is that, in the simplest terms, in the present funding model the Insolvency Service is given an amount of money for the Official Receivers, and then has to give it back. It gets it back by charging fees, which means that over a three-year cycle we are supposed to break even. We think it is thoroughly irrational. We also think that it is unfair on creditors.

We do not think the creditors should be funding absolutely everything. The Insolvency Service and Official Receivers exist for a reason. We are dealing with failure and performing a court function and a function of the state.

Q69 Ann McKechin: Your proposal is that there should be further Government funding of the service. If I could put the contrary argument: given that this involves, in effect, people who enter into private commercial contracts and take a risk that the person that they supply the service to may not have enough money to pay the bill at the end of the day, why do you think that the taxpayer should be taking an increased share of the cost, given that there are, frankly speaking, likely to be more of these types of cases?

Tony Butcher: I would not like to sidestep this, but Iwas thinking about this on the way down, and I remembered that the Insolvency Service, with all that it does—and it does a lot of things—had running costs of £203 million. They were reduced to £143 million.

Now, that figure is going to reduce even more. I have a simple proposition: why don’t we give the

Insolvency Service £143 million and ask Mr Speed, who is the chief executive, "What can you do with that?", because we will not be spending any more money then, will we?

Q70 Chair: I think by the silence—you say, "We will not be spending any more money", but surely they are supposed to get it back. How would they get it back? We have heard one half there. We would like the other half.

Tony Butcher: Our contention is that the Official Receivers section should not be expected to break even. It should be expected to make recoveries that contribute to reducing or mitigating the cost of running that side of the business. The consequence of the suggestion I made, which brought silence in the room, is that, if we follow that logic towards the investigation side—and I am sure we are going to come on to how to fund that—there is a block on utilising the resources of the Insolvency Service, which is people. You cannot send investigation cases to the Official Receiver to do. You cannot send the people in the Official Receivers to do the investigation, because if that happens, it comes out of the cost of IES, the £32 million that is given to investigate.

So, if the Insolvency Service was told, "Here is the money, here is £143 million—do it", it could use that money, that is effectively in the Official Receivers' offices at the moment as an untapped resource, to do that extra work. It is not extra money in terms of the Government giving us extra money. It is producers being allowed to produce more with the money that we are being given.

Effectively, we have to recognise that the very nature of the Insolvency Service is that it is going to be unable to recover its costs, because it is dealing with insolvent businesses. The present funding model is thoroughly illogical. Not only does it produce the effects that I heard you describe earlier, in the present economic cycle, if case numbers go up and asset values do not, then the notional loss increases even though there is a need to have more resources to process and investigate more cases. That is built in to that funding model. It is thoroughly illogical.

Q71 Simon Kirby: I want to ask a hypothetical question. What would you say to a small business in my constituency that might welcome the savings of £60 million, say that you are being very selfish, and would welcome the money to cut corporation tax, VAT and red tape and try to remain solvent? That is, at the end of the day, what we want—jobs and employment. As a hypothetical supplementary question, that same business might ask how and who pays for the 500 union members that are employed by your union?

Tony Butcher: I will leave that matter aside, about who pays for the 500 members.

Simon Kirby: I was just wondering.

Chair: I do think that that is part of rather a different issue and we need to focus on the purpose of the inquiry.

Tony Butcher: Why does the Insolvency Service exist? That is my starting point. Why does the Official Receiver exist? The Official Receiver came along as a statutory officer of the court in the 1880s because of scandals in the private sector in Victorian times, which was not administering insolvent estates in an appropriate way. The Insolvency Service and the Official Receivers have a basis in fact and reality about what can happen when a market goes wrong.

That is what we do. The present Minister of State has often been quoted as describing us as the plumbers of the economy. If you do not get the plumbing right, the whole house falls down. It is a value judgment that Government will have to make, and the Committee can make a recommendation in terms of what is it right to do in terms of policing the market and ensuring that rogue and incompetent business entities are removed.

Q72 Simon Kirby: I accept all of that but my question is, in a climate of limited funds, how do you justify arguing for increased spending? Every other part of Government is having to make these difficult savings.

Tony Butcher: We have already had £60 million of savings in a year, which is a huge amount to lose. It is just under a third of a relatively large organisation.

To reduce it further may render the organization incapable of performing its statutory functions. It will come to a point where it has to make a decision as to what its priorities are within its statutory obligations, and some of those may not get done. If they are not being done, that will impact ultimately on small businesses—small businesses are the ones that get hit most, we can see that—and the taxpayer, ultimately through HMRC. If people are allowed to remain hiding behind limited liability, they cause an imbalance in the local market. The worst thing that can happen to a local business is another local business taking them for a ride. You can say, "Something must be done about it"—well, we are the something-must-be-done people. The Insolvency Service is the backstop. If we do not do it, no one will. If you want something done, we are the people to do it.

Q73 Ann McKechin: On this element about the fee level, I take your point about how we have debtor petition bankruptcy cases, and if people do not have any money, then how much can we reasonably ask them to pay as a fee? If it is too high then presumably your argument is that people will not present themselves for bankruptcy.

Tony Butcher: Sorry, I misunderstood. That is a slightly separate issue. That is about the bankruptcy fee, to make yourself bankrupt or be made bankrupt.

That is different from the administrative fee that feeds into the funding model. There is a school of thought within the Insolvency Service that we are effectively pricing ourselves out of a market. We do not like to refer to it as a market, because we do not think it is a market, but if we think of it in those terms, we are making it too expensive to go bankrupt. If you look at the alternatives, they are cheaper, in the sense that there is no immediate cost to individuals. The consequence of that is that people in dire financial straits are more likely to go down another route.

Whether that is the right route or not is a moot point.

It is certainly noticeable, and has been reported back by members in each Official Receiver's office, that the reason why we are getting a lot of cases where people have no assets is that we are getting a sizeable number of cases where the assets have gone because they have gone down another route.

Q74 Ann McKechin: The more profitable ones are going to the debt management companies?

Tony Butcher: Yes, you can say that. There is nothing left. We are just left with an eviscerated husk, which is another reason why we have financial problems. It is also another reason why we are there—we are performing a function of public good.

Q75 Katy Clark: The figure of a cut in the budget of a third in a year is absolutely massive. Could you outline very briefly how that has affected the service in terms of the amount of work that has been carried out and the quality of the service?

Tony Butcher: Briefly? The impact, as I have alluded to and described earlier, is internal change on a huge scale. The consequence of that is that things get delayed, essentially. I shall concentrate on the

enforcement side, because that is what the terms of reference were—unless you want to talk about something else, like the Official Receivers. On the enforcement side, because of the internal chaos—I would use the word "chaos", but I am sure that senior managers would not be happy with that; I am sure she is smiling behind me—things are not done quickly. If things are not done quickly, then insolvency practitioners are effectively saying, "What are you doing about something? I sent this six, eight, nine or 10 months ago, and have heard nothing about it".
They have heard nothing about it because we have no one to give it to at that point.
Q76 Katy Clark: So you are saying that there are bigger backlogs?
Tony Butcher: There is a backlog.
Chair: I will move on to the bad debts write off. In the context of this, I believe something like £81 million was written off in 2010–11. Can I just bring in Katy on the last annual report?
Q77 Katy Clark: The last annual report from the Insolvency Service stated that £15.7 million, I think, of bad debt had been written off to the cost of the taxpayer. What do you think are the reasons for that and in your opinion is that acceptable?
Tony Butcher: This really flows from the flawed funding model and the nature of insolvency. What it refers to is the funding model being that we charge a fee and try to get the money back. If we do not get the money back, it goes down as a bad debt. That is all that it is. In previous times, that was regarded as just being the cost of dealing with insolvency—that there are cases where there are no assets, and there is insufficient income, so you write them off as a bad debt, because they are and that is just the way it is.
The question within the accounts—if is just an accounting matter and whether the Insolvency Service was correct in deciding that a figure of 12% was right for bad debt write-offs or if it should have been higher—is, to be fair to management, in a sense looking at things in hindsight. The economic cycle is an unusual one. We have had a big recession. Whether they would have the ability to guess that it would be greater than 12% is something that I would not like to criticise them on. I think that is was unforeseeable. I would not say this area is a red herring, but I think that it is a recognition of the impact of the funding model. It creates a notional loss. You are basically creating a balance sheet on which the Insolvency Service looks insolvent.
Q78 Chair: I can see the basic problem with the model insofar as if you have a statutory obligation and, in order to fulfil that obligation, it costs so much money, and you are supposed to compensate by fees from the organisations you are dealing with, if they cannot contribute those fees, then obviously you are caught between a rock and a hard place. It comes back to the prioritisation issue. Is there an argument, given your limited resources and the funding issue, for prioritising those cases on which you can actually get a return?
Tony Butcher: Can I ask you to be more specific? The Insolvency Service is a very big organisation and it works in very different ways. Are you talking about the Official Receivers here?
Chair: Yes.
Tony Butcher: We have a statutory obligation. We have to do what we have to do under the Act.
Q79 Chair: So is it simpler, with a company where there is absolutely nothing there, and there are no assets—
Tony Butcher: If there are no assets, there are no assets. There is nothing to retrieve, so therefore

there is a notional loss. It is the same with bankruptcies.

Q80 Chair: What I am trying to say is could you have, if you like, one model of service delivery for such a company, where there are no assets, and another for a company where there were assets?

Tony Butcher: That appears to have intellectual coherence, but the reality is you do not know what the asset position is until you investigate it. You rely to a large degree, at the very first instant, on the director or the bankrupt providing you with information.

Accuracy of that information depends on many factors, which could include the honesty of that individual. It could also be that they are not recognising what they are being asked to provide. It is only after you have done an initial investigation or perusal—whichever phrase you wish to use—that you can assess whether there may be further assets.

Especially in bankruptcy, there are a lot of referrals to the Official Receiver for matters which they could not possibly know at the time. So, it is post-event that they get told that somebody has got something or had something at the time.

So if you decided to separate out cases at an early stage, saying, "This is a NINA— no income, no assets—and this one is something else", another acronym that I cannot think of at the moment, then you have to have the mechanism to move it from one place to another. You are creating essentially unnecessary bureaucracy within the system. If you treat every case the same, you will find things or not find things. With the ones where you do not find things, you just have a notional loss

Q81 Chair: Have you just created a new word for the Insolvency Service or did it exist before?

Tony Butcher: What one is that?

Chair: NINA?

Tony Butcher: I have stolen it from the Insolvency Service. I will not claim that.

Q82 Chair: I think that you have explained that last point very lucidly. Thank you for your evidence. I will repeat what I said to the previous panel: if you think

that there is anything else that should be added, please feel free to submit it.

Tony Butcher: I will submit to you by email the thing that I referred to earlier.

Chair: Thanks very much.

D Notices

From: "Department for Business" <bis@service.govdelivery.com>
Date: 2 April 2014 13:04:28 BST
Subject: Insolvency Service press release - West Lothian director banned for poor record keeping and tax breaches
Reply-To: bis@service.govdelivery.com

The Insolvency Service

XXXXXXX director banned for poor record keeping and tax breaches

XXXX XXXX, XX, director of XXXXXX (Scotland) Ltd, a company specialising in the storage, delivery and installation of computer components and peripherals, was disqualified for eight years from XXXXXXX 2014 for failing to keep adequate records, pay tax and rates debts or register for VAT.

22 March 2013
Professor Elaine Kempson CBE
The Insolvency Service
Development Team
Policy Unit
PO Box 15393
Birmingham
B16 6HS
Email IPfeesreview@insolvency.gsi.gov.uk

Dear Professor Kempson

RESPONSE OF THE INSTITUTE OF CREDIT MANAGEMENT TO:
THE INSOLVENCY SERVICE IP FEES REVIEW

Thank you for your letter of 4 March 2013, and for giving the Institute the opportunity to contribute to your review of Insolvency Practitioner Fees. I have to observe that a period of 20 days between the date of your letter and the deadline for information submission makes it very difficult for us to provide a meaningful response to your questions and I would be grateful if you would note that fact within your findings.

As a professional membership body with 7,000 members it is difficult to make sufficient contact and elicit adequate responses, particularly when we are asking for supporting evidence, in the time made available.

As a result, I am unable to respond in detail to the questions on the document attached to your letter and can only provide the following summary response.

Anecdotally, but supported by outcomes, it seems not uncommon for the recoveries in an insolvency to match the fees of the IP. We know that the regulatory bodies monitor remuneration carefully but we are also aware that creditors rarely raise formal complaints, and believe this to be because of what they see as perceived "barriers".

A response from one of our members is insightful and I quote it almost completely here:

"I don't believe that fee structure or pricing has any bearing on the actual work carried out by IP's, nor does it offer an easy opportunity to query or disagree.

I have had an example whereby if we wanted to query the fees we could only do so if the single or combined creditors debt were 10% of the total (we knew this) but also that we would have to convene a meeting to do so and there would be a charge in the organisation of this. Not only are we out of pocket because a client has gone into liquidation we are being asked to pay to convene a meeting to query the fees – obviously being out of pocket already we are not going to pay a charge to convene a meeting that ultimately will probably have no effect on the overall outcome.
I have dealt with several client liquidation / administration/ receiverships over the years and I do not feel the fees reflect the work undertaken.
☐ *Paperwork is standard and more recently is on-line (surely charges should be lower)*
☐ *Hourly rates are extortionate*

Examples
Work Experience £30ph – surely this is a high charge for work experience
Support - £35 - £115ph
Administrators - anything between £60 - £250ph
Managers – anything between £250 - £500ph
Partners / Directors - £500 + per hour

Legislation stipulates that - ***the payments to an officeholder should be appropriate, reasonable and commensurate reflections of the work necessarily and properly undertaken.***

All we see on some breakdowns is hourly rate, hours and timecost – and this is following legislation to make IP fees more transparent

An example I have is for 204 hours work in a given period the time cost for one IP company was £44k averaging at £214ph. When the end result is either £0.00 or at most £0.03 in £ for unsecured creditors seeing a breakdown that charges nearly £3k for statutory reports, over £7k for General correspondence etc., seems rather excessive.

Most of the breakdowns are for hours worked by administrators between £60 and £250ph, this does not reflect the pay structure of these individuals – I work for a recruitment agency and know only too well the pay and charge rates of different professions and different levels of seniority – these charge rates greatly exceed the average hourly rate earned by individuals in the accounting profession.

Whilst I understand the essential role played by IPs, I think we are all too willing to allow these costs. I know unsecured creditors can challenge through the court but only if the debt is 10% or more of total debt –this would mean convening a meeting with unsecured creditors, taking the time to challenge and when money has already been lost it is not a cost effective use of my time to take this action – it would be easier if there were a system whereby individual creditors could lodge an intent to challenge with a challenge being put forward if enough creditors showing same intent. Either this or I would be interested in supporting legislation that capped IP hourly rates".

The Institute believes there is a need for greater transparency on fees charged and their calculation, and a heightened awareness about how creditors can, and should be, engaged in establishing the remuneration structure at the start of an insolvency procedure, monitoring progress throughout, and the opportunity to complain in the event that they believe the fees charged to have been excessive.

Given the current lack of creditor engagement, more needs to be done to encourage communication between IPs and creditors, perhaps by embracing online tools through which creditors can consider proposals and vote on their acceptance or otherwise. Additionally, we believe IPs should be required to give an estimate of their expected fees at the outset of all procedures.

I am sorry that we cannot be more helpful by providing more detailed information and evidence but I hope the above will be of some use in your review. If you wish to discuss further, I would be happy to do so.

Yours sincerely

Philip King FICM
Chief Executive

APPENDIX: WHO WILL CHOOSE TO RESPOND TO A CONSULTATION BASED ON APPARENT MINISTERIAL MISBRIEFINGS? – feedback on the briefing to, and statement by Minister Willott.

Strengthening the regulatory regime and fee structure for insolvency practitioners

[1] Financial crisis was from 2008

[2] the profile which has been raised is that of the banks (Parliamentary Commission on Banking Standards) and their auditors (House of Lords Select Committee). The OFT has reported (June 2010) of those opportunistically securing £1b per year for themselves from the prolonged devastation.

[3] There is effective regime as these IPs are not required to carry full indemnity for the estate which falls under their control by one mechanism or another. They may even not be formally on notice of transactions they facilitate

[4] there is no empirical evidence of correlation between debt and employment

[5] the process of bringing down businesses and people is destructive not constructive

Foreword The recent economic downturn[1] raised the profile of insolvency professionals [2]and the regulatory regime [3]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[4] through encouraging lending and preserving economic value [5].

At the heart of our insolvency regime [6] is the insolvency practitioner (IP)[7] who, in addition to advising on business recovery and restructuring[8], will lead [9]companies and individuals through the insolvency process. [10]IPs carry out an important role often in very difficult circumstances [11] [12]. 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. [13] It is understandable therefore that both the general conduct of IPs and the fees they charge should come under close scrutiny. [14]

Recent independent reports[15] have concluded that there is clear evidence of the difficulty unsecured creditors face in controlling IP fees, [16] and that there is a need to strengthen the regulatory framework in this area.

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[6] there is the 1986 Insolvency Act and Rules. These have the purpose of protection (trusteeship, administration, requirement to account publicly, need for court authority, so that right to notice, to be heard, to cross examine and to evidence is preserved) and ensuring no unfair preference

[7] an IP who does not carry 100% indemnity for the estate he controls including contingent and intangible assets may not be in a position to meet damages and consequential damages claims, nor his firm and its members collectively. He is personally liable to losers on his default on acceptance of appointment (reckless/knowing etc)

[8] unlimited exposure as shadow director and exposure to own ineptitude in not understanding the business he takes on (eg PwC re Lemann Bros, rehiring the derivatives team to teach them about bsnking and do the administrator's job). IPs typically operate with leveage, 1 IP to several without licence, rendering the efficacy of the licence negligible.

[9] It is not appropriate for a Minister of State to act as a marketeer for the IPs. They must have full indemnity, and if they do not, those whose estates are being taken are exposed to not being able to recover. This is wholly unacceptable

[10] Untrue. They write to the victim to inform them they have a statutory duty to "realise their assets", the victim can attend a kangaroo court with unknown persons but will not have a right to be heard and to the Land Registry to say they now control any properties owned. The Land Reg is content to take their instructions from such persons without checking whether they have indemnity or informing the owner that a letter without application has been received.

[11] The IP has the option not to accept. That is more than his victim has.

[12] There is a distinction between difficulties which pre exist and those created by the IPs.

[13] No. What is important is that those not carrying full indemnity must not be allowed to operate effectively in the name of the state.

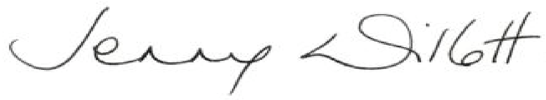
[14] The take home pay of an IP should equate to his opposite number in terms of experience who is employed by the Official Receiver. If not licensed and not carrying full indemnity, the remuneration is nil, or he pays if benefiting by training opportunity.

[15] The OFT report was June 2010. The March 2013 exercise on fees did not elicit sufficient data to add meaningfully to the 2010 report (a £1b per annum industry) – 12 individual cases and 21 written pieces of evidence, combining unsecured and preferential creditors (an unhelpful combination). Picture was that secured creditors and the IP took whatever comprised the estate.

[16] Complaint was that they were not being heard. Reason was set out in the OFT report that the IPs are on lists maintained by the banks, that was where the relationship was, and beyond helping the bank exit on its own terms (or improve its position in some way) they could do as they pleased.

This consultation document sets out measures to strengthen the regulatory regime[17] by introducing clear regulatory objectives for the regime and a range of proportionate sanctions[18] 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[19].
We want to ensure that our insolvency processes work fairly and effectively.
I look forward to hearing your views.



Jenny Willott MP Minister for Employment Relations and Consumer Affairs

1 The Office of Fair Trading's 2010 report into the market for corporate insolvency practitioners (http://www.oft.gov.uk/shared_oft/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).

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[17] There is effectively no current "regulatory regime". There is a weak "memorandum of understanding" to which the IPs are not party. This is focussed on the maintenance of a register but excludes any financial recompense arrangements for those interested in an estate who have lost due to the dishonesty of the IP/his firm/those acting with him. This is akin to the 2004 agreement between police (ACPO) and the solicitor's body for crime detection and conduct sanctions, that was de-commissioned some while back, the predictable fate of the RPB Memo, as it does nothing to protect the public financially (full indemnity on estate value); in terms of their data use; treatment to which they are subjected; or set out a clear path where an IP accepts "appointment" when he ought not.

[18] This falls on the first hurdle as the relationship can only work if direct between the statte and the IP: sanctions on the RPB are irrelevant and it could disappear if joined in defence of a prosecution, as the BBA in the US.

[19] The only basis of charge that works is unit labour cost according to a regulated price list set with reference to civil service pay levels. This works well in a number of industries. There is no prima facie reason why the Insolvency Service does not retain this work in house.

Dear sir/madam.

I was pleased to note that the Insolvency service has started a consultation as to fee being charged by practitioners. THIS NOT BEFORE TIME!

I have been in business for over 45 years now and have always been disgusted by the hourly fees charged by these people.Geneally speaking the only people that gain from an insolvency are the administrators who cream off what little money is left, leaving small amounts or nothing for unsecured creditors. I have known matters to drift on for years........these 'specialists' milking the system all the time. I notice that R3 the trade body have 'serious concerns'............obviously they are worried! so they should be !........hopefully something positive will come out of this for the benefit of smaller businesses who have up to now not been able to do anything about these high fees.

As a qualified craftsman in the building industry myself, it has always been a serious issue with me as to how people in the legal profession can justify the exorbitant fees they charge...........but that's the way it is, a day rate that a skilled carpenter is what these people charge PER HOUR FOR AN OFFICE ASSISTANT.....SOMETHING IS WRONG HERE! They plead overheads etc etc .....but don't let then pull the wool over your eyes!........... Surely when other people's money is concerned, a different view should be taken.....

I think random case studies should be made of sample insolvenceys,and the administrators be forced to open up their books and made to justify how they are spending OTHER PEOPLE 'S MONEY.

All power to you as a government body if you can show some teeth and take on these greedy people....especially the big companies who seem to act with impunity ....they have been shown in recent years to condone crooked practices, so they'll do it again!

The Parliamentary Public Accounts Committee should be sent a copy of the report by Elaine Kempson from Bristol University............they will sort these sharks out!

Please can you send me a copy of this report?

Consultation Response

Insolvency Practitioner regulation and fee structure

The Law Society of Scotland's response

March 2014

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

This response has been prepared on behalf of the Society by members of our Insolvency, Company and Banking Law sub-committee ('the committee'). The committee is comprised of senior and specialist lawyers (both in-house and private practice) and legal academics.

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?

The Society supports the first four regulatory objectives set out in the Consultation paper and agrees that they are appropriate for the Insolvency Regulatory regime. The Society suggests that the words "which are fair and proportionate" are added at the end of the first objective so that the overall objectives for the Insolvency Regulatory regime are in line with the well- established, Wednesbury principles.

The Society has reservations about the use of the expression "value for money" as the fifth regulatory objective as this expression is a somewhat nebulous one. The Society suggests that a more precise and factual term be used for the fifth regulatory objective in order to provide greater regulatory certainty for both consumers and Insolvency Practitioners. It is also the case that often an insolvency practitioner undertakes work within an appointment which is based on their public duties such as the preparation of a report on the conduct of directors with a view to possible disqualification proceedings. Such duties have no benefit to creditors but are of public importance. It is for this reason as well that an objective to provide "value for money" should be very carefully considered within the context of the overall duties of an insolvency practitioner.

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

The Society suggests that the Secretary of State should not publish any Notice of his intention to revoke a body's recognition until after the 28 day period within which representations can be made by a body. To do otherwise, may prejudice the standing of a recognised body in a manner which is neither fair nor proportionate. Any publication should then only be made after the Secretary of State has made a final decision on whether to revoke a body's recognition.

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

The Society suggests that the Secretary of State must ensure that the scope and procedures granted to him to issue a direction to the Law Society of Scotland are consistent with the specific provisions under the Solicitors (Scotland) Act 1980 by which regulatory practice rules of the Society are made. Statute provides that the Society's Regulatory Committee with the concurrence of the Lord President of the Court of Session in Scotland make practice rules. The Society suggests that any direction from the Secretary of State to any recognised professional body must take account of the statutory process by which a body promulgates its regulatory practice rules and not just give consideration to due process under any such statutory provisions.

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?

The Society suggests that it would be both fairer and more in keeping with an open system of regulation and governance that the Secretary of State is required within the appropriate Statutory Instrument to state the maximum level for a financial penalty which may be imposed on a recognised professional body.

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

The Society proposes that clarification be obtained on the proposed scope and procedures for the Secretary of State to publically reprimand a recognised professional body. It is suggested that no such reprimand should be issued until the Secretary of State has reached a view after the expiry of the 28 day given to a body to make written representations to the Secretary of State on the terms of the draft reprimand.

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

The Society reiterates its response to Question 5, that it should be provided in the relevant Statutory Instrument, that there will be no publication of a reprimand against a recognised professional body by the Secretary of State until after the Secretary of State has determined his response to any written representations made within the 28 day period by the relevant body. Thereafter, the Secretary of State should be required to issue his reprimand within 14 days of reaching a decision on the written 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?

The Society queries how the proposed new power to be given to the Secretary of State to directly sanction an Insolvency Practitioner in the public interest would be implemented. The Financial Reporting Council is notoriously slow and costs which seems contrary to the objective to deal with serious cases. It is suggested that the proposed powers for the Secretary of State in this area may benefit from some further consideration.

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?

The Society suggests that a clear time limit be set by the Secretary of State for his office to be provided with the information he has requested by the appropriate Notice.

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

The Society notes that over the course of the last 15 years there have been various proposals to create a single Insolvency Regulator within the United Kingdom. The Society further notes that the consultation paper suggests that a reserve power be given to the Secretary of State to designate a single Insolvency Regulator. This should apply only as the ultimate sanction if the current arrangements fail. We envisage significant issues with both the sole Regulator and the oversight Regulator being government agencies.

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

The Society suggests that if it is the Government's intention to create a single Insolvency Regulator that its establishment should be created by primary and not secondary legislation.

Part 2 – Insolvency Practitioner fee regime

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

The Society believes that the actual cost to each recognised professional body in monitoring the fees of an Insolvency Practitioner, will be considerably higher than the costs which are set out in the impact assessment. This is because it is highly likely that such fees monitoring will have to be carried out by an external Cost Accountant with considerable experience of insolvency work to ensure the required levels of independence for all parties. It is often the case that when a party objects to the level of fees charged that they can never be convinced that a fee is fair. Having the RPB consider the level of fee charged will in such cases often be seen as the RPB simply supporting their member and not being independent. That will be the perception and it is unlikely that this perception can be overcome by the method proposed. In clause 23 of the Executive Summary it is noted that the position in England and Wales is different from the position in Scotland and that it is not proposed to bring them into line. We disagree with that and consider that the more appropriate proposal would be to bring England and Wales into line with the position in Scotland which the Executive Summary notes provides the checks and balances. In Scotland the court have an active role in the settlement of fees with the use of a Court Reporter. Such a system shows the creditors that the review of fees is independent and will avoid creditors complaining that the RPB is not independent. No RPB can welcome the creation of a system which puts obligations on them in a situation where they can see that the perception with the public will be wrong. Clause 97 notes that recourse to the courts is costly and slow, but that is capable of resolution if a new system is being put into place. Instead what is being proposed will require each RPB to set up a system for monitoring fees, with an element of duplication and against a background that the public will not see the RPB as independent.

The Society also believes it would be appropriate for the Insolvency Service to make it very clear in any reform proposals which are introduced which proposals will not apply to Scotland.

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?

The Society refers to its answer to question 11. The expression "value for money" within a regulatory context is a somewhat nebulous one. The Society suggests that a more precise and factual term be used as part of the overall regulatory framework in order to provide greater regulatory certainty for both consumers and Insolvency Practitioners.

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?

The Society supports the principle of "information asymmetry" but is less certain that the publication of greater material within the insolvency field will assist unsecured creditors to negotiate competitive fee rates given their ranking place in the order of creditors.

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?

The Society considers that in insolvencies it is always difficult to assess the level of complexity in advance and considers that educating creditors as noted in question 13 will assist and that this in conjunction with a Court Reporter system to assess the level of work that needed done will provide a better solution.

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?

The Society refers to its answer to questions 13 and 14.

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

No comment.

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?

The Society refers to its answers to questions 13, 14 and 15. The Society considers that in the situations referred to that the current system functions well and is inevitably agreed with the stakeholders in advance.

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?

The Society refers to its answers above. The Society accepts that the setting of a prescribed scale for the amount available to take in as fees, if at a market determined level may work.

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?

No comment.

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

No comment.

Impact Assessment questions:

Q21: Do you agree with this estimation for familiarisation costs for the changes to the fee structure?

No comment.

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?

No comment.

Q23: To what extent do you expect the new fee structure to reduce the current level of overpayment?

No comment.

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?

No comment.

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?

No comment.

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?

No comment.

Q27: Do consultees believe these measures will improve the market confidence?

No comment.

Q28: Do consultees believe these measures will improve the reputation of the insolvency profession?

No comment.

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Strengthening the regulatory regime and fee structure for insolvency practitioners

We are pleased to submit our response to this consultation.

General comments

We generally welcome the proposals in this consultation relating to the regulation of insolvency practitioners (IPs), subject to the more detailed comments below, but have significant concerns about the proposals to change the ways in which IPs fees can be fixed.

Many of our cases have either a secured creditor who will not be paid in full, or a committee, so the impact of the proposed reforms on our practice is likely to be less than for many others. But we are nevertheless concerned about the likely effect of the reforms on our profession generally and on its reputation.

We believe that there are real risks that the proposals will drive some IPs out of the market, and that the quality of service offered by some others will fall. It will become difficult to find an IP willing to take on a case with low value assets, and IPs are likely to be reluctant to do any more work than is strictly necessary where the fixed fee has been reached or further realisations will not be made, or will be difficult to make, with a resulting decrease in overall net returns for creditors.

If, as we believe, the quality of certain IPs' work will deteriorate if the proposals are implemented, there are likely to be lower overall net returns for creditors, more non-fee related complaints about IPs, and an adverse effect on the reputation of the profession generally. Insolvency work will be reduced to a commoditised supply and professionalism will be removed from the market.

We note that a principal concern within the consultation paper and impact assessment is that there is an "overpayment" of fees where unsecured creditors are responsible for fee approval because, according to the OFT's research, fees are 9% higher where secured creditors are not in control. We would vigorously refute the suggestion that such higher fees mean that IPs are overpaid in those cases. A more accurate analysis would be that where there is a secured creditor and lower fees are charged, that is because the secured creditors impose an under payment on IPs, which would not be sustainable in all cases.

IPs' firms currently take on a portfolio of work, which may require different resources for different work. The economics work where the portfolio is balanced, but if the balance is altered by disallowing the ability for IPs to charge different rates on different cases the likely result is that IPs will stop doing the uneconomic work.

The consultation suggests that the proposal to move to percentage of realisations as the presumed method for setting remuneration emanates from the Kempson review. But in fact the Kempson review suggested that this would have many of the same issues as fees based on time costs - section 6.1.4 states (our emphasis added):

> "A more radical change in the basis for remuneration could make oversight easier still. In some jurisdictions the main or only method of setting an IP's remuneration is as a percentage of realisations (and this was also much more common in UK in the past). **Moving to this as the presumed method for setting remuneration in the UK would, however, be problematic as creditors currently have responsibility for setting the percentage and they lack the knowledge and skills to determine the rate that would be**

appropriate in a particular case. Change in this area would almost certainly require a more nuanced approach, with a statutory scale that links the percentage to the level of assets realised to ensure that IPs would be prepared to take on cases where realisations are likely to be low. And, as in Austria, there would need to be separate scales for the secured and unsecured assets."

The review suggests that a more promising approach would be to allow for different methods of charging for different aspects of a case. This has been discounted as too complex in paragraph 113 of the consultation, and indeed the draft Rules at Annex A of the consultation do not permit even a combination of fixed fee and percentage basis, but only one or the other. We suggest that at the very least further consideration should be given to this.

It is a retrograde step to return to a percentage basis of fees as the default, when that was abandoned in 1986 following the Cork Report.

It is difficult to understand how a percentage basis, especially a default scale, could result in better value for money in the sense (as per paragraph 98 of the consultation) that IPs' remuneration properly reflects the nature and complexity of the work done in any given case. A default scale in particular would simply be an arbitrary level not reflecting the nature and complexity of the work, given that asset values are not necessarily determinative of the scale and/or complexity of the work required.

In some high value cases a percentage basis risks over-rewarding an IP. Indeed we are aware of certain cases conducted in overseas jurisdictions where fees are fixed on a percentage basis where the office holder was entitled to a very significant fee as a result of a large cash balance (which required little work to collect), and then sub-contracted much of the work at additional expense to the estate. We can only fear that similar behaviours may arise here if the proposals are implemented.

There is no more certainty that a fixed fee would represent value for money. Insolvency cases are unpredictable by their nature. It is very difficult for an IP to know at the outset what work will be required - this depends on many factors including the quality of the company's/debtor's records (which can be very poor) and the level of cooperation and engagement of the directors/debtor. This makes it virtually impossible for an IP to estimate costs accurately at the beginning of a case.

Fixed fees and fees fixed on a percentage basis would therefore be unnecessarily inflexible and in any particular case might work out unfairly to either the IP or the creditors.

It is not clear that creditors are generally opposed to time costs as a basis of fees, but rather it seems that the main concern is to ensure that the manner in which fees are fixed and disclosed is fair and transparent – this could still be achieved without removing the right to charge on a time basis.

Whilst we do of course recognise that the complaints system is not currently able to deal fully with complaints about the quantum of fees, we do think that the very low numbers of complaints relating to fees in the last four years, and the even lower proportion of total complaints that these represent, as disclosed in the Minister's written answer of 11 March, suggest that there is much less of an issue than the consultation suggests.

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?

We support the setting of objectives but, as we indicated in our response to the consultation in 2011 on reforms to the regulation of insolvency practitioners ("the 2011 consultation"), there must be a clear distinction between regulation and policy. The objectives should reflect, and not contradict, IPs' statutory obligations.

Accordingly, objective 2(1) in paragraph 50 of the consultation ("fair treatment") must reflect that duties are owed to creditors as a class and not individual creditors. Similarly objective 3(ii) under which IPs are to "consider the interests of all creditors in any particular case" should refer to classes of creditors not individual creditors, and this objective may not be appropriate for administrative receiverships.

Please see our response to question 12 below in relation to objective 5.

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

No.

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

We consider that the scope of a direction by the Secretary of State should be limited to his role as "regulator of regulators", and should not make him an indirect regulator of IPs. Accordingly we disagree with the proposal that the Secretary of State should be able to direct an RPB to begin an investigation into individual IPs where it has received intelligence relating to alleged misconduct. The intelligence should of course be passed on to the RPB, which should then make its own decision as to whether an investigation is warranted. The RPB's decision making process would of course be subject to the Secretary of State's powers of monitoring and sanction.

It should be noted that the equivalent power to issue a direction under the Legal Services Act 2007 specifically excludes the ability to issue a direction "requiring an approved regulator to take steps in respect of a specific disciplinary case or other specific regulatory proceedings (as opposed to all, or a specified class of, such cases or proceedings)".

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?

We agree that the Secretary of State should have the power to impose financial penalties on an RPB, and that these should be of a sufficient size to deter future transgression. However, given that in practice the members of the RPB will have to foot the bill, we do not agree with the proposal not to set, or make provision for, a maximum level for a financial penalty. We note that the Legal Services Act does have provision for a maximum penalty.

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

No.

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

We have no comments.

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?

In our response to question 3 above we have disagreed with the proposal that the Secretary of State should be able to direct an RPB to discipline an IP. However if that proposal is implemented we would question whether it is also necessary for the Secretary of State to have power to apply to Court to sanction an IP directly.

Notwithstanding paragraph 79 of the consultation it is not clear to us what sort of exceptional circumstances might give rise to an application to Court.

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?

The list of people from whom information may be required is incomplete where the IP is a partner in a partnership, or a member of a limited liability partnership – it does not currently include the IP's firm or the LLP (which would probably not be the IP's employer if he were a partner or a member), or a partner in the firm or member of the LLP.

It is proposed that information may be required from an IP's employees or those of the IP's firm. We consider that it should be sufficient for the information to be required from the firm. Requiring information from individual employees could put them in a very difficult position.

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

As we said in our response to the 2011 consultation, we would support a reduction in the number of regulators as this would help to achieve greater consistency. However we agree that a move to a single regulator would involve significant change, time and cost and do not believe that there is currently a need to implement this.

We welcome instead the proposals to strengthen the current regime, and only to exercise the reserve power to appoint a single regulator if this is clearly and demonstrably not working, and after further consultation.

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

No.

Part 2 – Insolvency Practitioner fee regime

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

We note that the costs estimate included in the impact assessment is the cost to the RPBs. In practice the cost is likely to be passed on by the RPBs to IPs in higher fees and levies. No assessment has been made of the cost to IPs of responding to the investigation of fee complaints.

We are not in a position to comment on the likely cost to the RPBs, although we note that the estimated costs are based on 300 fee complaints a year and 50 appeals. In R3's response to the 2011 consultation they also produced estimated costs for 2000 fee complaints and 340 appeals a year which they thought was a reasonable assumption. Unsurprisingly, on that basis the costs were much higher (over £11m compared to £1.7m).

It may be that the proposed reforms will not in fact generate a significantly different number of fee complaints than are made currently. However, as we have suggested above, if the proposed changes to the bases of fees are implemented we believe that standards will fall and as a result there will be a significant increase in the number of non-fee related complaints, with the associated cost of dealing with those.

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?

Yes, but potentially at much greater cost. The requirement to monitor the level of fees requires a different skills set from a requirement to monitor the process around fee setting (including the quality of the information provided, transparency etc), as well as an appropriate level of experience. Given that the appropriate level of fees should depend on the particular circumstances of the case, monitoring of the level of fees is likely to need a much more in depth review of the facts of a case.

We do however have reservations about introducing the ability for the RPBs to monitor the level of fees rather than just the process by which the approval is obtained. As R3 commented in their response to the 2011 consultation, an after-the-event fee complaints system may render the fee setting process irrelevant, by discouraging creditors from engaging in the process till the end. Additionally an IP's duty is to the creditors as a whole, not individual creditors, and the fee setting process reflects this. The ability for RPBs to handle fee complaints would give individual creditors power to seek to overturn the fees agreed by the body of creditors, giving disproportionate power to individual creditors.

In any event, value for money may be a difficult concept to monitor. If the proposed fee changes are implemented, it is difficult to understand how a percentage basis, especially a default scale, could result in better value for money in the sense (as per paragraph 98 of the consultation) that IPs' remuneration properly reflects the nature and complexity of the work done in any given case. A default scale in particular would simply be an arbitrary level not reflecting the nature and complexity of the work, given that asset values are not necessarily determinative of the work required.

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?

We welcome the moves for Government departments to strengthen their role as unsecured creditors in agreeing and reviewing fees.

With regard to publishing additional information, there is already plenty of guidance for creditors. No doubt this could be improved or made clearer and more user friendly, and it might help to raise awareness. But we are not convinced that the proposals will help improve engagement, particularly where the funds available for unsecured creditors are minimal, so that they have little reason to be interested.

The information sheet produced by the Australian regulator is not that dissimilar to the current SIP 9 guidance notes for creditors, although perhaps containing a little more detail and written in plainer English, and we would have no objection if creditors had to be provided with a "Government backed" information sheet, rather than the current guidance notes.

We are not sure how meaningful comparative fee data would be. If fees have to represent value for money and reflect the nature and complexity of the work in a particular case, it will not necessarily help to know what the fees were on a similar sized case, even in the same sector, without knowing more about the individual circumstances of that case.

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?

As we have made clear in our general comments we are strongly opposed to the proposed fee structure. But if it is to be implemented, we consider that further exceptions to those proposed risk over-complicating the process. However we would suggest that serious consideration be given to setting a de minimis level for asset values below which time costs can still be charged.

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?

Please see our general comments above.

We consider that the likely unintended consequences of the proposals as described above risk seriously damaging the overall net returns to creditors and the reputation of the insolvency profession. This in turn risks undermining the UK insolvency regime's position as 7^{th} best in the world, according to the World Bank Data (in terms of speed and returns to creditors).

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

We expect that overall the proposals will result in a reduction in IP fees, although as indicated above there would be some cases where an IP would be over-rewarded in terms of the nature and complexity of the work.

The proposals may make it unviable for some IPs to take on certain work, or indeed to continue to practise, and thus reduce competition.

If, as we believe, the quality of some IPs' work will deteriorate if the proposals are implemented, there are likely to be lower overall net returns for creditors, more non-fee related complaints about IPs, and an adverse effect on the reputation of the profession generally. Insolvency work will be reduced to a commoditised supply and professionalism will be removed from the market.

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?

If, despite our objections, the proposals are to be implemented, we agree that they should not apply to MVLs.

Whilst we agree that fees are closely controlled by certain creditors in IVAs, we do not believe that the current position in CVAs is any different from that in other corporate insolvency processes. We therefore do not see the policy justification for excluding them from the proposed changes, although of course, given our opposition to the changes generally we cannot object to any exclusion.

There is clearly logic in treating IVAs and CVAs the same as each other.

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?

No – this would simply be an arbitrary level not reflecting the nature and complexity of the work – asset values are not necessarily determinative of the nature or complexity of the work.

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?

We do not think that it is appropriate to set a prescribed scale.

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

We consider that time and rate should be able to be charged in all cases, but in the event that the proposed changes are implemented we suggest that time and rate be permissible where the asset value is below a prescribed minimum.

Impact Assessment questions:

Q21: Do you agree with this estimation for familiarisation costs for the changes to the fee structure?

No – not least because the estimated costs include only the time for IPs themselves to familiarise themselves with the changes, without including any familiarisation time for their staff.

Additional time will also be required to understand the full implications of the changes in relation to the particular IP's usual mix of cases and whether that remains sustainable.

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?

Not applicable.

Q23: To what extent do you expect the new fee structure to reduce the current level of overpayment?

Please see our general comments above. We consider that it is misleading to refer to the higher fees in cases where unsecured creditors are responsible for fee setting as an overpayment. In fact the difference in fee levels is because secured creditors impose an under payment on IPs, which would not be sustainable in all cases.

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?

It may not add additional cost, but it is not likely to result in any cost saving either. In order to enable creditors to make an informed decision, it will be necessary to provide them with information about the likely value of the assets and the fee that would result from approval of a particular percentage, as well as information about the nature and complexity of the work, and possibly the time likely to be required to be spent on it.

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?

We do not agree with these assumptions. As indicated above, we consider that the changes to the fee structure will result in a deterioration in the quality of IPs' work and consequently lower overall net returns for creditors.

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?

We consider that the analysis of the benefits is misconceived for the reasons stated above and adding a weight would therefore be irrelevant.

Q27: Do consultees believe these measures will improve the market confidence?

No. As explained above we consider that the proposed changes will result in poorer service and IPs being priced out of the market, which means that there is a very real risk of a decrease in market confidence.

Q28: Do consultees believe these measures will improve the reputation of the insolvency profession?

No. As explained above, the proposed changes are likely to result in a commoditisation of service and a reduction in standards. This is likely to lead to more (non-fee related) complaints against IPs and accordingly lower the reputation of the insolvency profession.

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28 March 2014

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JOHNSTON CARMICHAEL

Your ref:
Our ref: MPH/SEB

27 March 2014

Dear Sirs

Strengthening the Regulatory Regime and Fee Structure for Insolvency Practitioners

I have pleasure in enclosing our response to the recently published consultation document on the above subject. The response has been collated following a meeting of our Firm's Insolvency Practitioners held to discuss the topic.

If you require any further information regarding our submission please contact me.

Yours faithfully

M P Henderson
Partner, Business Recovery & Insolvency

E-mail: matt.henderson@jcca.co.uk

Response to Consultation Questions
Insolvency Practitioner Fee Regime

General views were given highlighting to the differences in the process used in Scotland to that of England and Wales. Specifically being that in Scotland there is the facility to use Accountant in Bankruptcy and Courts to approve/appeal remuneration.

Q11 Do you agree with the assessment of the costs associated with fee complaints being reviewed by RPB's

Observations/concerns:

- complaints relating to fees are not dealt with by RPB's under the current arrangements
- If RPB's dealt with fee complaints then their costs in doing so would fall to be met by the IP's. IP regulatory costs are already high.
- We make the observation that only a very small %'age of complaints are received regarding fees - 2% in 2013 (* info from response to R3 Query)
- In the vast majority of cases the engagement of creditors is negligible with few if any creditors attending creditors meetings and even fewer willing to become involved in the fee setting process by agreeing to form a Liquidation Committee.
- There would be less need for RBP's to become involved if more creditor engagement was received throughout the insolvency process. Costs should not be placed on the RBP's for an issue which could be remedied by reducing creditor apathy, and by increasing creditor engagement.

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?

- Consideration should be given to England & Wales adopting the Scottish Framework where the courts will give consideration to appropriate levels of fees for the work done. That process involves an assessment of the nature of the work done, the complexity of the work and the appropriateness of the grade of staff that performed the work.

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?

- This is unlikely to help as links to similar information are provided to creditors at the outset of each case. If creditors do not access the information that we already provide, it is unlikely that further information given by IP's will be utilised by them.
- For most creditors, their initial concerns are not with the IP's fees; they are mostly concerned about unfit conduct of directors.

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?

- Hard to answer as does not apply to Scotland
- Unlikely to occur. Our experience is that even larger creditors common to every case, usually HMRC, Local Councils or The Insolvency service, do not seem to actively engage in the insolvency process so it is highly unlikely that any smaller creditors would take the time to do so. They prefer to invest their time on managing their ongoing customers.

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

- Suggest minimum fee applies for performing the Statutory work not related to asset realisation – to comply with statutory and with regulatory requirements.
- We are concerned that IP's don't know at the outset of the case what work they will be required to perform. Remuneration based on a %'age of realisations will not always adequately cover the costs of complying with statute and SIP's in cases where there are complex issues e.g. involving unfit directors conduct or the reduction of challengeable transactions.
- If time/remuneration was restricted on the basis that secured creditors would not be paid in full and then other assets were discovered would the basis of remuneration change? We have concern about how this would be agreed. The majority of the work undertaken previously would have been for the benefit of the secured creditor but then it is other creditors who approve the costs of doing that work which does not seem appropriate.

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

- Could become unfair for ordinary creditors: a restricted fee may in turn restrict the work we are willing/able to carry out which could in turn reduce potential asset realisations.
- We think this will have little effect on ordinary creditors.

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

- Yes - these processes are essentially not geared to achieving further asset realisations.
- Creditors/stakeholders are more engaged in these processes and agreeing fees.

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?

- No - prefer remuneration on a time basis
- If we do have scale rates then we must have the right of appeal through the courts.

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?

- Any scale needs to take into account the ratio of work done to assets realised.
- If scale rates are introduced we favour different scale rates to apply to different sizes of case. For example one rate for cases with asset realisations below £100k, and a different scale rate for cases where asset realisations are above £100k. In this way the costs of covering the basic compliance costs can be covered in smaller cases.
- There should be scope for change to the use of scale rates if further assets are discovered or problems are met when ingathering them.

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

- Yes - if problems occur during the case - i.e. reporting on adverse director's conduct and complex legal issues.

British Property Federation response to:

The Insolvency Service consultation on 'Strengthening the regulatory regime and fee structure for insolvency practitioners'

March 2014

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1. The British Property Federation (BPF) is pleased to respond to the review being undertaken by the Insolvency Service into the fee structure and regulatory regime for insolvency practitioners.

2. The British Property Federation is the voice of property in the UK, representing companies, owning, managing and investing in property. This includes a broad range of businesses comprising commercial and residential property owners, housing associations and financial institutions including pension funds, corporate property owners as well as a number of regional landlord associations. A list of our largest members can be found at the following link: http://www.bpf.org.uk/en/members/our_members.php

3. The consultation poses a number of questions with regards to IP regulation and the structure of fees. We have therefore decided to take a thematic view of the proposals outlined in the consultation. We will firstly address the proposals around strengthening the regulatory framework of the insolvency practitioner industry and thereafter will move on to comment on the fees system. We would be delighted to provide any further information or clarification on any aspect of our response on request. In the first instance, please contact Stephanie Pollitt, Senior Policy Officer, Tel: 0207 802 0104 or Email:spollitt@bpf.org.uk

Part 1 – Regulation of Insolvency Practitioners

4. The difficult business environment has been particularly challenging for both occupiers and landlords and there has never been a more pertinent time to address the regulatory system governing Insolvency Practitioners (IPs).

5. Our members have remained concerned that the current system of IP regulation does not provide sufficient transparency or consistency for unsecured creditors and we very much welcome the reform objectives as set out in paragraph 43 to the document. Having previously responded to the review of corporate insolvency conducted by the Office of Fair Trading, we were left disappointed by time taken to make any further progress.

Regulatory objectives for RPBs

6. We wholeheartedly agree that the insolvency profession should act with integrity, fairness and transparency and whilst we would hope that this is done as a matter of course, we appreciate that this is not always the case. As noted, the complaints mechanism has been a particular sticking point for unsecured creditors, primarily based around how to complain and who to and a lack of confidence that if they were able to put forward a complaint, whether this would be upheld and dealt with accordingly.

7. We were therefore pleased to see the emergence of a complaints portal which we believe will go some way in trying to deal with the issue of who to complain to. Further work, however, must be undertaken to ensure that where a complaint is lodged, that it is dealt with transparently and fairly to help give unsecured creditors the confidence that their voices are being heard.

8. We also agree that existing RPBs must give every regard to the regulatory objectives as set out and ensure that they are at the centre of their work. Furthermore, we agree that for an RPB to be recognised as such is contingent on them incorporating the regulatory objectives within their framework of rules and practices.

Secretary of State as oversight regulator

9. One of the failures of the current regulatory system for creditors is the lack of tools for the Insolvency Service to monitor and sanction RPBs to a sufficient degree. The result is a lack of confidence in the regulatory system for creditors. To address this we support the proposal to appoint the Secretary of State as oversight regulator with a range of powers to proportionately sanction RPBs for misconduct.

10. We welcome the proposals to introduce a range of proportionate sanctions which the Insolvency Service (IS) may impose on behalf of the Secretary of State. Where sanctions are imposed, these should be done in a fair and consistent way and be attributed on a case by case basis.

11. We agree that the revocation of recognition should remain the most powerful sanction available to address any serious misconduct by an RPB and that the process by which this will be done should be clearly outlined in legislation. This would ensure that RPBs are fully aware of their duties and the consequences that could be incurred if they do not meet these duties. It will also help increase creditors confidence by confirming that there are real penalties for non-compliance.

12. We are also pleased to see that notices of the Secretary of State's decision will be published and which will specify the reasons for this decision and when that revocation will be effective from. We feel that this will help set the example that to other RPBs that non-compliance will not be tolerated. We agree that such notices should be published by the Insolvency Service and information be held centrally there.

13. We agree that financial penalties should form part of the package of sanctions available to the Secretary of State. We strongly agree that fines should be of a sufficient size to deter future transgressions and that each fine should be set commensurate to the breach that has occurred. We do not, however, agree that a period of 3 months be given for payment to be

made. We feel that this is too long and given that the RPB will have had prior notice of the intended action, the fine should not come as a surprise to them. Government's own good practice denotes that commercial debts must be paid within 60 days and we feel that this should be applied here.

Reserve power to replace RPBs with a single insolvency regulator

14. We believe the current structure of seven RPB's for IPs, or eight including the Insolvency Service, is too great a number and is not conducive to increasing transparency in the system. We are aware that not only did the 2011 consultation on IP regulation show strong support for a single regulator, but in her review, Professor Kempson also felt that this was strong argument for a reducing the number of RPBs and introducing a single regulator. Through her research she noted that there was 'considerable variation in the compliance monitoring'[1] undertaken by RPBs and that 'ultimately there is a case for a single regulator[2].

15. We note that the IS clearly sees the merits of a single regulator but that the preferred option would be to work RPBs to strengthen the current regime through the introduction of regulatory objectives and sanctions. Work done since the OFT report in 2010, the IP consultation in 2011, the single complaints portal and various changes to Statement of Insolvency Practices (SIPs) have only really served to tinker with the existing regulations and the proposals being put forward in this consultation are no different. The introduction of a single regulator would bring a significant change to the IP regime and it is frustrating that such a change which has consistently received strong support is yet again to be put on the back burner.

16. We acknowledge that powers will be put in place for the SoS to appoint a single regulator in place of the existing RPBs if the current proposals do not improve public confidence in the current system. However, as mentioned above, support has already been there for a single regulator and therefore we must ask ourselves, what other show of support must be attained before this proposal is finally enacted?

Part 2 – Insolvency Practitioner Fee Regime

17. Any new insolvency event generates particular issues and difficulties. With the current volume of already empty units, members are finding their time focussed on, amongst other matters, minimising void periods, seeking new occupiers, pushing IP's for rental payments and getting them to comply with lease provisions. All this aside, rightly or wrongly, the level of IP remuneration is not given the attention that is needed to enforce a change.

18. However, there is a clear strength of feeling amongst members that where fees are charged for work done, it is often difficult to quantify the value of this cost. In particular with restructures through pre-pack there is rarely any hope of a dividend to unsecured creditors anyway, with the charge holders hoovering up any realisations long before us ordinary creditors get a look in. Aside from the most straightforward of cases such as small company

[1] Review of Insolvency Practitioner Fees Report to the Insolvency Service, Elaine Kempton, July 2013

[2] Review of Insolvency Practitioner Fees Report to the Insolvency Service, Elaine Kempton, July 2013

voluntary liquidations, the level of confidence relating to whether fees are commensurate with working undertaken is low.

19. We therefore very much welcome the proposals being put forward in this consultation and see them as an important step forward in making the whole fee regime far more transparent for creditors. As rightly noted Professor Kempson pointed out that it is particularly the smaller and less experienced unsecured creditors that bear the brunt of the current fee structure, resulting in higher costs and lower realisations.

Enhanced monitoring by regulators – providing value for money

20. We agree that an objective should be set to ensure that fees charged by an IP represent value for money and which is reflective of the nature and complexity of the work being undertaken. Whilst we acknowledge that this monitoring will be done by the respective RPB, we would ideally favour the creation of an independent body to oversee this work creating a greater degree of objectivity. However, on the basis that RPBs will face relevant sanctions and penalties should they not fulfil this objective at the required level, this is still a good starting point.

Increasing creditor engagement

21. As previously stated, it is often the smaller and less experienced unsecured creditors who do not have access to the relevant legal knowledge and are therefore at a disadvantage when trying to negotiate fees or question the work being done. We certainly commend the efforts to increase the level of information available to unsecured creditors which include updating SIP9 and having internet based information on how to appoint an IP and negotiate on fees.

22. What will be key will be ensuring that this information is readily available and accessible to unsecured creditors which also means ensuring that it is communicated as widely as possible.

23. Whilst we appreciate that drawing up a comparative data study on fees charged by asset size and sector would be labour intensive and costly, we do feel that it would benefit both unsecured creditors in allowing them to make more informed choices as well as RPBs in helping with their oversight role.

Simplification of the fee structure

24. Giving creditors greater control over how fees are charged marks an important step in revolutionising the fee structure and we very much welcome the proposals being put forward. We agree with the exceptions that have been outlined particularly in respect of where a creditors committee has been established and where they are satisfied that they are able to oversee office-holder's remuneration.

25. We believe that a system of fixed fees which are presented to creditors at the earliest opportunity and which are based around deliverable outcomes or remuneration taken as a percentage of realisations would help ensure a more transparent process and alleviate the need for disputes further down the line.

26. We appreciate that a system of fixed fees in particular will be a contentious one for the IP community as they will argue that their work and therefore the costs, can never be predictable. However, we feel that the proposals to allow IPs to request a review of the fees where there is a material and substantial change is a fair solution and should provide all parties with greater confidence that those fees most accurately reflect the work that is being undertaken. We also believe that fixed fees will incentivise the IP to achieve the best possible outcome and eliminate waste.

27. The proposed fee scale contained in the consultation seems sensible and practical, however we have difficulty in understanding how an IP can justify the additional charges shown for distributing to creditors what is effectively their own money.

28. We strongly agree that time and rate should only be allowed in specific circumstances and only when supported by unsecured creditors and where they have been able to agree the basis for how this will be set. We are concerned that fees set on this basis will be greatly inflated to cover the costs of the IP. Charging on a time and rate basis is too difficult to quantify and we would only condone its use when it has been sanctioned by the majority support of unsecured creditors.

IP regulation and fee consultation question response sheet
(Consultees may wish to respond just to those questions that are of relevance to them)

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***Please note our answers to the consultations questions below relate purely to personal insolvency only.**

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?

Yes the proposed regulatory objectives and requirements are appropriate as it will bring the insolvency regime into the twenty-first century; having seven RPB's who are not governed by a single regulator or overall set of regulations, does not instil confidence that the current regime acts with integrity, is accountable, transparent, independent, consistent and accessible.

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

The proposed procedure seems a sensible solution, as it will ensure that the RPB's, are focused on adhering to the proposed regulatory objectives and requirements, and that RPBs would have every opportunity to redress any poor performance by its authorised IPs.

Q3: Do you have any comments on the proposed scope and procedures for the Secretary of State to issue a direction to an RPB? The proposed scope and procedures for the Secretary of State to issue directions to an RPB is a sensible approach and will bring Insolvency regime into line the Legal Services Act 2007, and Companies Act 2006, which will no doubt bring renewed confidence into this sector.

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?

Again as above this is a sensible approach which we are sure will also be endorsed by the RPBs and IPs in this sector, as this is something they themselves have called for before.

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

As these will closely mirror the procedures of the Legal Services Act 2007, which has been tried and tested over the years, it should not be a cause of concern for any of the RPBs.

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

Yes 28 days is an adequate period of time for an RPB to make written representations, if the Secretary of State does vary the wording of the proposed statement, then a further 21 days for the RPB to respond is sensible, providing that the variation of the statement is not overly extensive, in which case the RPB should be allowed a further 28 days to respond.

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?

This can only be seen as a benefit to the Insolvency regime, and will further instil public confidence; that in the rare event that an IP acts in an improper way and the RPB does not intervene appropriately then the SoS will deal with is a swift and effective manner.

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?

A good proposal in that the procedures will be those already adopted under the Companies Act 2006, and that it is already proven that this procedure does work effectively.

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

Yes in the event that the current reforms fail to have an impact on public confidence, or if the RPBs do not show willingness to adapt to the reforms.

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

The proposed functions and powers of a single regulator are sensible as they will essentially take over all the functions already being undertaken by the various RPBs, and bring the regulations under one governing body, which can only benefit the insolvency regime.

Part 2 – Insolvency Practitioner fee regime

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

Yes this is a far more sensible and cost effective approach for creditors, in the event that they feel fees charged by IPs are excessive for the work undertaken.

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?

Yes this should ensure that IPs make sure that the fees applied when dealing with an bankrupts estate are proportionate, and that those fees applied can be justifiably explained in the event that creditor feels they are disproportionate.

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?

Publishing information on approving fees, and how to appoint an IP, should be beneficial for unsecured creditors to better understand the process and the costs involved. We believe that there is enough data to justify a fixed fee structure or a capped fee structure but there should always be an exception to the rule that an IP can seek creditor approval to draw further fees if required with the appropriate justification and supporting evidence in exceptional circumstances.

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?

We strongly disagree with the proposal to amend the insolvency Rules, to require office holders to take their remuneration as a percentage of realisations. In respect of a fixed fee, whist the proposal for fixed fees on the face of it seems a sensible proposal, it should also include a provision for IPs to seek further approval from creditors in the event that, further fees will be required to be drawn from the estate, either by a further fixed fee or on a time cost basis. We do not feel that that remuneration as a percentage of realisations will benefit unsecured creditors, and could well prove detrimental to debtors, given the unpredictable nature of insolvency work; the practice of doing this was given up as a standard practice by the profession years ago.

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?

Yes see response to Q14. Above

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

It appears that the proposed changes will lower IP fees which will result in higher returns for unsecured creditors. In addition it should also drive better efficiency throughout the process individually and throughout the industry.

However in respect of remuneration as a percentage of realisations, IPs will rather see poor returns for the work undertaken on an appointment, or possibly higher fees than they would have charged on a time cost basis, which would be detrimental on returns to unsecured creditors and individual debtors. We do not believe that charging a percentage of realisations is a compliant way for IP's to be paid. We do not believe that this method of fee charging if fair on the debtor and therefore we strongly disagree with remuneration as a percentage of realisations. If these proposed changes do come into effect, it will dramatically change the current market, as IPs will be less likely to take on work, this will leave cases with the already struggling Official Receivers office, which could possibly leave creditors in a worse position, in relation to assets in an estate being realised quickly and efficiently. We believe that IP's will "cherry pick" the easy cases and leave the more difficult ones as there will be less of a profit margin in it for them.

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?

Yes the proposed changes should not apply to company voluntary arrangements, members' voluntary arrangements or individual voluntary arrangements as the current regime works well in relation to these.

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?

As stated in the questions 14 to 17 above, we do not think that this is a viable solution, and would work far better as a fixed fee, with the IPs being able to go back to creditors on an exceptional basis to seek further remuneration in the event further costs are required to deal with the estate. The IP should be able to demonstrate the reasons for requesting further remuneration.

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?

We do not consider this commercially viable for reasons previously stated above.

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

We think that time and rate should remain in place, given the proposed regulation reforms but should only be allowed to be used in specified circumstances and whereby a strong support of unsecured creditors has been obtained in the form of a creditors committee.

Impact Assessment questions:

Q21: Do you agree with this estimation for familiarisation costs for the changes to the fee structure? N/a

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? N/a

Q23: To what extent do you expect the new fee structure to reduce the current level of overpayment? N/a

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? N/a

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? N/a

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? N/a

Q27: Do consultees believe these measures will improve the market confidence?

The proposed regulations will improve market confidence, however we strongly disagree with the proposal for remuneration to be as a percentage of realisations.

Q28: Do consultees believe these measures will improve the reputation of the insolvency profession?

The proposed regulation reforms will improve the reputation of the insolvency profession.

Suprina.Bashar

From: graham skinner <skinnergraham@gmail.com>
Sent: 27 March 2014 22:56
To: Policy.Unit
Subject: Strengthening the regulatory regime and fee structure for insolvency practitioners
Attachments: Comparison of Insolvency results between time.docx

1) The number of RPB's should be reduced to one ,in order that IP's all march in step to the same tune.
2) My choice would be the Treasury within HMRC because they are involved in all insolvencies and have a day to day relationship with all commercial activities .They also have a national coverage and are more aware of companies ,with "history ".

Insolvency Practitioners
a) With regard to fees the default position should always be on a percentage return basis and the Schedule 1 would appear to be good place to start .For large value items such as buildings and collective realisations where assets are sold at auction a realistic fee should be applicable. .Reasonable expenses should also be considered acceptable .

Much comment has been made about the level of hourly rates charged by IP's with the inference that these represent the going rate for the work by R3 and others.When charges starting at £115 per hour rising to £565 per hour (admittedly for a large national company) are quoted, together with a charging system which is totally opaque ,creditors ,particulary unsecured creditors are extremely sceptical and angry that their credit is being used to pay off secured creditors and provide IP's with a totally unjustified excessive income.
If we examine just what IP's do to realise assets, the fee scales become even more scandalous.

In todays business world all the company data is stored in a computor . At the press of a button the sales and purchases are available to show debts and credits,the bank balence is instant , costs of staff are consistant and regular, stocks of raw material and work in progress even if stock checked manually -a few days, value of land and buildings from the last balence sheet are sufficient as are plant and equipment.When a company is in trouble word spreads instantly again via the internet and there are always predator companies looking for a bargain.If the picture is totally bleak ,the staff can be dismissed and plant and equipment put up for auction while the sales debtors are actively chased from day one and creditors payment also ceased from day one .
Very few of the these tasks need skills much beyond that of a bookeeper who has computor skills and is used to chase payments from the sales ledger .If there are skills comensurate with £565 per hour I am sure there are many people waiting to hear with bated breath.

In the consultation there was considerable coverage over the role of creditor location commitees mainly in the context of communication but this becomes very difficult when the IP is in a different geographical location- where would they meet ,would people find the time ,who would pay the costs ?
How is the IP chosen for any particular potential insolvency and can an IP be rejected at the creditors meeting only by creditors with a substantial interest by value .

I have many more questions to ask and points to raise ,after all I have been asking questions for nearly 12 years but if the method of reward can be established as a percentage of realisation and distribution of increased benefits for unsecured creditors this will be an important event.

Attached is a financial report of an insolvency , where the original method of IP payment by rate+time has been replaced by Schedule 1 scales - I trust this may be of interest.

Graham Skinner

Communications via the GSi may be automatically logged, monitored and/or recorded for legal purposes.

www.bis.gov.uk/insolvency

##

IP regulation and fee consultation question response sheet
(Consultees may wish to respond just to those questions that are of relevance to them)

Name: Adam Nakar
Organisation (if appropriate): Marks Bloom (employee, not a director or licensed)
Contact Details: anakar@marksbloom.co.uk

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?

A: In what circumstances is it envisaged that any of the above (Q1-3 too) will be used? (With regards to financial penalties, I would assume that there are present matters of concern with the RPBs, for which power is being sought to take action soon, thus why this proposal is being put forward now). Who or what will drive investigations into the monitoring of RPBs, taking action against them, and imposing fines? Are RPBs to expect monitoring by the Secretary of State generally, and if so with what funds, resources, and professional competence? Alternatively, will the SoS act only on anecdotal or agenda-driven comments by creditor groups and the like, as the government has done in recent consultations into pre-packs, and indeed into fees?

What thought has been given to how these envisaged potential actions would impact how the RPBs regulate their IPs?

For the most part, this seems to be simply adding more legislation, for questionable needs. However, the threat of financial penalties to RPBs seems more dangerous. I presume that, if threats of financial penalties become real, the RPBs will be looking to their members to meet the financial cost – which presumably will mean higher fees for membership, or fewer free training resources, with more requiring premiums to be paid. Of what benefit is that?

To avoid penalties, is the intention to see RPBs pushing for even more box-ticking, to do nothing more than cover their backs?

I do not see how any of this helps with any of the proposed regulatory objectives. How does it help protect the public interest, improving the current regime? How will it improve the regulation of IPs – what is currently wrong with it, that this will redress? How does it encourage and promote a competitive IP profession – surely with more back covering and regulation, it threatens to do the opposite, driving out a number of smaller IPs and smaller firms, and leaving only a few larger, more expensive firms? How does it encourage IPs to consider interests of all creditors – what has this got to do with that? Isn't that covered by Paragraph 3 of schedule B1, or rules 1.3, 5.3 & SIP 3 for CVAs? How will it make any difference in liquidations? How does it maximise returns to creditors, when threatening more regulation, and therefore with it compliance – all of which takes time, and needs paying for? And how does it promote fair fees?

This seems to be very poorly thought out, and the knock on effects of another layer of regulatory powers does not appear to have been given any regard.

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

A: No. This does not seem to offer any benefit, but may have severe detrimental effects on the IPs regulated by a particular RPB, despite doing nothing wrong.

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?

A: Yes. I do not agree with a lot of paragraph 79, and indeed I only consider that the above proposals so far will only make the timeframe in which an RPB acts even longer, and the act of sanctioning an IP even more arduous. None of this means that the SoS should not be able to step in itself, however.

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?

A: No.

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

A: A single regulator has pros and cons, and I remain neutral. However, it does not seem fair or productive to RPBs or IPs to introduce a mechanism whereby it can be introduced at any time; either proceed to introduce it, or drop the idea for now completely.

Part 2 – Insolvency Practitioner fee regime

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

Yes. However, as this is nothing more than a sop to creditors, is this likely to be soon followed by a report stating that creditors don't trust this system, using self-regulated bodies to complain about their members' fees?

If the Court route is too costly and long-winded, allow the SoS the power to review fees of IPs on a case directly. There is now a centralised gateway for complaining about IPs via the Insolvency Service – why not add a complain over fees to that?

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?

Yes, but see above.

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?

No. More information?! I would strongly suggest that one of the reasons for creditor apathy is the bombardment of information. When we call a S98, we send an entire sheet dedicated to fees. With every progress report, a significant amount is devoted to fees. Creditors guides to fees run to pages, to the extent that we no longer have to send them out and only need to offer links to where they can be found. And now you want to add more paperwork with comparisons of IPs' fees etc? Only expect more apathy.

There is also the assumption that unsecured creditors want to be more involved in setting fees. But the facts point to the contrary.

Why do so few creditors attend S98 meetings, when not only can they vote on fees, but they can give directors a hard time with questions, vote to form a committee, and even put another liquidator in place. None of that is arduous – but creditors seldom care.

Why can you avoid involving creditors at all in an administration where they won't be paid?

Why have annual meetings been scrapped? Because interest from creditors was minimal, making them a waste of time.

Why do the draft new rules propose scrapping even final meetings, and even offering opportunities not to hold S98 meetings? Again, because interest is so minimal, making many of these meetings a waste of time.

These meetings are where fees are decided, can be questioned and challenged, yet interest is so often non-existent.

The consultations by the OFT and Professor Kempson have not, in fact, found that creditors have trouble controlling fees. Instead, they have found that they have no practical interest in controlling fees, and apparently the blame for that should be placed everywhere but at their feet.

This proposal is trying to offer a poor solution to a made up problem, and ignore a more important issue over deciding fees – that of creditors caring in the first place.

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?

A: All cases should be exceptions. The reasons IPs go for time costs is because it is simplest, and it's the most prepared route for the unpredictable nature of work on insolvent entities.

As examples, part of the point of having a formal liquidation or administration instead of just dissolving, and indeed part of the fun of the job, is not knowing exactly what you will find, not knowing what might be hidden, what might be realisable. This will always take time to review, even initially – but the time will only be put in if there is a chance of it being worth something. It is largely unconnected to the number and size of the company's creditors.

The claim is that restricting time costs will make things simpler, but it will have the opposite effect on insolvent cases. It will encourage unturned stones, avoidance of any tricky issues, and failure to realise smaller assets.

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?

A: It is a dreadful, poorly researched, badly thought out, totally unrealistic proposal. It does not simplify matters for creditors, and does not encourage high standards of work among IPs.

To an extent, the proposal already seems to realise this, thus the number of extra provisions being proposed too. In other words, the proposal is trying to make the system as complicated as possible. One look at the proposed rules in Annex A should make this extremely obvious.

It would take an exceptionally delusional creditor to see these as an improvement.

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

From our side, fees will rise. A large case with lots of assets will result in higher realisations than we would earn with time costs – and a lower return to creditors as a result.

With some assets, we would work to get a committee, then get time costs. This takes time, and with the proposals having completely failed to address anything to do with creditor participation, we will get them, including all the extra time that has been wasted constituting a committee.

Where there are no assets, at least to begin with, we will not bother with the job – unless we can obtain a larger pre-appointment fee.

Creditors will be worse off in any of the above scenarios.

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?

A: They should not apply at all.

The difference with these three processes is that the work to be done is (in theory) more predictable at the start, and therefore a fixed fee or percentage fee is more workable. We do use these successfully, especially on MVLs.

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?

A: No. This takes no notice of the difficulty or otherwise of making the realisations. (Time costs do).

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?

A: Time costs are simpler, and commercially viable. This alternative is an unnecessary complication. Surely this is obvious?

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

A: All circumstances. No exceptions, unless creditors vote otherwise.

Impact Assessment questions:

Q21: Do you agree with this estimation for familiarisation costs for the changes to the fee structure?

A: No. Too low – especially with regards to their proposed regulation.

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?

A: I think it will increase it, if not initially, certainly soon.

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?

A: No.

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?

A: Based on our current cases. As per answer to Q16. I don't think I can give case specifics at this stage. However, although revenue for us will probably increase, it won't be for doing any actual case work.

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?

A: No. I would suggest they will have the opposite effect.

Q28: Do consultees believe these measures will improve the reputation of the insolvency profession?

A: No – although it's clear at least that they are intended to, I do not think they will.

Begbies Traynor Group plc

Part 1 - Regulation

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

The case to support why regulatory objectives are required is not stated? This part of the consultation ignores the fact that the RPBs deal with complaints and licensing issues through their own rules and that this has worked since 1986. There are sanctions against members and the vast majority of IPs are sufficiently concerned about RPB inspection visits and possible sanctions to comply. It is unclear what additional benefit will be achieved by setting out regulatory objectives in statute. The stated objectives, other than point 5, are already understood to be the current objectives of regulation. If the aim of enshrining these well understood objectives in legislation is to demonstrate to creditors and the wider public that there are effective regulatory mechanisms in place then we consider that this is unlikely to achieve such an aim. Insolvency practitioners are already required by statute to act in the best interests of creditors; the consultation fails to recognise this at paragraph 48. The data on which the OFT's report was based was out of date at the time that it was issued because it failed to take account of the 2010 Amendment Rules. It is even further out of date now that the complaints gateway has been in operation since June 2013. We do not understand why, when the intention appears to be to reduce the number of RPBs, time is to be spent drafting an application process to include in the legislation.

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

The implication is that the Insolvency Service has experience of the RPBs ignoring it or not fulfilling their regulatory functions. Is there evidence that this has ever happened? If not, why is there a need to legislate in this area? If the SoS has not wanted to sanction an RPB previously then why cover the issue now? Why is a revocation procedure necessary when it has never been used before which indicates that the SoS has been able to obtain co-operation of RPBs to act in a satisfactory manner, without requiring the force of statute to do so. What is proposed appears to conflict with the current aim of parliament to reduce the regulatory burden.

3. Do you have any comments on the proposed scope and procedures for the SoS to issue a direction to an RPB?

Please see answer to question 2 above. We are not aware that there is an issue with the RPBs not complying with the requests of the SoS/Insolvency Service. Our understanding is that there is a positive dialogue between those parties e.g. one of the current focuses of monitoring visits is how insolvency work has been obtained which is understood to have been driven by the Insolvency Service's desire for the RPBs to look closely at this area.

4. Do you have any comments on the proposed scope and procedures for the SoS to impose a financial penalty on an RPB?

Other than the comments above, this is a matter for the RPBs to comment upon.

5. Do you have any comments on the proposed scope and procedures for the SoS to publicly reprimand an RPB?

See comments above. This will not address the fundamental problem which is that creditors do not engage; they do not do so because they do not consider it to be of interest. This is a justifiable stance in the majority of cases where there is significant secured debt and other proprietary claims resulting in very little available for general unsecured creditors.

6. Do you agree with the proposed arrangements for RPBs making representations?

If the Government is going to legislate as proposed then it is only appropriate that the RPBs have full opportunity to make representations.

7. Do you have any comments on the proposed procedure for the SoS to be able to apply to court to impose a sanction directly on an IP in exceptional circumstances?

The ability of the SoS to apply to court or otherwise sanction an IP directly should only be available once the RPB route has been exhausted. It is difficult to see how this will operate in practice – overlapping powers between RPB and SoS to reprimand IP. We could understand the logic of the RPB being able to refer the matter to the SoS where it does not feel that it has sufficient power to take action as suggested at paragraph 79 of the consultation. The idea of a practitioner being subject to penalties by a body other than his authorising body appears to be inconsistent with the treatment of other professions. The intended procedure appears not to give the IP any opportunity to make representations before the SoS decides to apply to court. If it is intended that the IP is to have the ability to make representations this needs to be set out in the statutory procedure. The IP should be given full details of the allegations against him/her so that a proper response can be provided. The fact that insolvency appointments are personal to the practitioner appears not to have been appreciated in the consultation. The vast majority (if not all) of IPs would be very concerned to learn that there was a possibility that they could lose their licence and hence their livelihood. We do not anticipate that there would be circumstances where there was conduct that the SoS thought merited severe penalty in relation to which the RPB was unwilling to take action. We consider that such a power would be used very rarely, if at all.

8. Do you have any comments about the proposed procedure for the SoS to require information and the people from whom information may be required?

We do not consider that it is appropriate for the SoS to have this ability except in cases where the RPB route has been exhausted. Some explanation needs to be provided to those parties from whom information is sought as to why it is required – perhaps statute could limit the types of information that the SoS may request so that an order from the court would be necessary in other circumstances. Information needs to be restricted to the issue, e.g. where information is sought from employer this cannot be a 'fishing expedition'.

9. Do you agree with the proposal to provide a reserved power for the SoS to designate a single insolvency regulator?

No, seek the power when it is required. This is not needed now when the consultation states that the Government intends to consult when it is required.

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

No, because it is not needed now.

Part 2 – Fees

These comments should be read in conjunction with our main response document dated 27 March 2014 (copy attached) where noted

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

It is impossible to comment other than to say that RPBs undertaking such a role will require resources. It would seem reasonable to expect costs to rise for this additional work but it is for the RPBs to respond on this point given their experience of the costs of handling complaints generally.

12. 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?

The monitoring of compliance by the RPBs is already robust. We do not agree that adding VFM will result in 'greater' compliance monitoring. The difficultly for the RPBs is that determining whether VFM is being obtained is entirely a subjective view (what one creditor considers represents VFM, another creditor will have a different view depending on their particular circumstances). It will require criteria to be set as to what constitutes VFM so as to ensure consistency (which the Government appears to desire) but the criteria cannot apply universally because cases are so different. The consultation fails to recognise this. Cases where there are limited assets require the same level of compliance work. We have made an alternative proposal in paragraph 46 of our main response.

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

We welcome any attempt to improve creditor participation. However, the statement at para 103 that creditors do not know that they can question the amount of work done is incorrect. This is in all reports. Very good and detailed information about fees is already provided to creditors. Information is provided to creditors about charge out rates, a breakdown of time costs is given, a narrative explanation of what has been done, and creditors are made aware of the right to ask further questions/challenge remuneration or disbursements in correspondence and reports from IPs. The proposal to produce more background data (para 105) to assist creditors is generally welcomed but the suggestion that fee comparison data should be obtained based purely on asset values (and possibly sector) is very dangerous. Asset values are one of many different factors affecting the level of costs on a case, each of which has its own complexities and facts quite unconnected to the level of assets. That said, we would welcome a proper, detailed and considered assessment of fee levels that do apply to cases and this should be carried out before any proposals for amending the current regime should be put forward.

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

We do not agree with the proposal regarding remuneration and we do not believe any of the proposals will really improve creditor engagement. HMRC and the RPO could take the lead on creditor engagement if they wish to and believe it could add value.

The Rules in relation to creditors' committees could be amended to require a minimum number of 2 creditors as opposed to 3, to encourage the establishment of more committees.

The default position is that creditors' committee meetings are held remotely e.g. on telephone or video conference, to reduce participation time and costs

15. 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?

We do not agree with the proposals. The reasons are set out fully in our main response document.

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

See paragraphs 30-41 of our full response.

17. Do you agree that the proposed changes to basis for remuneration should not apply to CVAs, MVLs or IVAs?

Although we do not consider that the changes should apply to any of the insolvency procedures, if the Government chooses to implement them, then yes, we agree.

18. Where the basis is set as a % 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?

We do not agree with the proposal to have fees set as a % of realisations and distributions. See paragraphs 18-24 and 32-41 of our main response in particular.

19. 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?

See paragraph 22 of our main response. It is not commercially viable and hence it is never/seldom used.

We not agree that setting fees as a % of realisations and distributions (only) is either commercial or fair. See our main response document.

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

We do not agree with the removal of the basis. We consider that time costs should be available in all circumstances. We have set out alternative proposals in our main response (paragraphs 42-47)

21. Do you agree with the estimation for familiarisation costs for the changes to the fee structure?

No, we consider this to be an underestimate. See paragraphs 34 and 38 of our main response.

22. 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?

We are unable to answer this question.

23. To what extent do you expect the new fee structure to reduce the current level of overpayment?

We do not consider that IPs are overpaid; they are properly compensated for the work that they undertake. See paragraphs 9 to 17 of our main response. Paragraph 29 of our main response details the amount of payment we actually receive for our work, considerably less than the OFT and Kempson reports suggest.

24. Do you agree with the assessment that the requirement to seek approval of creditors for the % of assets against which remuneration will be taken will not add any additional costs?

No, IPs are likely to look at cases on their own merits and seek to charge a scale appropriate for the case. This will lead to additional work and costs for the IP.

25. 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?

No. See our main response document, in particular paragraphs 38 to 41.

26. 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?

Not able to comment.

27. Do consultees believe that these measures will improve the market confidence?

No, for the reasons set out in our main response and above. Creditors will remain uninterested.

28. Do consultees believe these measures will improve the reputation of the insolvency profession?

No, for the reasons set out in our main response (paragraphs 32-37) and above.

What improves the reputation is better creditor participation and understanding of the statutory requirements imposed upon, and the work of, an IP.

Begbies Traynor Group 27 March 2014

Begbies Traynor Group plc

STRENGTHENING THE REGULATORY REGIME AND FEE STRUCTURE FOR INSOLVENCY PRACTITIONERS

Comments submitted by Begbies Traynor, on behalf of all its licensed Insolvency Practitioners and staff, on 28 March 2014, in response to The Insolvency Service consultation paper published in February 2014

Contents	**Paragraph**

Introduction

1. This is the response of Begbies Traynor on behalf of its 67 licensed Insolvency Practitioners and 400 staff, to the consultation paper *Strengthening the regulatory regime and fee structure for insolvency practitioners*, published by The Insolvency Service on 17 February 2014 ("the Consultation"). We are the UK's leading firm of insolvency practitioners with 8,250 open insolvency cases under our management. The views of our IPs were assessed by our Regional Managing partners and then collated to form this consolidated response.

2. These comments are made in response to the consultation, the 2010 OFT report and the 2013 Kempson report (together, "the Reports"). The comments focus on Part 2 – the Insolvency Practitioner Fee regime – of the Consultation.

3. The overriding concern is that the Reports contain a number of unsubstantiated assertions from which flawed conclusions have been drawn. The OFT report analysed only a relatively low number of Administration cases, arguably the most costly corporate insolvency procedure. The data is from 2009/10 and takes no account of the changes introduced by the 2010 Insolvency (Amendment) Rules ("the 2010 Rules"). The Kempson report reviewed the OFT findings, but gave little substantiation before adopting the conclusions.

4. The existing rights available to creditors are not being properly exercised. There is an assumption in the Reports that all unsecured creditors are individuals or are unsophisticated. This is not the case. There is no evidence in the Reports to suggest that the proposed changes will make any difference to creditor engagement. HMRC and the RPO are creditors on almost every case and could take the lead on engagement now, if they wish to do so and believe it would add value.

5. There is a lack of recognition in the Reports that not all assets are the same. Different levels of effort are required to realise physical assets, compared to causes of action of a company and antecedent transactions.

6. The Kempson report compares aspects of the UK insolvency practice and procedures to those in Germany, Australia and Austria. This comparison is difficult on a piecemeal basis – the World Bank report stated that the UK regime works favourably, ranking 7th and ahead of all of these countries, as well as the United States.

7. The suggestion in the Reports is that IPs increase their fees purely because of the lack of engagement by unsecured creditors. There is reference throughout to "overcharging" and "increased fees". The Kempson report does however confirm that the differential levels of fees which have been found is not indicative of any abuse by IPs, so the wider inferences are inappropriate to IPs.

8. The Insolvency Service concludes that this is "market failure" and little has changed since the OFT Study "despite numerous discussions with the profession and the regulators". The case for determining "market failure" has not been made. There has not been significant change because the profession did not agree then, as now, with the outcome of that study. This was made clear at the time by the large numbers of IPs who attended the discussions.

Low levels of complaints

9. The theme throughout the Reports is that there is considerable dissatisfaction with IP fees, hence a tougher regulatory regime is proposed. However, the Kempson report states that views vary but "the evidence base is thin". We assume that this means evidence of overcharging by IPs is unusual, a conclusion with which we agree.

10. The impact assessment on regulatory change confirms that there is a low level of complaints against IPs generally (despite the nature of insolvency meaning parties suffer losses). This is stated to be due to the low level of creditor engagement, but as creditors are usually aggrieved that they have suffered losses, it is hard to imagine they are not prepared to complain about IP fees if warranted.

11. The single complaints gateway was established by the Insolvency Service in June 2013 to meet the previous concerns identified by the OFT that creditors did not know where to complain. The Consultation does not mention how effective this has been or how many valid complaints about fees have been made. We believe that there continue to be a very low number of complaints about fees.

12. There may be a few instances where IPs have charged excessive fees or engaged in bad practice, but the case for making a fundamental change to the remuneration structure has simply not been made.

The competitive market

13. The Kempson report states that where the control lies with unsecured creditors "there is little competition for jobs". There is no evidence to support this point and it is the absolute opposite of our experience, particularly in the last three years.

14. There have been considerable cost pressures and an increase in competition which have led almost all firms of IPs to make staff redundancies and other savings. Many IPs have left their former firms because of redundancy and set up as sole practitioners, operating with minimal overheads. This in turn has led to increased competition particularly at the lower end of the market – where control typically does rest with unsecured creditors. Such small jobs are intensely fee sensitive and company directors, or their lawyers / accountants, now routinely call various IPs seeking the lowest fee rates.

15. The trend towards aggressive tendering is increasing. We have come across many IPs offering to convene a Section 98 meeting for ever lower fees in the past three years, falling from £3,500 two years ago to £2,500 in some cases now. Our IPs do not recall fees for this work being this low even 15 years ago.

16. The same informal tendering approach is experienced with proposed Administration cases and MVLs, with directors and their advisors seeking a number of different fee quotes before deciding which IP to use.

17. The OFT Report summary of market shares of IPs (para 4.13) shows clearly that the greater amount at stake, the larger the IP firm typically used. Larger firms tend to have higher hourly rates and use more staff, so resulting fees are higher. Smaller jobs use local IPs at lower cost. This shows that the market is sensitive to different level of costs and is competitive.

18. The proposal to move to fixed fees via a percentage of realisations is inflexible and is not fair either to IPs or creditors. This was identified by the Cork Report prior to the legislation introduced in 1986 – namely that such a basis of remuneration fails to reward IPs for work on complex cases and by contrast, can be too generous on simple cases.

19. We estimate that 90% of all cases turn out to be different to what was anticipated at the start. Realisations and distributions are never known with certainty at the commencement of an insolvency so a scale fee basis will not lead to creditors knowing what an IP will be paid, or what funds may be left, until the end of the case.

20. Scale rates will be imposed on all creditors. If rates are as low as is being suggested, IPs will seek consent to raise them (creating more work and more costs) or, more likely, the work will simply be declined. In time, it is quite probable that the larger accountancy firms, who have a much wider base of clients, will go back to "representing" their client creditors and seeking to approve higher fees for fellow IPs, who will do the same in return on other cases. Creditors will not have any more control in this process as larger firms of IPs will be driving matters in practice. Smaller firms of IPs, or those without an audit or tax client base, will be prejudiced.

21. Scale rates do not reward the work that IPs are required to do which is unrelated to the realisation of assets or distributions to creditors. There are an array of statutory requirements (which have increased over the years) and other matters such as dealing with creditor queries, handling uncooperative directors, locating proper books and records, all of which are unrelated to the value of assets, if any.

22. The Consultation suggests that the Scale rates per Schedule 6 of the Insolvency Rules might apply. These rates were set several decades ago and have not been increased to reflect inflation (over 150% since 1986) or the raft of increased statutory obligations on IPs. At the same time, the relative value of available assets has declined (see paragraph 30 below). Indeed, even the Official Receiver does not rely on these Scale rates. The 2004 Fees order, last amended in Feb 2012, provides for a greater scale of "administration fees" that are payable to the Secretary of State and the OR for the general duties in compulsory liquidations and bankruptcies. We note with interest the announcement of an increase in these fees from 6 April 2014. The Scale rates are very rarely used by IPs because they are seen as too low and inappropriate. We do not support the use of fixed % rates but if we did, we would seek to apply different rates to different cases and in all instances, we would seek rates which are much higher than the suggested Scale rates.

23. Time costs on the other hand are not unfair. They are flexible and allow remuneration to adjust for the changing circumstances in a way that fixed fees can never do. They reflect the IPs costs and allow the IP to seek to operate in an economic way. They are directly comparable in the market place and do already drive competition, as stated above.

24. There is no mention in the Reports of why IP's hourly rates are considered inappropriate and yet the rates charged by auditors, tax advisors, solicitors, and other professionals are not. Many of these wider professionals are required to assist IPs with their insolvency work and their fees are payable from the same assets. Furthermore, IPs are exposed to risks and personal liability in a way that these other professionals are not and yet IP's hourly rates are often lower than, and at least comparable with, these other specialists.

The 9% difference

25. The Reports repeatedly refer to the 9% stated difference in fees between cases with secured creditors which are not paid in full and cases where unsecured creditors receive a dividend. This is what appears to drive the conclusion that fees are "unfair".

26. There does not appear to be any recognition that many secured creditors require IP firms to offer discounts in order to be on a "panel" and in turn, be eligible for the repeat work they give out to IPs. IPs can be reasonably sure that they will benefit from a certain level of work each year in return for the small discount on hourly rates. It is not explained in the Reports why such a modest difference is considered either unusual or concerning. In our view, it is the normal market mechanisms at work, typical in a competitive economy.

27. The Reports also fail to recognise that in cases with secured creditors, often those creditors have specialist teams which manage the pre-insolvency periods very closely. The likelihood of inappropriate transactions, poor conduct or dissipating assets in these cases is thus far lower. This in turn means a lower level of complexity for the IP when it comes to the statutory investigation and reduced instances of litigation or other action.

28. There is an additional layer of work to complete when dealing with unsecured creditors which has not been taken into account by the OFT Report. By way of example, time is spent chasing and agreeing creditors' claims, advertising proposed dividends and making calculations and accompanying payments.

29. The hourly fee rates which are quoted in the reports do not reflect what we are actually paid. The Kempson report mentions this but does not give the point sufficient weight. Over the last three years, the total volume of cases where we are not paid the full amount of our costs has been 89% and in the current financial year it is actually 92% of our cases. The average amount per hour that we are actually paid from insolvency cases is £115 over the same three years (despite rising overhead costs). This is clearly a long way below the headline rates quoted in the Kempson report and, we would suggest, lower than many of our larger competitors who tend to work on the bigger, more profitable cases which are often in the public eye.

Returns to creditors

30. The Reports and the Impact Assessment assume that, in many cases, were it not for IP fees, there would be funds remaining for distribution to unsecured creditors. There is a corresponding assumption that available assets have remained constant over recent years. In our experience, the level of available assets not subject to any form of security has declined over the last 20 years. Companies and individuals have increasingly granted more proprietary rights to suppliers, such as invoice finance houses, HP and leasing businesses. Trade creditors have also used more robust and comprehensive Retention of Title clauses in their terms, meaning assets such as stock are not available to the IP or to wider creditors.

31. The combination of these developments is that assets available to meet the costs of insolvency processes have continually reduced, as has the prospect of funds remaining for creditors. At the same time, creditors are benefitting from their improved terms by reducing their losses in the event of failure of their customers.

Consequences of the proposed changes

32. Should the proposed radical remuneration changes be implemented and IPs future fees are reduced, then some work will no longer be economic for IPs to carry out. Some IPs will leave the market and the impact will be particularly felt at smaller practices, which ironically usually have the lowest levels of hourly costs. There will be further redundancies among the IP firms and the workload of the Official Receiver will inevitably increase.

33. The Impact Assessment actually recognises the risk (paragraph 64) and says that more compulsory liquidation and bankruptcy cases will fall to the OR to deal with, and could "result in costs being incurred with no benefit or prospect of repayment (for example when assets are not investigated…)". It goes on to say that in voluntary liquidation or administration cases, "companies will continue to trade with a detrimental impact on the economy as a whole (zombie companies)". Lastly, it says that "Creditors will be out of pocket…..and more assets will be written off".

34. We believe that the Impact Assessment is correct to identify these risks for the economy, though the costs are totally understated, with no provision at all made for the significant costs the OR will face. The suggestion that the risk will be "overcome by the introduction of IP fees offering value for money" and that the "RPBs will, through their monitoring" help to ensure this, is totally unsubstantiated and without any foundation.

35. A further possible, perhaps probable, consequence will be a fall in industry standards. The less reputable IPs in the market will move towards charging companies and individuals much higher costs prior to an insolvency process, to avoid the impact of any regulated fee changes. There will be more use of third parties to carry out some aspects of the insolvency work, who would inevitably not be regulated by the RPBs and yet their costs would be met as a disbursement from the insolvent estate.

36. There will be more directors of insolvent businesses who will continue to trade to run down values of assets and an increase in errant behaviour, which will go undetected and unchecked.

37. There is a risk that fewer and less thorough investigations of wrongdoing and inappropriate transactions will be carried out. Creditors remain very concerned about directors' conduct and wish to see wrongdoing addressed. We understand that the government has also expressed concerns about the effectiveness of the current directors' disqualification regime. Should IPs be paid in future only for the realisation and distribution of assets, coupled with the proposed step to remove CFAs in insolvency cases, actions with merit but which are risky may not be pursued. This appears to be acknowledged at paragraphs 27 and 28 of the Impact Assessment. The statement that this risk can be overcome as "the IP has the option of pulling together a creditors committee" ignores the reality that creditors do not wish to be involved.

Impact Assessment benefits

38. The Impact Assessment estimates (paragraph 53) that the benefits of these significant proposed changes, with all of the inherent risks, is for the return to unsecured creditors to increase by £9m, or just 0.06p in the £. We believe that the estimated costs are wholly understated and do not take account of the required changes to internal systems, to automated software packages or the real costs of obtaining new authorities from creditors (or creditor committees) in some cases but not in others, including part way through certain cases. In addition, no account is taken of the future non-realisation of assets which have a marginal value.

39. We have stated why we disagree with many aspects of the proposed case for change. However, even if the stated level of benefits are accurate, an additional return to creditors of 0.06p in the £ is insufficient to warrant such an overhaul, with all of the risks we believe it brings.

40. The non-quantifiable benefits (paragraphs 55 and 56) which are reported are hard to believe. The claims that unsecured creditors will reinvest more in the wider economy and increase the level of credit available are unconvincing. Even if accurate, the total amount is still just £9m, a fraction of the total of £80bn of unsecured credit currently extended by SMEs according to the OFT Report.

41. These theoretical and unsupported benefits estimated by the Insolvency Service are modest and not persuasive and do not outweigh the many risks of the proposed reforms. There is simply not the wholesale case for change that the Consultation concludes.

42. As set out fully above, the case for insolvency practitioners to continue to be able to use time costs as the basis for remuneration is strong while the proposed alternative basis for many types of future insolvency cases, being a % of realisations and distributions, is flawed. Our proposal is that time costs should largely continue to apply as they do now.

43. However, we propose that in future, the statutory element of each assignment could be carried out for a fixed fee, which would be stated to creditors at the time of the proposed appointment. Time and rates would continue to be available to IPs for all other elements of the insolvency case.

44. We would support a greater level of information for creditors on likely fees. IPs could provide their best estimate of total expected fees at the commencement of all assignments. Each time a progress report is provided to creditors, the total fee should be reconfirmed. Should the IP feel that the original estimate is no longer valid, they could explain why and justify the changes to creditors.

45. We would also support a greater role for the RPBs in monitoring IP fees, though we do not agree that they should be required to form a very broad and subjective (and thus impossible) view of what is "fair". The RPBs could review the number of staff involved on assignments to check for cases where too many staff have been engaged. They could also review the grades of staff used for different aspects of cases and ensure that these are appropriate.

46. HMRC and the RPO could take the lead on creditor engagement. The RPO limits could also be increased, which would result in increased distributions to employees.

47. Finally, to increase the funds available to unsecured creditors in liquidations and administrations, we propose that the definition of the "Prescribed Part" (Section 176A of the Insolvency Act 1986) be amended. The assets that would otherwise go to the floating charge holder (if registered after September 2003) could go to the unsecured creditors as follows:

- 50% of the first £10,000 of such assets; and
- 25% of the balance, up to a total of £600,000

Begbies Traynor Group   27 March 2014

West Yorkshire Chambers of Trade & Commerce

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Secretary: Val Summerscales Email : val@bradford-chamber-of-trade.co.uk

26th March 2014

Jenny Willott MP
Minister for Employment and Consumer Affairs

Dear Minister

Re : Strengthening the Regulatory Regime and Fee Structure for Insolvency Practitioners

Having studied the complex consultation document relative to the above - please find listed below our comments & observations relative to specific concerns outlined by our membership on a regular basis (but not necessarily as outlined in the questions in your questionnaire.

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Although our responses do not specifically link to questions numbers asked in both parts of the questionnaire - They do represent the numerous and varied comments given to us by our membership on this issue over many years, As such - **Please feel free to enter our comments where appropriate as the relevant feedback for the questions.**

Member businesses have stated that they feel the liquidated assets of a business sometimes have no recognised pattern to the fees charges by Insolvency Practitioners. Our membership therefore feel fees should always be charged as a percentage of the assets. All too often unsecured creditors are left with nothing - even though the money raised by the IP can vary substantially.
Also any legislation in place should mean that the only people with authority to place a business in Administration should be the creditors, and similarly the creditors should be able to question the IP on their hourly rate scale of charges in order to obtain the "best value for money " for the services undertaken by an IP.
And - Creditors of the liquidated company who have set up a Creditors Committee should be given powers to challenge the fees charged by IP's if they feel they are excessive and non quantifiable, - giving powers to the Creditors Committee to be able to reduced the IP's fees if appropriate.

Members also feel that IP's should not be allowed to enter into "formal agreements " with Solicitors to ensure the Solicitors fee is treated as " preferential " Solicitor fees should be treated as unsecured..

With regard to RPB's - Members feel that as the IP's are regulated by the RPB's - and as the IP would invariably be a fee paying member of an RPB, - there could be a conflict of interest in what action the RPB would want to take to sanction an IP. (we note the RPB's are in a 7 to 1 ratio with the Secretary of State) Also, currently - RPB's are regulated under a system of "self regulation " (with the Secretary of State)with no legal powers of their own, - hence members feel the RPB's have no teeth
Members therefore totally support the introduction of a Single Insolvency Regulator with full legal powers to oversee the work undertaken by IP's - and this structure should replace the work of the RPB

.... / 2

They also feel a Tribunal Structure should be set up with powers similar to VAT Tribunals to oversee complaints, - with the Single Insolvency Regulator having legal powers to regulate decisions.

The above represents comments made by our membership and are submitted as a response to the Consultation, - Our main aim being to try and ensure that small unsecured creditors have more say on how any liquidations / administrations are progressed - and they are able to influence what monies IP's are paid - with an end result that unsecured creditors would stand a realistic chance of having some of the money owed returned to them following a liquidations or administration.

Yours sincerely

VAL SUMMERSCALES
SECRETARY

FOR INFORMATION

The West Yorkshire Chambers of Trade and Commerce Group is an amalgam of member businesses within four separate Chambers of Trade (and or Commerce) within the West Yorkshire area. (Bradford, Dewsbury, Home Valley and Horbury) - and our response is submitted accordingly.

Each chamber is autonomous locally - but join together on a regular basis to create better working practises for all businesses in all areas and to lobby on behalf of all members.

Our membership base within all four chambers is mainly from the retail sector and the service industry - and staff numbers within these businesses vary from independently owned business with few staff members to large multinational companies with high numbers of staff.

Our ref: TP
Your ref: NH

Private & Confidential
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By email to nick.howard@insolvency.gsi.gov.uk

28 March 2014

Dear Nick Howard

BIS / Insolvency Service consultation "Strengthening the regulatory regime and fee structure for insolvency practitioners"

We have read your current consultation document and considered its proposals. Thank you for the opportunity to respond to this consultation.

We are responding to the consultation in respect of three points

- **Q1** – the proposed regulatory objectives
- **Q2-10** - powers of sanction against RPBs and reserve power to replace the RPBs with a single regulator
- **Q11-13** – proposed new responsibility for RPBs to assess costs associated with fee complaints.

We have no specific comments on **Q14 – Q20**, but in relation to these questions, our views on **Q1** and **Q11-13** should be taken into account.

Q1 In principle, we believe that having strategic regulatory objectives for a regulatory regime improves consistency and clarity of focus for regulators. However, we have the following additional comments and reservations.

We are unsure as to whether the proposed regulatory objectives as currently worded are primarily directed at RPBs or at IPs. For instance, objectives 1. and 2. appear to be directed at RPBs, whereas it is unclear whether objective 4. is primarily directed towards RPBs or IPs. IPs are, of course, already bound by a Code of Ethics which requires standards of professional conduct. It is our view that the aims of proposed objectives 4. and 5. relate not to the proper functioning of the regulatory framework but to the relationships between IPs and creditors and others, and for that reason would be better dealt with by means of conduct requirements on IPs. In this context, we believe it may be useful for the Insolvency Service to consider the Legal Services Act regulatory objectives, and we invite the Insolvency Service to consider that there is no Legal Services Act objective at the level of the proposed objectives 4. or 5.

As a public interest regulator operating within the framework of the Legal Services Act 2007 and its regulatory objectives, we are concerned that there may be a conflict between our obligation to act in accordance with these objectives and the proposed new insolvency regulatory regime. For example, our regulatory objectives under the Legal Services Act include improving access to justice and encouraging an independent, strong, diverse and effective legal profession. The proposed objectives under the current consultation include more granular requirements including promoting the maximisation of returns to creditors and promptness in making those returns, and ensuring that the fees charged by IPs represent value for money. In order for the SRA to meet proposals outlined, additional internal systems and resources would be needed to ensure and enforce the proposed insolvency objectives. It is likely that such costs would be passed on to solicitor IPs and thereby to their clients, with potential negative impact on the Legal Services Act regulatory objectives. It is possible that such conflicts might be lessened if there was evidence that the proposed insolvency regulatory objectives were proportionate and targeted to risk, but the evidence so far presented in the consultation document is not in our view sufficient to support this.

Overall, therefore, under the Legal Services Act, an outcomes focussed approach to regulation is the SRA's strategic position and ensures that we act in accordance with the regulatory objectives. Proposed objectives 4. and 5. do not appear to be aligned to this.

Q2-Q10 We recognise the perceived need, in its role as oversight regulator, for the Insolvency Service to ensure effective regulation and fair, consistent regulatory outcomes, and therefore understand the reasons why the Service believes that it may need a greater and more nuanced range of sanctions against RPBs than currently exist.

However, the SRA is already, in all its actions, subject to the governance of the Legal Services Board as an approved regulator under the Legal Services Act 2007, and any failure by the SRA to carry out the regulatory objectives under that Act is subject to sanction.

We are therefore not supportive of an additional range of sanctions which could be imposed by a separate oversight regulator in relation to a different, and possibly conflicting, set of regulatory objectives.

Q11-Q13 As mentioned in our response to Q1, we believe that the aims of proposed objectives 4. and 5. relate not to the proper functioning of the regulatory framework but to the relationships between IPs and creditors and others. We believe that the proper corollary of a regulatory regime founded on regulatory objectives should be that front-line regulators have the responsibility to deliver the regulatory objectives, and with that responsibility comes the flexibility and discretion to determine the best means for delivering the objectives.

Therefore, because as set out in our response to Q1 we do not believe that proposed objectives 4. and 5. are pitched at the correct level for regulatory objectives, we do not agree with the proposals set out in paragraphs 96 – 105 and under Q11 – Q13.

We believe that it should be for the RPB to determine its regulatory strategy to deliver the objectives in the light of the risks presented by the IPs it regulates. We believe that the proposals made in Q11 – Q13 represent a prescriptive and non-outcomes focussed approach to oversight regulation, which is inconsistent with an approach truly based on regulatory objectives.

We are looking forward to our meeting on 10 April at which Crispin Passmore our Executive Director for Policy and Julie Brannan, Director of Education and Training will be present. We will, of course, be very happy to discuss any aspects of the consultation proposals and our responses at that meeting.

Yours sincerely

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If you require this letter in an alternative format, please do not hesitate to contact me.

IP regulation and fee consultation question response sheet
(Consultees may wish to respond just to those questions that are of relevance to them)

Name:
Organisation (if appropriate): FRP Advisory LLP
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The FRP response to this consultation was obtained by FRP appointment taker wide circulation (35 IP's) for views, which were collated into this response. This response was subsequently circulated to all FRP appointment takers for approval/comment prior to submission.

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?

It is impossible to comment on this, the assessment of costs has made sweeping assumptions on the level of complaints anticipated, the reality is that the number of complaints received concerning fees in the industry is extremely low.

We suggest a better reflection would have been to consider the number of fee complaints actually received by IP's in the first instance and how these were addressed. It is appropriate to ascertain the strength of creditor views in this area that are actually expressed in the field, combined with an independent check on the reasonableness of those views.

Following the rule changes in 2010 creditors have an 8 week window to object to fees charged to an estate, we would suggest that consideration could be given to increasing the power to creditors at this stage may be more appropriate without necessarily requiring the costly intervention of the courts.

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?

Measuring value for money is subjective and it is difficult to see how the various RPB's in their capacity will be able to ascertain on a like for like basis whether value for money has been achieved. However, broadly we are in agreement that the RPB's currently monitor compliance with best practice and ensuring fees drawn have been properly approved, thus a more detailed over-sight in this area would improve confidence.

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?

No, the creditors are already provided with a significant amount of information on charge out rates, the ability to approve the fee basis and how to challenge the level of fees. Creditors very rarely engage in this process and providing more information is unlikely to encourage active participation in the process.

We agree that currently creditors do not engage in the process despite the number of tools available to them, IP's and creditors would benefit from greater creditor engagement.

The consultation notes that government creditors have a role to play and we think is the area where more attention should be given. If creditor ability to communicate with each other were improved they would be in a position to exert more influence utilising the existing tools available.

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?

We consider the fixed fee/percentage basis of approving of an office holders remuneration is flawed. Indeed it is arguable that this is easier in a CVA/IVA/MVL to agree a fixed fee when the work the IP is likely to undertake is largely known prior to appointment, unlike most other forms of insolvency.

Having different bases for different types of work is confusing both within the profession and to the creditors.

The consultation has discounted different methods of charging for different aspects of the case as adding more complexity and difficult to define. The current proposal is far too simplistic and will result in IP's being unwilling to accept assignments where asset levels are low or not readily realisable (ante-cedant transaction/ assets where ownership is disputed etc).

A fixed fee basis will likely to lead to a lower level of service and will penalise the recovery of more difficult assets.

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?

We believe the conclusions drawn on the reasons why fees on secured creditor controlled work appear lower than those cases where the fees are in the hands of the unsecured creditors is flawed. Blended rates are often agreed with secured creditors which is normal in the industry and part the agreement of securing a place on bank panels where a regular flow of work is derived. Furthermore when a secured creditor is involved there is often good communication between the IP and the secured creditor which enables approval and agreement of strategy to be established promptly thereby enabling certain cost savings.

It is inappropriate to draw the conclusion that costs are inflated when control of costs rests with the unsecured creditors. A substantial proportion of work is undertaken by IP's where full recovery of time costs is not made, this is in respect of cases controlled by both secured and unsecured creditors. This is generally due to asset realisations being insufficient to pay all or sometimes any fee.

As a profession we accept this is part of the business risk in accepting appointments. Taking appointment over cases where there are "potential" assets if robust *investigations/proceedings are taken against rogue directors and others is part of an IP's work. These type of cases often have high time costs and are often undertaken with a commercial risk to the IP. The change in fee structure as proposed will result in IP's not being prepared to accept these assignments or be willing to undertake sufficiently robust investigations within an appointment which could result in recoveries being diminished; a reduction in return to creditors and a reduction in sanctions being taken against directors.*

A percentage basis for agreement of fees is only likely to be attractive if the value of the assets is substantial, this does not in any way relate to the amount of work required in realising the asset and is likely to result in a lower return to creditors than the current time cost basis.

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

IP's fees will be reduced but this is unlikely to result in a higher return to creditors as we anticipate recoveries are likely to also fall.

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?

We think it will be confusing for all stakeholders to have a different approach across different types of insolvency.

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?

If anything consideration could be given to some sort of fixed basis to deal with statutory compliance issues. This is known at the outset of a case and the time taken should be broadly comparable across the industry. A percentage based on realisations is unlikely to result in a fair result to creditors as this would only be the preferred option if the value of the assets is significant. We would anticipate that if creditors engaged in the process they would reject this basis.

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?

No this is not viable. The starting point is not that in all cases the creditors will get a return. Any return to creditors is after certain costs are met which must include the IP's fees. There is a substantial amount of compliance matters that all IP's have to conduct in every case regardless of case size/asset values or creditor numbers in a low asset value case even these minimum costs would not be recovered utilising a scale rate.

Should this continue to be explored we would suggest it more appropriate to consider fixed fees for statutory work/some sort of commercial scale for known readily realisable assets with the ability to agree time costs for all other aspects if appropriate.

As commented on in the consultation this is complex and in fact a mixed bases of charging fees is already available, perhaps consideration could be given to addressing SIP9 in expecting the IP to document why the basis/mix of basis he has put to creditors is appropriate in the circumstances.

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

The existing basis of charging for time and rate is appropriate in the majority of circumstances; the hours involved in any assignment are always uncertain. We would suggest more thought should be given to initial capped time costs based on an estimate provided at the time the fee basis is approved. At this point the IP can set out his assumptions made in setting an initial capped fee and thereby agree a budget to work to, if circumstances change the IP should then have the option to revert to creditors for approval of additional fees or approval to undertake any additional work identified as needed. This is in fact already an option for creditors and is included in Professor Kempson's review. It would be more helpful if "creditor panels" were created or HMRC took a more proactive approach in this matter in working with the industry to ensure the perception that IP's are over-charging is eradicated and where this is indeed found the IP's involved are made accountable.

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?

We do not believe that there is a level of over-payment. The proposed fee structure is likely to reduce the overall IP fees at the expense of recoveries and action against rogue directors.

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?
No

Q28: Do consultees believe these measures will improve the reputation of the insolvency profession?
No

MONEY ADVICE TRUST

BUSINESS DEBTLINE NATIONAL DEBTLINE WISER ADVISER

Strengthening the regulatory regime for IPs

Response by the Money Advice Trust

Date: MARCH 2014

Contents

Introduction

About the Money Advice Trust

The Money Advice Trust is a charity founded in 1991 to help people across the UK tackle their debts and manage their money wisely.

The Trust's main activities are giving advice, supporting advisers and improving the UK's money and debt environment.

We give advice to around 140,000 people every year through National Debtline and around 30,000 businesses through Business Debtline.

We support advisers by providing training through Wiseradviser, innovation and infrastructure grants.

We use the intelligence and insight gained from these activities to improve the UK's money and debt environment by contributing to policy developments and public debate around these issues.

We help approximately one million people per annum through our direct advice services and by supporting advisers through training, tools and information.

Public disclosure

Please note that we consent to the public disclosure of this response.

Introductory comment

We welcome the opportunity to comment on the Government proposals to reform the regulation of insolvency practitioners. We support the proposals in most instances to enhance the role of the Insolvency Service as overall regulator.

We hope that the plan to enable Government to create a single regulator for insolvency practitioners paves the way for this to take place in the medium term. We would also like to see an independent complaints' mechanism put in place as part of this reform.

We have fewer comments to make in the area of insolvency practitioner fees as this is not our area of expertise. Detailed commentary will be best left to those with experience in running an insolvency practitioner business.

Responses to individual questions

Part 1 – Regulation of Insolvency Practitioners

Question 1 – Are the proposed regulatory objectives and the requirements for RPBs to reflect them appropriate for the insolvency regulatory regime?

The proposed regulatory objectives and requirements for RBS, as set out in the paper, appear to be appropriate and sensible.

Question 2 – Do you have any comments on the proposed procedure for revoking the recognition of an RPB?

The procedure appears sensible. However, we would suggest that a simple appeal process would be easier than relying on the complex and costly process of challenging the Secretary of State decision via the mechanism of judicial review.

Question 3 – Do you have any comments on the proposed scope and procedures for the Secretary of State to issue a direction to an RPB?

Again, we would suggest that a simple appeal process would be easier than relying on the complex and costly process of challenging the Secretary of State decision via the mechanism of judicial review.

Question 4 – Do you have any comments on the proposed scope and procedures for the Secretary of State to impose a financial penalty on an RPB?

We support the proposals as outlined in the paper. We also note that the procedures include an appeal process. We would suggest that this is adapted for use in appeals on directions on and the revoking of recognition of an RPB as well as the process for making representations.

Question 5 – Do you have any comments on the proposed scope and procedures for the Secretary of State to publicly reprimand an RPB?

We would hope that the procedure is robust as the process and scope mirrors the powers of the Legal Services Board to censure an approved regulator. Presumably the views of the LSB will have been sought to ensure that there are no useful changes to be made to the process.

Question 6 – Do you agree with the proposed arrangements for RPBs making representations?

We would suggest that a simple appeal process would be easier than relying on the complex and costly process of challenging the Secretary of State decision via the mechanism of judicial review.

Question 7 – 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?

We support the stated intention of this procedure to allow swifter and more effective regulatory action to be taken against an IP. However, we are concerned that this is in part being put forward because of a perception that RPBs may be slow or unwilling to act. The paper states at point 70 as follows:

"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 would certainly support the idea that the Insolvency Service acting as regulator should be able to take further action against the RPB where their willingness to act promptly or efficiency is under question. Such cases should also call into question whether the RPBs have strong enough powers if the RPB felt unable to bring disciplinary procedures against an IP. If the RPB is not delivering *"fair, effective and prompt outcomes"* then their efficacy should be questioned.

Question 8 – 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?

The proposed procedure to require information seems very sensible. We do not have any further comments.

Question 9 – Do you agree with the proposal to provide a reserve power for the Secretary of State to designate a single insolvency regulator?

We fully support the proposal to provide a reserve power to designate a single insolvency regulator. This is an important step forward in creating a much less confusing landscape for insolvency practitioner regulation. We feel that a single regulator would be less confusing and would be more transparent for consumers. A body that has a clear role in enforcing the regulations, providing one set of guidance and code of practice and ensuring a common accredited training platform, would be an advantage. We have supported the establishment of a single regulator in the Money Advice Trust response to previous consultations. We feel that there needs to be regulation of the conduct of firms and not just the professional conduct of individual IPs.

Question 10 – Do you have any comments on the proposed functions and powers of a single regulator?

The proposed functions and powers of the single regulator set out in the paper appear to cover most requirements. We have a concern that part of the powers of the regulator is to investigate complaints against IPs. We would prefer to see an independent body such as an ombudsman to deal with complaints against IPs.

This should go further than the complaints gateway and its remit should be widened to include any wider consumer detriment. This could cover lead generation companies, text messaging and cold-calling, the failure to give holistic advice on the full range of debt options, churning debt options, failure to explain fees transparently, the mis-selling of an IVA in inappropriate circumstances and so on.

Part 2 – Insolvency Practitioner fee regime

We do not get involved - with any regularity - in personal bankruptcy cases which have IP involvement post-bankruptcy. We are most likely to come across cases where a client has a query about the high costs of annulment where they have been made bankrupt perhaps for council tax or for HMRC debts. The Local Government Ombudsman recent focus report included cases where the combined costs of the bankruptcy order in trustee fees and official receiver legal costs far outweighed the amount owed in council tax.[1]

Question 11 – Do you agree with the assessment of the costs associated with fee complaints being reviewed by RPBs?

We would agree that RPBs should have a monitoring role to review fee complaints. We cannot comment on the costs of this process.

Question 12 – 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?

It is to be hoped that asking the RPBs to monitor fees will lead to improved compliance monitoring and reduce complaints about fees. We can see that it would be expensive and complicated to create a new body and system for adjudicating on fee complaints. However, if there was a single regulator established, it would be most suitable for fee adjudication to be handled by the single regulatory body.

Question 13 – 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?

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[1] Cant' pay, won't pay Using bankruptcy for council tax debts http://www.lgo.org.uk/publications/advice-and-guidance#focus

We would always be supportive of the provision of information using plain English. We would expect any such information to help unassisted creditors, many of whom will be small traders with no access to expert legal advice. It is difficult to say whether such measures will be successful in promoting engagement and helping unsecured creditors to negotiate competitive fee rates, but it is certainly a helpful step forward.

Question 14 – 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?

We do not have a particular view on whether any further exceptions should apply.

Question 15 – 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?

We can see that the use of time and rate as a basis of remuneration can be problematic for parties who may see returns to creditors diminishing in fees and charges. The proposals to restrict its use to cases where there is a creditors committee or where secured creditors will not be paid in may appear sensible at first glance, but we will leave it to insolvency practitioners to comment in more detail.

Question16 – What impact do you think the proposed changes to the fee structure will have on IP fees and returns to unsecured creditors?

We will leave it to insolvency practitioners with a detailed knowledge of their business models to explain the impact the proposed changes will have on their fees and the viability of their businesses. We note that in their press comment, R3 stated:

"*These proposals will have unintended and unwanted consequences, and it would be the UK's creditor community that would lose out were they to be implemented.*"[2]

They went on to say:

"In practice, insolvency practitioners and creditors would find enforced fixed-fee caps or setting fees as a proportion of realisations unfair – indeed, the latter was abandoned as a standard practice decades ago. Arbitrary measures such as these are not always compatible with the unpredictable nature of insolvency work, and would routinely leave both creditors and insolvency practitioners out of pocket."

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[2] http://www.r3.org.uk/index.cfm?page=1114&element=19734&refpage=1008

Question 17 – 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?

These exemption proposals appear to be sensible.

Question 18 – 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?

This proposal seems sensible.

Question 19 – 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?

Again, we do not have detailed knowledge of insolvency practitioner business models, so cannot respond to this question.

Question 20 – Do you think there are further circumstances in which time and rate should be able to be charged?

We are not able to comment on this question.

Impact Assessment questions:

We have no comment to make on the impact assessment questions. We would suggest that they would require detailed insolvency practitioner expertise to provide the required evidence.

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27th March 2014

Dear Sirs

Response of Insolvency Consultancy to the Insolvency Service Consultation: 'Strengthening the regulatory regime and fee structure for insolvency practitioners'

About Insolvency Consultancy

Deborah Manzoori trading as Insolvency Consultancy is a Licensed Insolvency Practitioner with over 20 years of client facing, compliance and technical business recovery experience. She established Insolvency Consultancy in July 2012 to assist Insolvency Practitioners with their regulatory, technical and compliance requirements. Deborah has a longstanding and continuing commitment to improving standards in all areas of insolvency work and encouraging those involved at all levels in the insolvency profession to develop knowledge and skills.

Deborah has a passion for the potential and impact of business recovery; she is innovative, with a devotion to involvement of the younger generation in her professional body, the Insolvency Practitioners Association ('IPA'). Deborah is a Council member of the IPA and the youngest lady ever to be elected by her peers. She is a regulatory, compliance and technical expert having worked for JIMU. She gained her Insolvency Licence in May 2002.

Overview and general remarks

This consultation document is the third in a succession of consultations affecting the insolvency profession. There have been back to back consultations for several months. It is disappointing that this consultation has been limited to a 6 week consultation process when it has the potential to have a wide ranging and fundamental impact on the insolvency profession; potentially the biggest change to the profession since 1986. Why such a fundamental change was limited to a 6 week consultation is not explained and nor is it justified, particularly when it was published on the first day of the school half term holiday when most families are taking holiday.

The insolvency profession is a relatively small one which is heavily regulated. It is therefore surprising that the limited resources available in the Government have been utilised to produce a succession of consultation documents rather than focusing attention on disqualifying delinquent directors which arguably creditors are more concerned about.

Of more concern is that the Insolvency Service has overseen and endorsed the insolvency regime for over 27 years (since the introduction of the Insolvency Act 1986) an yet now the consultation document appears to be suggesting that that oversight is lacking in some way and is need of reform. I simply just don’t see the evidence to support this.

It is also too early to assess the impact of the recent changes to insolvency legislation and best practice. The Insolvency Rules 2010 introduced the ability for creditors to approve Insolvency Practitioners (‘IPs’) remuneration on a fixed and mixed fee basis as well as the ability to request further information and made it easier to challenge fees. As there has been insufficient time to assess the impact of this Rule change it is difficult to understand why a further change is being introduced. This risks confusing creditors.

In addition the single complaints gateway was introduced by the Insolvency Service in 2013 which enables creditors to complain directly via the Insolvency Service to the IP’s RPB. The effectiveness of this change has also not yet been assessed as it is too early to do so. Again, the timing of further change is unfathomable.

Foreword

The foreword to the consultation by the Minister Jenny Willmott MP states in the opening sentence states that the recent economic downturn (which started in 2008 –6 years ago) has ‘raised the profile’ of ‘the regulatory regime’ which insolvency practitioners operate. In addition in paragraph 3 the Minister goes on to state: ‘there is a need to strengthen the regulatory framework in this area'. This is a statement unsupported by any evidence shared with the insolvency profession.

In the third paragraph the minister goes on to state: 'What is important is that creditors have the confidence that they will recover the maximum amount possible under the circumstances'. This can easily be achieved by increasing the £800 limit imposed on the amount employees can claim as arrears of wages (a limit not increased since 1986) as preferential and increasing the maximum amount and calculation of the Prescribed Part. Both these reforms would immediately increase the returns to creditors without the need of additional regulation, monitoring and legislation.

In paragraph 4 the Minister states the 'clear regulatory objectives' yet these are general, undefined and subject to interpretation. Introducing 'a range of proportionate sanctions and powers to deal with a failure to comply with the regulatory objectives' is unnecessary at present as here is no evidence that the regulatory regime is not working. However I do not object in principle to the proposal of enhancing the Insolvency Service's powers as the oversight regulator. Whilst the power to revoke the recognition of an RPB would be an extreme measure, in doing so or threatening to do so, will incur cost in addition to the uncertainty for insolvency practitioners regulated by it and have a destabilising effect on the regulatory process generally. It will also inadvertently undermine public confidence in the effectiveness of the Insolvency Service as oversight regulator and in the regulatory processes of all RPBs.

Paragraph 4 also directly correlates IP fees with returns to creditors. There are many factors, costs and expenses incurred when realising assets for the benefit of creditors. Investigation into the conduct of directors is a cost borne by creditors which directly depletes funds available to them. Removing the IPs requirement investigate and placing it onto the Official Receiver's ('OR's') office would assist in returning more funds to creditors.

IP fees

Much is made of the proposition that creditors are dissatisfied with IP fees and that this stems from the inability to control them but this is not supported by the available evidence. Complaints about fees to RPBs represent a very small proportion (the IPA report just 2% in 2013).

Emphasis has been placed on the widely criticised OFT report which only looked at a small section of insolvency which was limited to a small study of administration cases and did not consider the fees charged within more commonly used processes (liquidation, bankruptcy and voluntary arrangements). Its results are now being extrapolated as the basis of reforms to the charging arrangements in other insolvency processes, without any evidential basis for doing so. The proposals therefore are founded on both incomplete and potentially misleading data.

The OFT report found that in cases where there was greater creditor control over fees (largely, cases where there was bank involvement), fees were on average 9% lower. It also noted that it is normal to see a "discount" in prices where bulk-buying power is exerted. We are concerned that the assumption currently being made that this discount amounts to evidence of over-charging in other cases may be flawed.

Even if it is assumed that this assumption is accurate, as appears to have been accepted by Professor Kempson in her subsequent work, there remains no evidential basis to suggest that the same "market failing" applies in other forms of insolvency, such as liquidation and bankruptcy. The proposed changes to the manner in which remuneration may be charged are designed to produce a move towards fixed or percentage fee charging but no evidence is presented to suggest that charging on this basis will result in a reduction in fees charged, or that a reduction will bear any relation to the 9% "failing" alleged by the OFT, or that fees will represent better value for money.

Charging on the basis of a fixed or percentage fee is a retrograde step and will distort the value and the nature and complexity of work undertaken. There was a deliberate move away from the scale rate applied as the default basis for remuneration as it resulted in IP fees not reflecting the work undertaken.

Regulators will be presented with even greater difficulties in challenging a fixed or percentage fee on the basis that they are not a commensurate reflection of the nature and complexity of the task, as by definition, a fixed or percentage fee need not be a reflection of the time expended in performing the task.

Executive Summary

Paragraph 1 states that the OFT report in 2010 identified ‘a failing in the regulatory system’. This was not the thrust of the OFT report which, inter alia, failed to take into account the Insolvency Rules changes introduced in 2010.

Paragraph 3 seeks to address a problem that does not exist. There is no ‘widespread impression’ that the ‘current regulatory regime is not fit for purpose’. The World Bank Report states that the UK is in the top ten of the world’s best insolvency regimes. How does that correlate with this statement?

Paragraph 4 omits any references to the Joint Insolvency Examination Board exams (effectively a degree course in a year) that all Insolvency practitioners now have to pass before they can apply for a license to practice. Only after meeting the additional experience requirements, amongst other things, will a license be granted by any regulator. To state that the authorisation of insolvency practitioners is mainly through a system of self regulation is therefore misleading.

Paragraph 5 states that both the OFT and Professor Kempson ‘suggest’ that ‘the regulatory regime would be more effective if fewer bodies were involved’ yet there is no evidence to support wither of these statements. Reducing the number of regulators does not necessarily mean that the regime would be any more effective than it already is. The insolvency Service should have given up its conflicting role in overseeing and issuing licenses a long time ago and yet this is still to be introduced years after being identified.

Paragraph 6 refers to more changes to be introduced outside the legislation arena yet these have not yet been disclosed to the profession. It is impossible to comment on the integration of those proposals to what is being suggested in this consultation without have the detail of what is planned. This is a disjointed introduction of legislation and best practice in piecemeal portions across several legislative vehicles. This is neither efficient nor transparent. Why is this legislation not being introduced with the planned changes in the Insolvency Rules as well as all the other pieces of legislation altering insolvency going through parliament at this present time?

Paragraph 8 refers to powers to address ‘poor performance’ and yet there is no evidence of any poor performance by any of the regulators. It further states that ‘the regulatory system suffers from a lack of clear regulatory objectives’ which is simply not the case. The Insolvency Service has clear objectives when monitoring and reviewing the work of RPBs and holding them to account.

Para 9 The introduction of more regulatory objectives, which are undefined and loosely termed, will not (in the current form) make the framework clearer and nor will it enhance it.

Para 10 I comment in details about the regulatory objectives in the numbered responses below. However there is no direct correlation between returns to creditors and introducing revised regulatory objectives. Returns to creditors can be increased without the need for additional legislation by merely increasing the statutory limit on arrears of wages claimed preferably by employees in insolvency cases. The £800 limit introduced in 1986 has never been increased. Increasing this to equivalent value today would assist in substantially increasing returns to creditors who are employees.

Para 11 This paragraph clearly outlines the effectiveness of the current Memorandum of Understanding ('MOU') with the RPBs which has meant that in the years since the introduction of this the power has never been used.

Para 12 There is no lack of appropriate sanction for the Insolvency Service as oversight Regulator. As stated in the previous paragraph the power to remove authorisation is a threat enough in itself for all the RPBs to comply with the memorandum of Understanding. This does not leave the Insolvency Service in a weak position and nor does it undermine its credibility. This is a perception from within the Insolvency Service itself and does not reflect the views of the profession or the Regulators. It is difficult to understand why this is indeed an issue at all as the power of removal of authorisation has never been used on an RPB and all RPBs comply with the MOU.

Para 13 I do not oppose the concept of enhancing the Insolvency Service's powers as the oversight regulator in principle but a number of amendments to the powers proposed is required in order that their use would not be detrimental to the profession.

Para 14 There are assumptions /unsupported statements contained within this paragraph e.g. concerns about the number of regulators and the lack of a consistent approach to regulation. The Insolvency Service were due to cease direct regulation of IPs since 2010 and yet, despite the Deregulation Bill currently going through Parliament, the IS still directly regulates IPs. This is simple to rectify and does not require legislation – a mere willingness on behalf of the IS to direct the IPs it authorises to gain authorisation from another Regulator. In addition the IS is seeking a power to introduce a single regulator for the profession. This is an unnecessary piece of legislation as the IS already have this power by removing authorisation of the existing regulators. This would be duplication. There is no evidence that a single regulator is required, wanted or needed. Indeed a single regulator stifles a free market and competition. Creation of the single regulator would create a monopoly position which is undesirable. The IS are not fully convinced this is necessary as they have stated that this is a 'reserve 'measure in case the details they require are not enacted. They go on to state that there would be a further consultation, detailed analysis and secondary legislation required. Why then is this included here?

Para 15 It is astonishing that the IS can state: 'despite discussions with the profession and the regulators, little has changed to address this market failure.' The IS have been repeated requested by the profession to get the RPO and HMRC actively involved in insolvency cases. HMRC are a creditor in most insolvency cases and the RPO as well. Active creditor involvement by crown creditors would assist in addressing the issues that are stated. It is once again unnecessary to legislate to control IP fees when the Government already has the tools at its disposal and does not use them. Legislation is being introduced to address some of their own failings in this area. This is incredibly frustrating for the profession who have repeatedly requested for active crown creditor involvement. Requests have been made in person several time to the IS to no avail.

Para 16 The paragraph correctly states that issues are within the 'headline hourly rate' charged by IPs and their firms. The OFT review in 2010 evidence that the headline rate was rarely recovered and in fact in most cases was a small proportion of this rate. Time costs are written off in the majority of cases handled by Insolvency Practitioners. Any perceived lack of control of the number of hours charged is rectified when the time costs are approved by creditors – as stated already – the majority of cases necessitate a write off of time and remuneration. IPs operate businesses. Our profession is to streamline businesses for sale. To state that 'this can result in inefficient working' is an unsupported supposition. Combining that statement with another stating that leads to overcharging on cases is extrapolating. IPs and their staff are professionals and record time in accordance with legislation, regulation and best practice. Going on to state that unsecured creditors are in a weak position makes the inaction of the RPO and HMRC as unsecured creditors even more problematic. The crown already has the means to control IPs fees and they choose not to. The introduction of further legislation – which has already been amended in the 2010 Rules to give creditors more rights of information and challenge – is unnecessary. The crown, as unsecured creditors, should become actively involved in cases.

Para 17 Creditors rights to challenge fees were made easier in the Insolvency Rules 2010. This right includes crown creditors who have remained inactive on cases. Creditors can directly ask an IP for more information under the new rules and can also challenge fees directly. A creditor does not need to involve an RPB to do this. A creditor does not need to apply to court to challenge fees in every case as there are new rights of information and challenge in the 2010 Rules. This is described as a key feature of the new regulatory objective of 'value for money'. This is not easily defined due to the wide ranging issues that can and do affect insolvency appointments. What is value for money to the Insolvency Service (e.g. investigation in the conduct of directors) can be seen as a waste of money to unsecured creditors who see their potential return used to fund such investigations (which rarely result in a disqualification).

Para 18 The proposals to 'simplify' IPs fees follow the recent change in the Insolvency Riles 2010 which extended the basis of IPs fees to include fixed fees, time costs, percentage basis and any combination thereof. Creditors already have at their disposal the means to set the basis of IPs fees on whatever basis they choose. Banning fees on a time costs basis is a retrograde step reverting to the position pre 1986. Setting fees on a purely percentage basis can lead to a disproportionate fee basis and recovery for IPs.

Para 19 suggests that IPs realise assets merely to pay their own remuneration. The law clearly states what the duties of an IP are which includes, amongst other things, investigation into the affairs of the company and the conduct of the directors. In addition statute clearly sets out the priority in which funds realised must be paid. This can also be reordered by the Court whenever necessary. There are many costs and expenses that have to be paid in priority to the fees and expenses of an Insolvency Practitioner. To suggest therefore that an IP realises assets merely to pay their own costs is disingenuous.

Para20 -23 The IS proposes to introduce legislation piecemeal in Scotland. This will result in an even more divided process in England and Wales and Scotland.

Para 25 States that again the NI legislation will not fall in line with the rest of the UK and they will fall even further behind in the legislative process. These differences create enormous administrative issues when IPs work in different areas where the company is based. Such differences are burdens which result in additional cost and expense which ultimately will be placed on creditors.

Consultation Question Responses:

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?

Whilst the aim of the regulatory objectives and the requirement for the RPBs to reflect them is laudable, I think that in practice these present immense problems and may prove unworkable.

Paragraph 44 of the consultation document claims that 'the Secretary of State is frustrated in his ability to effectively regulate the RPBs'; Yet in paragraph 41 admits that there were only 6 complaints in 2013 about regulators and does not state what the nature of these very few complaints were. As the current system clearly works very effectively it is difficult to understand what problem or issue is being addressed by even more legislation.

The consultation fails to mention the 'Dear IP' guidance notes issued by the Insolvency Service on a regular basis which direct IPs on specific issues.

Paragraph 45 states that there is support for a single independent regulator. All the Regulators are independent except the Insolvency Service. There is no support within the profession to have a single regulator imposed on them by the Secretary of State. It is disquieting that the Insolvency Service states that they want to take these powers now. In addition a single regulator would create an undesirable monopoly position in the profession.
Paragraph 46 gives examples of regulatory frameworks of other professions which 'have been significantly strengthened in recent years.' One of these examples is the legal profession following the changes in the Legal Services Act 2007. The OFT undertook a review of the impact of the changes introduced and reported in January 2013. This can be found by following the link: http://www.oft.gov.uk/news-and-updates/press/2013/07-13#.UyljVLdF3io The opening paragraph of the press release states: 'The OFT is calling for the legal profession's complaint handling procedures to be further simplified after it published research today showing that only one in eight (13 per cent) dissatisfied customers goes on to make a formal complaint.'

Paragraph 48 states that 'the insolvency profession should act with integrity, fairness and transparency.' This seemingly ignores the fact that Insolvency Practitioners ('IPs') act as officers of the court. The final sentence of that paragraph appears to states that all the current insolvency legislation, regulation, best practice and other guidance is not effective. I find that very difficult to digest and in fact undermines the Insolvency Services own work over the past few decades. In addition, if ‘due regard’ is to be given ‘to the interests of all creditors’ in all insolvency processes then the current legislation will have to be fundamentally changed to incorporate that. This will have far reaching implications for lenders and secured creditors in insolvency processes.

Paragraph 51 distinguishes the roles of the RPS to that of The Insolvency Service when it states that RPBs ‘must’ act in a certain way but the Insolvency Service merely be required to ‘have regard’ the regulatory objectives.

In response to the specific question asked, I comment first on the objective of ‘protecting and promoting the public interest’. What is considered to be in the ‘public interest’ changes with the Government at the time. There appears to be a lack of acknowledgement that the Insolvency profession is just that. Insolvency Practitioners operate businesses and not public services (or even charities). If the Government’s aim is to protect and promote the public interest (whatever that is defined to be at the time) then it is perhaps better that all insolvency procedures are administered by the Official Receivers’ (‘OR’) offices and their staff. Of course there is neither the resource nor expertise to do so; (the OR’s offices could not have dealt with the Administration of Woolworths or Lehman’s for example). What is protecting and promoting the public interest? This is not defined and is subject to interpretation. Is protecting the public interest saving jobs? Trading on a company at a loss to keep jobs isn't going to make returns to creditors increase. Promoting the public interest - how exactly? Is there an expectation for IPs to launch advertising and marketing campaigns about insolvency and creditors’ rights? This is so loosely worded that it can be interpreted to mean anything depending on the current political climate. This is not fair and transparent.

The second objective is already being met by the profession. Indeed it is confusing as to why this is included at all. The Insolvency Service introduced the Complaints Gateway for creditors last year. There has been no time to evaluate that change and yet a further change is already being proposed. It seems that Government departments are not working together. If further change is required then this is not an endorsement for the changes already introduced by The Insolvency Service already.

As regards objective 3 regarding an ‘independent and competitive IP profession’; this objective demonstrates how out of touch the policy makers are to think that the profession isn't already highly competitive. The insolvency profession has suffered redundancies and prices have dramatically fallen in the face of fierce competition for work. The Insolvency Services own figures demonstrate how much insolvency has fallen over the last few years. In addition, the current Insolvency legislation does not fit the IP considering the interests of all creditors as it stands (this is specific to certain types of insolvency such as Administrations and not to Administrative Receiverships for example).

The fourth objective of ‘promoting the maximization of returns to creditors’ is again a strange objective to include when the whole purpose of the insolvency regime is to return money to creditors. However what happens when an Administrator takes a lower offer for a business because the cash is in the bank as compared to a higher offer by installments which is insecure in nature? In addition this does not fit with the first objective re Public interest which could mean saving jobs rather than maximising realisations. This objective easily is achieved by increasing the £800 limit imposed on the amount employees can claim as arrears of wages (a limit not increased since 1986) as preferential and increasing the maximum amount and calculation of the Prescribed Part. Both these reforms would immediately increase the returns to creditors without the need of additional regulation, monitoring and legislation.

Finally, the proposed requirement for RPBs to assess whether an Insolvency Practitioner’s (‘IP’) fees represent value for money could prove to be extremely time consuming and costly which will ultimately increase the costs of regulation. This ultimately will result in reduced level of returns to creditors. What is value for money? Ensuring jobs are saved? Delinquent Directors stopped? Maximising returns to creditors? What is value for money on a case the size of Lehman's (and the expertise required) is somewhat different to the value for money on a consumer credit IVA (and the 'expertise' required).

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

There is no detail provided to enable useful comments. As the Insolvency Service has stated, in the consultation document, there have been only 6 complaints in the previous year. As a consequence it is highly unlikely that an RPB’s actions will warrant revocation of recognition as an RPB. This is clearly to be used as a threat to RPBs to determine a type of behavior. Such a threat is unwarranted and unnecessary (as there is no basis for it).

In any event, any RPB subject to a threat of revocation would either mount a challenge or voluntarily withdraw from the market. I cannot envisage a straight forward revocation at all.

I am concerned that inadequate time would be given for an RPB to address any concerns that the Insolvency Service had. The consultation also glosses over the impact that this would have on individual IPs authorized by any RPB which is subject to revocation. The current application and approval process can take months not weeks due to the due diligence required. This factor has seemingly not been taken into account anywhere.

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

I am concerned that this will progress from oversight to direct regulation. RPBs have systems in place to deal appropriately with complaints and other regulatory matters. Consistency across RPBs should be applied to their various processes. The consultation proposes varying time, periods between 14 – 28 days which is ambiguous; clarification and consistency is required.

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?

The time period allowed for representations should be increased to a minimum of 28 days. It is undesirable for there to be no upper limit to the fine. This will lead RPBs, from a corporate governance and financial planning perspective, increasing fees to cover any eventuality. This will in turn be passed on to creditors. It is counterproductive. I am a Council member of the IPA, which is a company limited by guarantee, and I would be concerned that we would be unable to assess the risks, or acquire appropriate insurances, if there was no limit.

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

Time periods should be consistent and extended.

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

Time periods should be consistent and extended.

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?

I am concerned that any such power could be subject to inappropriate political pressure in high profile or media sensitive cases. It is difficult to envisage any circumstance where the Insolvency Service would need to leap frog a Regulator if the Insolvency Service shared relevant information with that Regulator to act upon. If the Insolvency Services proposes to impose a sanction greater than an RPB what would be the grounds for doing so after due process (approved by the Insolvency Service in the inspection visits) has taken place? The number of people involved in an investigation, including committees made up from the profession and lay members, means that the outcome is a fair, reasonable and balanced one in all the circumstances. The Insolvency Service would seek to review this process and seek to impose a further sanction via the Court. This would not only undermine an RPB's (approved) processes but would unduly lengthen the process and add an additional cost burden (in addition to Court costs of prosecution and defense). It is difficult to envisage any advantages in this proposal.

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?

The Insolvency Service already regulates RPBs and inspects IPs it directly regulates. It is not clear why their existing powers are insufficient and this not explained in the consultation document. As a consequence the taking of additional powers appears draconian.

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

No.

Paragraph 45 states that there is support for a single independent regulator. All the Regulators are independent except the Insolvency Service. There is no support within the profession for a single regulator to be imposed upon them by the Secretary of State acting via the Insolvency Service. It is disquieting that the Insolvency Service states that they want to take these powers now.

This would create the unwelcome scenario of a monopoly position. There is competition amongst the existing regulators within the profession and this enables choice for IPs and reduced fees. If a monopoly were to be created then excessive fees for regulation could be charged (which ultimately would be passed on to creditors), training and development services would be restricted and discussion on policy matters would only have the one viewpoint.

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

Paragraph 46 gives examples of regulatory frameworks of other professions which 'have been significantly strengthened in recent years.' One of these examples is the legal profession following the changes in the Legal Services Act 2007. The OFT undertook a review of the impact of the changes introduced and reported in January 2013. This can be found by following the link: http://www.oft.gov.uk/news-and-updates/press/2013/07-13#.UyljVLdF3io The opening paragraph of the press release states: 'The OFT is calling for the legal profession's complaint handling procedures to be further simplified after it published research today showing that only one in eight (13 per cent) dissatisfied customers goes on to make a formal complaint.' It would appear that the changes introduced were any more successful in addressing the previous concerns that existed. The single postbox system introduced was also highlighted stating it was not effectively signposted or easily understood. This is something which the Insolvency Service mirrored with the introduction of the single complaints gateway last year. There has been inadequate time to produce an impact assessment of that change.

The main issue here though is the lack of action taken against the unregulated market surrounding the insolvency profession. The lack of action against delinquent directors who undertake transactions to defraud creditors and operate phoenix companies (amongst other things) causes real concern for creditors and the public alike. Yet these unregulated advisors to such companies, directors and individuals continue unabated and unrestricted. The Insolvency Service is still not seeking powers to deal with the unregulated market surrounding the insolvency profession and I think they are targeting the wrong area.

This also does not sit with the proposal to revoke an RPBs recognition; which would need to be repealed as there would be no alternative 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?

No, the familiarisation costs are massively understated. The assessment of costs contains so many estimates, assumptions and unquantified variables, that it is purely speculative. Whilst the changes are "not difficult to understand" the implications on the IP's business will be far-reaching. It will be necessary to increase resource to establish viable rates for the fixed fees and percentages to be sought.

It is impossible to assess the increased costs to regulatory systems without guidance on how value is to be assessed. Will RPBs be required to undertake a full review of time spent and how this compares to the fixed or percentage fees charged are? Will they be required to undertake additional visits to review IPs files? It is unclear how the estimated cost of £2,715 per case review is reached; This cost this is then subject to a multiplier which is also an estimate (anticipated fee complaints). It is difficult to state whether he cost is accurate or even reasonable.

The financial benefits are estimated as a result of the OFT's estimate of alleged over-changing in administration cases and assumes that a proportion of these funds would be paid to unsecured creditors. This assumption is not supported by any actual evidence that adopting fixed or percentage fees would act to reduce fee levels. In addition, an RPB can sanction the practitioner by way of fine, but that this would not result in an increased return to the unsecured creditors, as this could only be achieved by the repayment of remuneration to the estate. Even if fee complaints were upheld there would not be a financial return to creditors as a consequence.

This proposal is replacing the Court process and moving it to an RPB when there is a fee complaint. The RPB has to act as an independent adjudicator, effectively replacing a judge, to make such decisions. This has huge cost implications for education, training and insurance as well as the time involved in gathering evidence and validating it (as there would be in a Court process). This is significantly different to assessing the validity of any remuneration approval with statute.

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?

The assessment of value for money on a case by case basis will be extremely lengthy and time consuming. The reviewer will have to review the entire case for work undertaken and assess this against the time costs incurred and then fees actually charged. A review of the work done will have to include time charged and fees agreed to be assessed against the necessity of the work undertaken (statutory, best practice and case law) and the outcome of the case. This will be extremely difficult during the administration of a case especially if there is an ongoing investigation into assets when all the costs are incurred before the realisation of the asset. Establishing what value for money is completely subjective in nature and in whose opinion such value should be ascertained? Sometimes costs incurred investigating potential assets prove unfruitful as assets may be uneconomical to pursue or are in fact unrealisable for some reason. Such time incurred will be unable to demonstrate value added for creditors. Does this mean that IPs should not investigate assets unless they are certain of a recovery for creditors? This will lead to more delinquent behavior by some directors.

It is very common for Insolvency Practitioners to write off time costs on their appointments; In fact it is rare for them not to do so. This consideration is seemingly ignored in this consultation.

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?

IPs already provide and publish rafts of information regarding their fees and charge out rates in compliance with SIP 9. The reality is that creditors are simply not interested in receiving pages of information from IPs about their fees. Creditors merely want to know how much they are going to get back and how quickly. Occasionally they may be interested in actions against the directors of a company. The time and resource of the Insolvency Service would be better placed on pursuing delinquent directors.

In almost every corporate insolvency there will be two government agencies who will be significant creditors: HMRC and the RPO. They receive reports in all those cases, so must have the ability to judge objectively the value of what they are receiving, and have the power to lead other creditors (potentially could form a committee if one other creditor was interested) and request further information in cases that require it, and challenge fees in cases where they believe they are exorbitant. And yet they do nothing. Why is this? Why is more legislation being introduced when Government departments don’t engage?

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?

No. I don't agree that restricting IP fees in this way will result in a better outcome for creditors therefore extending this right further will create even more problems. IPs will be reluctant to invest time investigating potential assets for creditors unless they know they will be paid for doing so.

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?

Paragraph 113 of the consultation document states: "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". Both Professor Kempson's report and the OFT market study drew conclusions about the effectiveness of secured creditors' control but the OFT's study looked only at Administrations and Para 83 CVLs and Professor Kempson built on this study and therefore concentrated on the effect of IPs obtaining appointments via bank panels. This is a relatively narrow focus which has been extrapolated and stated that this should apply to all insolvencies (except for VAs and MVLs). It seems highly unlikely the secured creditors really control the level of fees in less significant liquidations or bankruptcies where the mortgaged home is in negative equity.

The bases of liquidators' and trustees' fees are fixed by resolutions of the unsecured creditors. As there is little apparent creditor dissatisfaction with the level of remuneration charged on those cases I do not believe this proposal is warranted.

Fixed or percentage fees will not necessarily incentivise IPs appropriately. Percentage fees are a very crude measure and are less transparent and can produce results which do not reflect the work undertaken on a case; it will lead to windfalls on some cases and shortfalls on others. Fixed fees in particular present inappropriate economic motivator to avoid non-profitable tasks and may in turn have an adverse effect on outcomes for creditors. Time costs basis for fee provides transparency, accountability and comparability.

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

The Insolvency Service has repeated the statement from the OFT's market study. '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' (paragraph 88 of the consultation document)**.** This ignores legal fees, agents' fees and costs of insolvencies such as insurance, bond premiums etc. In addition the Insolvency Service's own fees (a priority expense payable from the assets in bankruptcies and compulsory liquidations) have been ignored.

It is an incorrect perception of IP fees as the £1bn stated appears to be the costs incurred on insolvent estates. The OFT's explanation of how they calculated the £1bn (footnote 11 at http://www.oft.gov.uk/shared_oft/reports/Insolvency/oft1245) mixes up fees and costs. This statement ignores the actual and real costs of insolvency appointments drawing conclusions that are unsustainable under scrutiny.

The statement that the use of the Schedule 6 scale rate for fees "ensures that there are funds available for distribution and not all realisations are swallowed up in fees and remuneration" (paragraph 117 of the consultation document) is an emotive one and inappropriate in a consultation document. The reference to excessive' fees and charging is a constant theme throughout the consultation document; even though the consultation document acknowledges that Professor Kempson did not interpret over-charging as deliberate.

Reverting to office holder fees being charged as a relatively low percentages of Schedule 6 will not ensure there are funds available for distribution. This objective seems to be the reason for of the fees proposals as Ms Willmott MP explains in her foreword: "[The consultation document] 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*"*. This is a misconceived expectation; not every insolvency has enough money to result in a distribution to creditors. There seems to be a fundamental misunderstanding that insolvent companies and individuals have money to pay all the costs incurred in administering an insolvent estate. This simply isn't the case.

If IPs work primarily on fixed fees (estimated at the outset) this will results in an element of cross-subsidisation of cases, with cases where the fixed fee is ultimately profitable, subsidising those where the fixed fee results in the IP making a loss by reference to time given. The use of fixed fees may also make it difficult for RPBs to assess fees and more difficult for creditors to successfully challenge them. If a fixed fee is agreed, would this still be measured against the time costs incurred? Will IPs still be required to maintain time records on each case if time cost charging is prohibited? How does this correlate with the IP Regulations 2005 which require accurate time records to be maintained on cases? If not, what would value be measured against?

There is a risk that insolvency practitioners will concentrate on easily realisable assets which have a more certain outcome. Cases with a contingency relating to an outcome will be difficult for an IP to recover costs and may lead to more cases being administered by the OR's office.

Finally there is a risk that creditors will become confused by a further change in the fee structure following on so swiftly from the change implemented in the 2010 Rules, the impact of which has yet to be assessed.

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?

I don't think that the proposed changes should apply at all. Creditor and member involvement is usually more active in VAs and MVLs and therefore it is unnecessary. Consumer credit IVAs involving regular, fixed monthly contributions from income, already have a percentage basis as the norm.

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?

No. The percentage should be appropriate to the nature of the assets to which it is to be applied, and this will vary considerably. By setting a prescribed scale there is a risk that it will be applied across the board to all cases whether or not the percentages applied are appropriate. Creditors will still not engage in the process. Where assets are easily realised it may in fact lead to a greater return to the Insolvency Practitioner than if a time cost basis for fees had been agreed. If the scale is insufficient the IP will have to seek to have it increased and if unsuccessful will suffer a loss.

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?

No. These rates were set almost 30 years ago, at a time when the regulatory expectations and statutory burdens were smaller. They were also largely abandoned as a default basis for remuneration on the grounds they were not operating appropriately. Corporate structures are much more complicated than they were when the Insolvency Act was first introduced in 1986. In addition in 1986 companies owned physical assets included fixed assets, stocks and debtors. Today it is unlikely that a company has any unencumbered assets; Companies operate from leased premises, stock is subject to ROT and debts factored. To apply a scale that was hardly relevant 30 years ago when a company had assets to today's companies that have very few assets is illogical. It is difficult to envisage them being appropriate today.

In many medium and large cases these days there are cross-border elements either assets in another jurisdiction, or overseas branches or stores, each requiring significant time to deal with in order to discharge the responsibilities required to overseas creditors and employees. If a percentage fee is applied to realisations, then in many cases IPs may just abandon the overseas elements as being too costly to deal with.

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

Yes. In all instances where creditors have actively agreed that this is the appropriate basis. There is a very real risk that if IPs are paid solely on a realisation basis that focus will be on easily realisable assets and little else. In many cases where investigation is required to uncover and realise assets these assets may well be abandoned in future. Creating creditors' committees to approve a time costs basis is unworkable in many cases due to the lack of creditor engagement and general apathy amongst creditors, including crown creditors.

Impact Assessment questions:

Q21: Do you agree with this estimation for familiarisation costs for the changes to the fee structure?

Paragraphs 35 and 43 of the IP fees Impact Assessment states: “We would estimate that familiarisation would take up to 1.5 hours of an IP’s time based on the assumption that this change is not complex to understand and would only need to be understood once before being applied… IPs are already required to seek the approval of creditors for the basis on which their remuneration is taken and it is anticipated that at the same time they will seek agreement to the percentage they are proposing to take. We do not therefore anticipate any additional costs associated with this”.

No I don’t agree with the estimation and think they are substantially under-estimated. 1.5 hours fails to recognise the need for IP staff to be fully familiarised with any changes and the need to revise standard internal documentation and systems. For IPs to switch to a percentage basis (but only in certain circumstances/cases) will require days – weeks, perhaps months – of organising changes to systems, procedures and templates and a greater time burden per case. The challenges for systems, procedures and staff will include assessing a fair percentage of estimated future realisations to reflect the value of work done. This is an impossible task on Day One. For example, how difficult will book debts be to realise? Will it involve scrutinising and collating records and dealing with objections and delaying tactics? Ongoing monitoring will be required to check if/when fees can no longer be fixed on a time cost basis as the draft Rules state that a time cost basis falls away when “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” (draft R17.19 (1) (b)). IPs will need to revert to creditors when a revised fee basis needs to be sought with the potential for court applications if creditors don’t approve the revision.

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?

Not applicable as I am not a secured creditor.

Q23: To what extent do you expect the new fee structure to reduce the current level of overpayment?

I do not agree that there is a ‘current level of overpayment’ or that sufficient empirical evidence has been presented in order to accurately formulate any such calculation.

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?

No. A proper assessment of the appropriate percentage should be conducted and a reasoned explanation to creditors will need to be provided. The provision of any additional, non-standard, information is likely to ultimately increase the cost of insolvency processes. Cost of this type may be the unavoidable consequence of any reform of the way in which fees are authorised and the basis upon which they are charged.

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?

No, the familiarisation costs are grossly underestimated. Whilst it is accepted that the changes themselves are “not difficult to understand”, the implications on an IP’s business will be far-reaching and it will be necessary to expend resource in establishing viable rates for the fixed fees and percentages to be sought.

The increased costs to the regulatory systems are almost impossible to assess in the absence of guidance on how value is to be assessed. Will a full review of time spent and how this compares to the fixed or percentage fees charged be required? Will site visits be required to review IPs files?

It is unclear how the estimated cost of £2,715 per case review is reached and this cost this is then subject to a multiplier which is also an estimate (anticipated fee complaints). It is impossible to confirm whether the assessment of cost is accurate, or even reasonable. It is also noted that the financial benefits are estimated as a function of the OFT’s prior estimate of alleged over-changing in administration cases and assumes that a proportion of these funds would necessarily be paid to unsecured creditors if the proposed fee arrangements were implemented. However, this assumption is not supported by any actual evidence that adopting fixed or percentage fees would act to reduce fee levels. In addition the RPB can sanction IPs by fining them but this would not result in an increased return to the unsecured creditors as this could only be achieved by a repayment of remuneration to the estate.

The assessment of costs contains so many estimates, assumptions and unquantified variables, that it is purely speculative.

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?

I have concerns about the accuracy of the impact assessment due to the number of assumptions on which it is based. Any attempt to add weight to the relative costs would only further distort the scenario.

The likely financial impact upon creditors is tiny in the context of the all the unsecured creditors and amounts owed in all the insolvency processes (the impact assessment suggests unsecured creditors will benefit by 0.1p in the £ (paragraph 52). The impact on Insolvency Practitioners due to the major revision of systems, procedures, documents and reports will be substantial.

Q27: Do consultees believe these measures will improve the market confidence?

No not at all.

Q28: Do consultees believe these measures will improve the reputation of the insolvency profession?

No, in fact they risk undermining public confidence by failing to properly manage creditor expectations. The dissatisfaction with fee levels by creditors is not a commonplace issue within the profession. The majority of insolvency professionals realise assets promptly, progress cases, investigate directors' conduct and pay dividends to creditors when possible. Reporting requirements ensure that creditors are advised in significant detail of the actions of an IP and the progression of a case. Creditors are more concerned about phoenix company's and directors effectively dumping debt and started again the following day in the same business and premises debt free. In addition the unregulated advisors surrounding the insolvency profession is confusing to creditors and they do not know or understand the difference. The Government would be better placed focusing its limited resources on regulating the unregulated.

A hard copy of this reponse is available upon request. Please do not hesitate to contact me should you wish to discuss further.

Yours faithfully

Deborah Manzoori

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IP regulation and fee consultation question response sheet
(Consultees may wish to respond just to those questions that are of relevance to them)

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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?

It is our view that there are too many RPBs, but any failings in regulation by the RPBs cannot be levelled at them all equally. We are regulated by the ICAEW, the largest of the RPBs and we believe that the level of regulation to which we are exposed is appropriate, and in no way could it be called lax. We would welcome changes in the regulatory regime, as long as it resulted in a more cost-effective process, with fewer competing interests and with equal standards placed upon each IP, regardless of their background or previous RPB. .

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

No

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

No

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?

No

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

No

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

No

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?

We believe that the regulation of RPBs should mean that this is not necessary. Whilst we can see that the Secretary of State might want to intervene in a case where the RPB was seemingly failing to deal with the issues, this would surely be a failing in the regulation of the RPB. We believe that singling out one IP for Court sanctions for failings which, within another RPB, would have been dealt with by that RPB would create unfair treatment. Without knowing the circumstances where the SofS was unable to act, we cannot say how important this power would be to the SofS. However, it is our fear that IPs would then be exposed to a dual regulatory process with double jeopardy through the back-door whereby, despite dealing with a matter with their RPB in the proper manner, the IP became subject to a second process because the SofS was unsatisfied with the original outcome.

We believe that this power is inappropriate, and could be subject to inappropriate and inconsistent application.

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?

We accept that the SofS should be able to request information about a hearing. However, these should be subject only to use in application of their powers as oversight regulator of the RPB, and not as a second or alternative judge or jury. It would be reasonable to apply the powers as currently granted by s1224 CA06, but not to grant additional powers.

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

Our concerns here come with the cost and disturbance of the changes. We can see the benefits that would (hopefully) come to the profession from a single regulator (ideally, lower cost, better consistency of application of regulation) but we would be concerned at the risk of scope creep of regulation or the imposition of significant change without consultation with the industry.

Therefore we believe that this reserve power should not be granted without the full process of a prior consultation, with a full and open consideration of both the costs and benefits, and confirmation that the powers of the new regulator would not exceed the powers of the existing RPBs with respect to regulation and sanction of IPs.

We add that, being regulated by the ICAEW, we would also wish this discussion to include the consideration of a single RPB, such as the ICAEW, separately constituted from the oversight regulator. A move such as this would be the least disruptive for most of the industry, since the ICAEW is the largest RPB.

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

We would want to see that a single regulator did not have absolute power of judge, jury and executioner, as well as standard setter, and there would have to be a cost-effective route for appeal. The right of appeal to the Court only is likely to fail to meet the cost-effective requirement.

Part 2 – Insolvency Practitioner fee regime

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

CANNOT LOCATE IMPACT ASSESSMENT WITH COST ANALYSIS REFERRED TO IN CONSULTATION DOCUMENT.

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?

We are not convinced that this will give any greater benefit to creditors. The way to improve transparency of costs is through reports to creditors. The requirements of SIP 9 already are that we have to disclose details of every unit of time spent, and fees taken. Arguably, there could be greater written detail of costs and problems incurred, but this is not a feature that this firm receives complaints about. This may simply result in increased time being spent trying to further justify actions to the RPB and regulators, when no complaints have been received from 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?

IPs already provide detail of the rates and charges, but in our experience there is little correlation between asset realisations, and complexity, in cases. For example, it is often the case that litigation has to be conducted by the IP in order to make any realisation at all. If we were not allowed to do the work we considered necessary (because of fee constraints) it is likely that realisations would fall, and particularly so in cases where there might have been director misfeasance, which was only uncovered through investigation.

We would also point out that the apparently better outcomes apparently identified by Professor Kempson where secured creditors are involved may well be a function of the assets covered. In smaller cases, security is frequently over property or plant, which are relatively easy to identify, locate and realise. The same could be said of IVAs on consumer debt, where fees are restricted by TIX. TIX are able to exert fee pressure because the creditors being dealt with (largely or entirely credit cards and banks) are easy to deal with, and the proposals for repayment are very simple. This simply does not apply in the more complex, small bankruptcy or CVL.

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?

It is difficult to see how this would make much real difference. In our experience, most often the largest creditor is HMRC, who rarely, if ever, agree to complete a proxy for a CVL creditors meeting,

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?

This process fails to take into account those cases where the secured creditor is able to influence the outcome to their benefit to the direct detriment of the unsecured creditors. A leading example of this is the use of panel firms who, even with panel rates agreed, are invariably more expensive than non-panel firms, and the extensive use of Administration, even where there is no expectation of trading or rescue, simply because it meets the requirements of purpose c of Sch B1 s3. Administration is a much more expensive process than liquidation and we question whether the Kempson report properly takes into effect the distorting effect of higher fees incurred because a Panel firm is appointed Administrator by a secured creditor in preference to the appointment of an IP from an independent firm.

It has been our experience that, where a creditors committee has been formed, they lose interest very quickly. Having had the chance to "have their say" they rapidly disengage from the process.

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

There seems little doubt that IP fees in the independent sector would fall, but this is not because excessive fees would be cut back. What would happen is that there would be much less willingness on the part of the IP to take a case on the basis that at least there is the prospect of payment, that visible assets at least guarantee a basic level of fee, even if the balance of costs need to be met by the outcome if investigation and litigation.

The Kempson report noted that in many cases IPs do not recover costs, and we have no option but to conclude a case and investigation even where there turn out to be no assets at all.

This proposal will simply result in marginal, low value cases being turned away. Frequently these are the cases that need to be investigated, because the low level of assets has arisen because there has been protracted insolvent trading, or dissipation of assets. If IPs only take those cases where there a plentiful visible assets (which may well mean far lower costs on investigation and recovery actions) then either this marginal work will fall onto the Insolvency Service (who are already grossly overstretched) or it will simply not be done, miscreants will "get away with it" and creditors will lose out.

We have cases where we have no assets to pay our fees, but with perseverance have made recoveries for unsecured creditors. We will not take these marginal cases at the outset if we have to adhere to a fixed scale which gives us no prospect of being paid for the basic work that we have to do.

We would also note that many comparative studies have shown the UK to be near the top of the world league of creditor outcome in insolvency processes, and feel that this review does not seem to take that into account.

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?

Yes

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?

Our objection to the prescribed scale as a basis is its complete lack of flexibility. There will have to be extensive consultation with all sections of the industry to arrive at a scale that gives a realistic prospect of proper payment for proper work, on all sizes of liquidations, and there would need to be revisions of this scale from time to time, if there is to be a fair reflection of inflation. If the existing scale were to be brought in without any amendment or revision, it is likely that all liquidations with immediately visible assets of less than £100k would be ignored by all IPs who have a proper regard for their duties under SIP2. The smallest liquidations will inevitably fail to be properly investigated and contingent assets, resulting from litigation, may never be recovered at all.

We would note that bankruptcy cases almost always to time costs from scale when complexities arise, such as dealing with unincorporated businesses or investigations.

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?

No. Even a basic liquidation with no significant recovery or investigation issues will cost around £10,000, and this increases if there are many unsecured creditors, directors' overdrawn DLAs, personal guarantees etc. to deal with. Note also that there are high initial costs (which the IP has to fund regardless of availability of cash in the case) such as advertisement, bonding, agents' fees, Court fees and so on.

Any statutory scale needs to reflect the fact that a significant volume of CVLs start with less than £20k of recoverable assets, and many have less than £10k of assets. At this level, it is inevitable that a proper liquidation, with a proper investigation, may result in no return to unsecured creditors. In our experience,

unsecured creditors in liquidations of this size are more interested in investigations being carried out properly and have no expectation of a dividend in any case.

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

Whilst this is an interesting suggestion, it leaves the split of work between "recovery" and "investigation" potentially open to perceived abuse. If creditors thought that the administrative part of a liquidation could be done for little cost, and then started to question the level of charges incurred on investigation or recovery of unreported or litigation assets, then there may well be the unintended consequence of many more complaints of excessive fees, where there has been no abuse.

It will introduce a further level of complexity into fees, which will require more detailed monitoring and reporting.

It is also worth noting that the option already exists to ask creditors to fund the cost of investigation, and in our experience creditors will never provide further funds for this. It is quite possible that splitting work and fees in this way will reduce the level of proper investigation, because creditors will prefer to receive a larger dividend than be the ones to fund the necessary cost of investigation. It is inevitable from this that conduct reports will suffer, and a greater burden of investigation might have to fall onto the Insolvency Service instead.

Finally, we would make the point that many cases start with uncooperative directors and debtors and if it became the norm that fees for liquidation were fixed at the start, it would lead to a situation whereby the directors would simply "shop around" for the cheapest IP to put in front of creditors, on the basis that the cheapest one would be likely to gloss over the investigation. We believe that introducing the requirement to fix fees before appointment, and before the IP is aware of the details and background of the case, would lead to a marked reduction in investigation and possibly result on lower outcomes overall for creditors.

Impact Assessment questions:

UNABLE TO LOCATE IMPACT ASSESSMENT SO CANNOT COMMENT

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?

Suprina.Bashar

From:	Natasha Stanley <NStanley@jamescowper.co.uk>
Sent:	26 March 2014 15:18
To:	Policy.Unit
Cc:	Peter Whalley
Subject:	Response to strengthening the regulatory regime and fee structure for insolvency practitioners [IWOV-JCAdmin.FID13762]
Attachments:	Response from Mr Peter Whalley of James Cowper - 26.03.2014.docx; IP regulation and fee consultation question response sheet.docx; 143476636.pdf.pdf; Response from Vince Cable 22.04.2013.pdf; 2nd Letter to Vince Cable re British Chambers of Commerce Annual Confere....pdf; 2nd response from Vince Cable dated 29.05.2013.pdf; ATT00001.txt

Dear Nick

Please find attached a response to your email sent to Mr Peter Whalley on 17 February regarding Consultation on strengthening the regulatory regime and fee structure for insolvency practitioners.

Yours sincerely

Natasha

Natasha Stanley | Personal Assistant (to Peter Whalley) James Cowper LLP Accountants & Business Advisers
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IP regulation and fee consultation

The stated objective of the consultation is to strengthen the regulatory regime by introducing clear regulatory objectives and a range of proportionate sanctions. This is notwithstanding the fact that, the Government already acknowledges that the UK insolvency regime is ranked as number seven of the world's best - ahead of France, Germany and the US. For the reasons this response endeavours to explain, what is proposed appears to us akin to 'using a sledgehammer to crack a nut'.

As the consultation document acknowledges there are just 1,677 UK insolvency practitioners of which no more than 1,355 actually take insolvency appointments[1]. The OFT report in 2010 observed that in corporate insolvencies IPs realise assets of c£5bn, distribute c£4bn to creditors and charge c£1bn in fees from insolvency procedures[2]. This is a minute proportion of economic activity in the world's sixth largest economy with a 2013 GDP of $2.4 trillion.

Using the OFT data one can draw the following conclusions.

- Asset realisations in corporate insolvencies as an activity represent something like 0.2% of UK economic activity whilst the fees charged by IPs to do this work is no more than 0.04%.
- Fees per IP for corporate work average c£740,000 per appointment taker. Other research that we have undertaken suggests that this compares to fees per partner generally for accounting firms ranked between 25 and 50 of the top 50 firms of £700,000[3]. When one takes into account that larger assignments such as Lehmann Brothers will skew the statistics, the billings of IPs generally would not seem to be markedly out of line with the billings of partners in mid tier firms generally.
- Fees equate in overall terms to c20% of realisations. Whilst, on the face of it, this ratio might seem high in the context of charges by other professionals which might be linked to asset realisations (such as corporate finance advisers, brokers, property agents etc), the role of the IP is far more extensive.

The consultation document recognises that, where there is not a dominant creditor such as a bank, creditor engagement can be low. This is not entirely surprising given that, in many cases, the most that a creditor can hope to gain is a relatively small percentage of the debt owed at the date of the insolvency. In this context, a creditor is likely to consider it more profitable to focus its activities on the securing of new business and fulfilment of existing contracts than to involvement with the conduct of an insolvency process which might only realise a matter of pence in the £1 of exposure. Indeed, this mentality would appear to pervade even within Government departments that are regularly creditors in insolvency procedures and where one might reasonably expect to see economies of scale making a greater level of engagement more practical.

The consultation draws on an inference from Professor Klempson's research that IPs, in effect, overcharge because in cases where there is no bank involvement fees are considered to be 9% higher in like-for-like cases. We have not reviewed Professor Klempson's research but we are concerned about the drawing of this inference for the following reasons.

- The perception that it is possible to compare 'like-for-like' insolvency appointments is flawed. The range of variables that can affect the amount of work that an insolvency practice needs to undertake on a case are considerable and might include not only the size and sector of the companies concerned (which might on the face of it make cases comparable) but also the following.
  - The period a company has been in existence - an older company's affairs may be more complex because of extant litigation, environmental or health and safety violations, pension issues, a longer tax history etc.
  - The quality and cooperation of management.
  - the extent of any antecedent transactions which require investigation and possible challenge.

[1] Paragraph 35
[2] Paragraph 1.5 of the market for corporate insolvency practitioners (June 2010)
[3] A sample of 24 firms ranked between 24 and 50 in the Accountancy Top 60 firms (Jan 2013) billing £385m between 550 partners

  - The saleability, or otherwise, of the assets, collectability of book debts, extent of any crown rights to set-off, the nature and extent of any third party claims to assets such as hire purchase, leasing and retention of title.
  - The extent of any trusts that might be asserted over some or all of what might otherwise be estate assets, the number and complexity of any challenges thereto, and any recourse to Court that may be required.
  - The nature of any property rights - freehold or leasehold facilities, tenancies at will etc.
  - The make-up of the number and value of creditors' claims to be agreed and the extent of any contentious claims (which may not always fall to be agreed in a case in which a bank, as secured creditor, effectively scoops the pool).

- The pressure that clearing banks in particular exert through the use of Panels may well result in reduced fees in certain cases but it is quite likely that Panel firms agree to those reductions as part of wider commercial relationships with those banks. We would argue that the effect is more analogous to firms 'loss-leading' on panel cases than to a pervasive practice of 'over-charging' on non-bank panel work.

In a letter to the writer last year Dr Cable, acknowledged that most practitioners try to provide a fairly-priced quality service when he commented as follows.

> *'I appreciate the job done by most practitioners.... both in restructuring a business to ensure its sustainability and in securing the best results for creditors while maintaining, wherever possible, jobs for employees..... However, I think it is recognised by all, including those in the profession, that there are some practitioners who do not play fairly. It is indeed a shame that in order to highlight the seemingly small proportion that bringing the market into disrepute, I have to shout loudly and in so doing, cause offence to the great majority that play fair.'*[4]

In making this comment, it seems to me Dr Cable acknowledged that there is not something fundamentally flawed with the existing regime and to paraphrase a well-known saying *'when something is not broken, one is unwise to mend it'.* Surely what Dr Cable's comments acknowledge is a requirement merely to 'weed-out' those bringing the profession into disrepute.

This, we argue, can be done without fundamental change. Consequently, whilst agree with Dr Cable's subsequent comment that *'what is needed are effective measures to stop those insolvency practitioners who are not fit and proper from acting in such a way'* [5]we consider that the proposals now under consideration not only fail to properly address that ideal but actually represent a departure from it.

Nevertheless, if one were to assume, for the sake argument, that even 5% of the 1,355 practitioners referred to above are not fit and proper, then we are probably looking at less than 70 practitioners, nationwide, whose conduct is unbecoming. On any measure, therefore, the Government's proposals to change the law appear a completely disproportionate response. More effective regulation to weed out such a group ought to be much simpler than what is proposed.

Furthermore, it strikes us a perverse that the practice of charging by reference to time at a rate - which arose out of concern in the 1970s that charging as percentage of assets realised was providing IPs with excessive returns - should now be replaced by restoring the previous approach. This, on the face of it, fails to heed the lessons of the past.

Crucial in any change of this nature, will be the percentage to be applied and, unsurprisingly, the proposals are largely silent on this - other than to suggest that the Official Receiver's scale should apply where no other basis is agreed. There must be a risk that, using a percentage approach, smaller cases in particular will become so unprofitable that IPs will simply refuse to accept them - in which circumstances such cases will fall upon the Insolvency Service - adding to the burden on the Exchequer. Conversely, in larger cases, such as Lehman Brothers, the use of percentages might just have a perverse effect, allowing firms to charge significantly more than might ever be justifiable on a time cost basis.

[4] Letter dated 22nd April 2013
[5] Dr Cable's letter dated 29 May 2013

Finally, the use of percentages may have a perverse effect on IPs motivation to press for the best possible asset realisation or resolution of antecedent transactions. Were an IP to be paid 10% of realisations for instance, the sale assets valued at £1m might result in a fee of £100,000 for comparatively little effort. To try to push the purchase price up by 10% could require considerably more input than the equivalent of £10,000 of time at a rate - disincentivising the IP from 'going the extra mile'.

Although it may well be that, as noted above, the influence of bank panels may be to restrain fees in some cases involving creditors, we believe that there are other instances of reciprocal arrangements between tertiary asset-based lenders and firms of IPs (particularly those with finance-broking arms) resulting in significant over-charging. In such instances the ABL may levy an unjustifiable termination fee whilst the IP firm appears to over-charge - the desired effect being to erode any prospect of a return to unsecured creditors - eliminating to almost zero the prospect of any challenge[6].

This practice, which has received national press coverage, appears not to have received any attention in Professor Klempson's review insofar as we are aware. We cannot see that the proposed fee changes would have any impact on potential abuse by both ABL and IP firms in these circumstances.

We are disturbed by the suggestion that RPBs should become arbiter of disputes in relation to the fees. The fact that at present not many creditors choose to challenge fees through the Courts could be a reflection of their lack of engagement but it could equally be a tacit acceptance in many instances that, although resented in some cases, the fees are actually reasonable.

Whatever the explanation, the Courts are better equipped and experienced to deal with the issue of fees than RPBs. Also the Courts are manifestly beyond any taint of conflict of interest that might be levelled at an RPB - which levies subscriptions from those whose fees it could be called on to scrutinize. Finally, maintaining recourse to the Courts eliminates any risk of disparity that might otherwise spring-up between different RPBs in relation what may, in some cases, prove to be a fairly arbitrary assessment of what fee level is acceptable.

We do have concerns, however, at the disparate manner of present regulation - through the mechanism of such a large group of RPBs. In principle, it is conceivable that regulation might be much more effective through a single body. Before legislation to pave such a course was brought forward, however, we would want to see much more clarity about the nature and identity of a single regulator; the extent of its understanding of the profession (insolvency is not a trade); and the manner in which it could be expected to exercise its powers. That said, some streamlining to reduce the number of RPBs - perhaps by revoking recognition of any licensing no more than a handful of appointment-taking practitioners - should be considered.The Government actions that we would advocate, therefore, are as follows.

- To re-consider whether it is not perfectly feasible to identify and 'weed-out' unsuitable practitioners - which is the real issue - without the necessity of a change of law.
- To streamline the number of RPBs from the present level by withdrawing recognition from any professional body that does licence more than (say) 15% of all appointment takers.
- To prevail on Government departments to take a much more direct interest in the selection of case appointment takers and their conduct of cases in which the departments are significant creditors - including acting on creditors committees where appropriate; challenging excessive fees through the Courts where appropriate and reporting unprofessional conduct to RPBs.
- To examine the inter-relationship between some ABLs and certain IP firms from whose broking arms they receive new business referrals.

A copy of the writer's exchanges with Dr Cable on this issue are attached for ease of reference.

[6] Due to an absence of funds in the case to pay a challenger and his advisers

IP regulation and fee consultation question response sheet

Name:	Peter Whalley
Organisation (if appropriate):	James Cowper LLP
Contact Details:	pwhalley@jamescowper.co.uk 020 7242 2109

Consultation Question	Response
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?	James Cowper LLP does not have any comment in relation to these questions.

Consultation Question	Response
Q9: Do you agree with the proposal to provide a reserve power for the Secretary of State to designate a single insolvency regulator?	James Cowper LLP does not agree with the proposal to reserve power to appoint a single regulator in the absence of much clearer proposals as to when that power might be exercised, what form that regulator might have; what powers it would have reserved to it; and clear guidance as to how they would be exercised.
Q10: Do you have any comments on the proposed functions and powers of a single regulator?	Not at this time.
Part 2 – Insolvency Practitioner fee regime	
Q11: Do you agree with the assessment of the costs associated with fee complaints being reviewed by RPBs?	No see main body of comments on the proposals.
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?	We are not persuaded on this point.
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?	We think that this is unlikely.
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?	No.
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?	We have grave reservations about this proposal in particular - see the main body of our comments.
Q16: What impact do you think the proposed changes to the fee structure will have on IP fees and returns to unsecured creditors?	This is, at best, uncertain and would depend on percentages to be applied but it could result in IPs refusing to handle some smaller cases on the grounds that they could prove unprofitable.

Consultation Question	Response
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?	As we do not agree with the proposed changes we think this question is not applicable.
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?	We have reservations about the entire premise for the reasons set out in our main body.
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?	See above.
Q20: Do you think there are further circumstances in which time and rate should be able to be charged?	See above.
Impact Assessment questions:	
Q21: Do you agree with this estimation for familiarisation costs for the changes to the fee structure?	James Cowper LLP does not have any comment to make on this section save that we do not accept the presumption of a culture of overcharging contained in Q23 and we doubt whether these proposals will have any material beneficial impact on perception of the profession as posited in Q28.
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?	

Consultation Question	Response
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?	

Client: R3
Source: City AM (Main)
Date: 15 March 2013
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OSBORNE TOLD TO TAKE ON ZOMBIES

EXCLUSIVE

RY TIM W

BY TIM WALLACE

ENDING the zombie business crisis plaguing the economy would be a cheap and easy way to boost growth, the UK's top turnaround group argued last night, urging George Osborne to push banks to take the plunge on bad debts and write off the thousands of firms that have no hope of recovery.

Around 50,000 firms are thought to have no hope of repaying their loans, and are seen as a drag on growth, tying up bank and labour resources unproductively. But they are hard to distinguish from 100,000 others with good growth potential but that are struggling in the weak economy.

The Institute for Turnaround (IfT) says big banks are best placed to judge which firms have a future and should embark on an intensive review of at-risk companies, pulling loans from those that cannot recover and offering extra support to those who can.

IfT boss Christine Elliott has been in talks with Treasury and business department officials over setting up a new zombie business taskforce to drive through the plan, starting with state-backed banks RBS and Lloyds.

She says that though it would take up few Treasury resources it could solve much of the problem in a year.

"The taskforce could begin by adjudicating in situations where struggling firms have been in business support with their banks for over two years – that amounts to hundreds of firms in the state-backed banks alone," she told *City A.M.* "Those without a future could be humanely run down; those that are viable in the long term could be supported and turned around."

"This is about supporting firms so they can attract investment, increase pay, create sustainable jobs – currently we are wasting potential, and it is holding back the UK's productivity."

Current policies focus on increasing available credit and cutting interest rates. But the IfT believes this support cannot get through to SMEs when banks' resources are tied up with tens of thousands of firms with no future.

As the government is short of cash, the zombie firm task force could appeal to the chancellor in the Budget.

Vince Cable yesterday told the British Chambers of Commerce he recognised the need for sensitivity: "The worst thing that could happen is if a large number of quite good companies that got into financial difficulties were hacked apart by insolvency practitioners rather than being taken over."

RBS rejected the idea it should review struggling businesses rapidly.

"If someone's running a firm and they're paying their bills, paying their interest charges, and employing people then we can't just run in and say we don't think you're very good," said corporate banking boss Chris Sullivan.

▶▶ ALLISTER HEATH: Page 2

Client: R3
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The chancellor should shut down struggling companies kept alive by low interest rates – known as zombie firms – a prominent business group says

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Mr Peter Whalley
Head of Business Restructuring and Insolvency
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22 April 2013

Dear Mr Whalley

Thank you for your letter of 15 March and for setting in context the work of insolvency practitioners. I am sorry that you took issue with some of my comments.

It may help to reassure if I tell you that I fully understand the delicate balance that an insolvency practitioner must find when called in to help an ailing company – looking at proposals for the business and its employees and creditors. I appreciate the job done by most practitioners in this regard, both in restructuring a business to ensure its sustainability and in securing the best results for creditors while maintaining, wherever possible, jobs for employees. It does not come as a surprise to me that the strength of our insolvency regime means the UK is ranked within the World Bank's top 10 countries to resolve insolvency; a ranking of which we should all be proud.

However, I think it is recognised by all, including those in the profession, that there are some practitioners who do not play fairly. It is indeed a shame that in order to highlight the seemingly small proportion that are bringing the market into disrepute, I have to shout loudly and in so doing, cause offence to the great majority who do play fair. I do think it is time to take action. That is why we are looking to introduce reforms to the regulatory regime by introducing a single gateway for complaints against insolvency practitioners. It is why Jo Swinson and I asked Professor Elaine Kempson to assess whether changes need to be made to provide confidence to creditors that IP fees are fair and commensurate with work done for the benefit of creditors. Her report is due by the Summer; I am sure that we will all look forward to reading Professor Kempson's report and I will certainly be looking closely at her recommendations going forward. We will also be commissioning a review on pre-packs once the new SIP measures are in place and the monitoring currently underway has been completed.

It is in all our interests that the IP professions, which has important powers and plays a key role in our economy, is held in high regard.

VINCE CABLE

Secretary of State for Business, Innovation and Skills

jamescowper

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APW

Rt Hon Dr V Cable MP
Secretary of State
Department for Business Innovation & Skills
1 Victoria Street
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25 April 2013

Dear Dr Cable,

I am, of course, grateful to you for taking the time to reply to my letter dated 15 March with yours dated 22nd April 2013.

Nevertheless, I am left perplexed by an apparent inconsistency - between your acknowledgment of the strength of the UK's insolvency regime, on the one hand, and your contentious remarks from the podium on the other.

Your implication that it is quite in order to condemn practitioners indiscriminately - in order to highlight a few whose activities bring it into disrepute - is difficult to comprehend. Indeed, if that *is* the issue I am not persuaded that 'shouting loudly' is what's required at all.

That, notwithstanding a regime of regulation, there are miscreants to be weeded out is clearly a point of consensus. With due respect to Ms Swinson and Professor Kempson, however, the solution to that is not going to come from a single gateway for complaints or more regulation of pre-packs.

Let's not skirt around the issue. What is required is more focussed and effective measures to stop those who are not fit and proper from practising - both within the regulated profession and around its fringes. That, I would welcome.

Yours sincerely

Peter Whalley

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Mr Peter Whalley
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29 May 2013

Dear Mr Whalley

Thank you for your letter of 25 April. I hope, too, that you have had the opportunity to read my recent piece in Recovery News (May 2013 edition) which clearly sets out my view on the insolvency industry and the important role fulfilled by insolvency practitioners.

I am very pleased to note that we are in agreement on the main issue, that what is needed are effective measures to stop those insolvency practitioners who are not fit and proper from acting in such a way. I do believe that the measures currently underway (including the review into fees, the review on pre-packs and the single complaints gateway) will have a positive impact in this industry. However, I also agree with you that more can be done, and this is an area I am keeping under close review.

If you have ideas of your own for how controls can be improved, please feel free to contact my officials at the Insolvency Service. The person to contact in the first instance is Mr Dean Beale (dean.beale@insolvency.gsi.gov.uk) who heads the Insolvency Practitioner Regulation team.

VINCE CABLE

Secretary of State for Business, Innovation and Skills

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26 March 2014

The Insolvency Service
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Dear Sir/Madam,

RESPONSE OF THE INSTITUTE OF CREDIT MANAGEMENT TO: THE INSOLVENCY SERVICE: STRENGTHENING THE REGULATORY REGIME AND FEE STRUCTURE FOR INSOLVENCY PRACTITIONERS

The Institute of Credit Management is the largest professional credit management organisation in Europe. Its members hold important, credit-related appointments throughout industry and commerce, and we feel it appropriate to comment on this consultation.

Our responses to the questions we have chosen to answer from the consultation are as follows:

Question 1:	Yes. No.
Question 3:	No.
Question 4:	The majority of our responding members felt this was a good proposal that would motivate and focus the minds of RPBs.
Question 5:	No.
Question 6:	Yes.
Question 7:	The majority of responding members felt this was a positive proposal, although a minority suggested that the procedure could undermine the power of the RPB.
Question 8:	No.
Question 9:	Yes, as a reserve power.
Question 10:	No.
Question 12:	Yes.
Question 13:	Yes.
Question 14:	No.
Question 15:	We recognise this proposal to be contentious and acknowledge that, in some cases, the result may be a disproportionate level of remuneration (either negative or positive depending on the circumstances) for the IP. We believe the provision of an estimate of the likely costs at the start of the insolvency procedure would be of greater benefit than simply restricting the use of time and rate as a basis.
Question 16:	See answer to question 15.
Question 17:	Yes.
Question 18:	Yes, subject to our response to question 15 above.

Question 19: Insolvency Practitioners are better able to assess the viability of the current statutory scale and such a scale should reflect their practical experience and knowledge, and be based on analysis of a large sample of cases.

Question 20: Short term appointments in cases where there are few assets, investigation and D report work, and legal matters.

Question 27: Yes.

Question 28: Yes.

If we can help in any further way please do not hesitate to contact us.

Yours faithfully

Glen Bullivant FICM
Chair of Technical Committee

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RHA

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26 March 2014

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Dear Mr. Roberts

Response of the Road Haulage Association to the Insolvency Service consultation on Strengthening the Regulatory Regime and Fee Structure for Insolvency Practitioners

I am writing in response to the consultation on the proposal to change the regulatory structure for insolvency practitioners (IPs) in relation to fees and other matters.

The Road Haulage Association (RHA) is the trade and employers organisation for the hire-and-reward sector of the road haulage industry. The RHA represents some 7,000 companies throughout the UK, with around 100,000 HGVs, with fleet size and driver numbers varying from one through to thousands. Generally, RHA members are entrepreneurs, including many family-owned businesses as well as some plcs.

RHA members sometimes encounter IPs when their own businesses become insolvent, however here I am writing primarily on behalf of members who engage with IPs as creditors or competitors of insolvent traders.

Before turning to the subject of IP regulation and fees I would like to say that RHA members have expressed particular concern about pre-pack administrations. As creditors our members continue to complain that they are not given sufficient information by IPs to judge if a pre-pack sale is the best available deal that would allow for recovery of the maximum proportion of monies owed. As competitors RHA members abhor pre-pack sales that allow the failed management team of a rival haulier to be resurrected debt free. This is of particular concern because the road transport sector tends to have an oversupply of haulage operators trading on low margins. This means that otherwise sound businesses are vulnerable to undercutting and sharp practice by rogues who run at below cost levels, become insolvent, dump debt, then resume trading after a pre-pack.

While the pre-pack system as a whole is distrusted by RHA members, here we will make some general comments with regard to the specific issue of fees and regulation of IPs raised in the consultation paper.

We note that the 2010 Office of Fair Trading report found that for over a third of insolvency cases where unsecured creditors received a payout, IP fees were 9% higher than like-for-like cases where secured creditors control IP fees. We see it is said that in many cases unsecured creditors provide little effective oversight of IP fees, but where large organisations such as banks are the main creditor then oversight of IPs and their fees tends to be far more effective.

Although some RHA members are large companies with significant resources, many are smaller enterprises without the time, resources or expertise to oversee the conduct and fees of IPs. So in the view of the RHA this current review should seek to find a regulatory framework that will, much more than is currently the case, discourage IPs from taking advantage of their greater knowledge to the detriment of smaller creditor or competitor businesses, or from simply acting in a lax fashion.

In our view the current arrangements with the Insolvency Service as the oversight regulator, sitting above several professional regulators, with the courts having a role, are too confusing for many unsecured creditors. The picture regarding where to complain is far from clear. These several strands of regulatory oversight for what is in effect the same type of activity by IPs, does not serve smaller creditors well. In our views rank fee overcharging and other bad practices are likely to be more difficult to curb if different professional regulators have different approaches to the same factual situations and place emphasis on different things.

So while the RHA supports the regulatory objectives set out in the consultation of encouraging IPs to act with integrity, fairness and transparency, we are not convinced that tightening up the existing regime, with several professional regulators still in the picture, will have the effect of improving oversight of IPs, for smaller creditors at least.

It would seem to us that having one regulator of all IPs would be the most effective way to ensure, for example, that fees charged by accountant and solicitor IPs were broadly in line. A single regulator would also be in a better position to collect data on the insolvency industry and to identify trends in good of bad practice.

Therefore while we understand that at a time of continuing austerity the government may prefer the more incremental approach suggested in the consultation paper, the RHA would rather see root and branch change to the system involving the designation or creation of a single regulator for IPs. Such a move would promote transparency and could improve the credibility of the regulatory system, which are both aims of the current consultation.

We hope that any major review of the insolvency system would include a review of pre-packs.

I trust you will take account of the views expressed in this letter and I look forward to being kept informed about the outcome of the current consultation process.

Yours sincerely

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Strengthening the regulatory regime and fee structure for insolvency practitioners

The Law Society response

March 2014

The Law Society welcomes the opportunity to comment upon the proposals about the regulatory regime and fee structure for Insolvency Practitioners (IPs). A relatively small number of solicitors practise as IPs and, we believe, provide a valuable service for creditors. They do so under arrangements whereby the Law Society acts as a Recognised Professional Body (RPB). The Society has delegated this aspect of its work to the Solicitors Regulation Authority – its ring-fenced regulatory arm.

The Society starts from the premise that:

- It is right that there should be competition among Insolvency Practitioners and that different professionals can bring different qualities to the market, which increases choice;
- The regulatory structure should be wide enough to accommodate the different regulatory regimes governing different professions, provided, of course, that basic standards of competence and probity are maintained.

We are concerned that the Government's proposals will be too prescriptive and will create additional burden for RPBs and for individual Insolvency Practitioners.

In addition, we are concerned about proposals which may be too prescriptive in respect of fees. It needs to be recognised that the outcome of insolvency proceedings can be uncertain, that there is a certain basic amount of work to be done individual cases and that this may, on occasion appear disproportionate to the amount recovered. In this case, the concept of "value for money" will be very difficult to achieve and may mean that a number of practitioners may feel that this market is no longer relevant for them. This would reduce choice and would not be in the public interest.

Part 1 – Regulation of Insolvency Practitioners

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

We agree that the bulk of the regulatory objectives are suitable for IPs, subject to two caveats. First, we think that the subsections to objective 3 are not obviously linked to the over-arching objective and may need to be redrafted.

More seriously, we are concerned about the final objective – to ensure that fees achieve value for money. This appears to us to be a very nebulous concept in the area of professional services and one that is likely to cause considerable uncertainty. Value is an inherently subjective criteria. Different creditors may regard very different matters as giving "value". Some may regard value as being the relationship between the amounts recovered and the fees charged; others may regard the amount of fees recovered as being unimportant compared to the distress and pressure put upon the debtor; others may want a "Rolls Royce" service with frequent expensive reports. Moreover, in respect of the first, the amounts recoverable are likely to be unforeseeable and may well not be linked to the amount of time spent on the work. This is not, so far as we are aware, a concept that is recognised generally in the field of professional (or any other) services and, if it is to be adopted here, there will need to be substantial guidance about what is involved. Clearly there needs to be transparency over fees and mechanisms for ensuring that there is not over-charging but the concept of "value for money" goes too far.

In respect of the RPBs, we have considerable concerns that the rules proposed may be too prescriptive and not fit well with the regime adopted by the SRA. As an approved regulator under the Legal Services Act 2007 (LSA), we are already subject to eight regulatory objectives. While some of the regulatory objectives suggested in the consultation document are compatible with the regulatory objectives in the LSA, such as objective 1, others may create more difficulties particularly as the objectives are detailed and prescriptive unlike those in the LSA. The SRA, as our frontline regulator has structured its regulatory system to meet the regulatory objectives set out under the LSA. Updating its regulatory structure to take account of new regulatory objectives will take time and will be costly.

It is likely that the Regulatory Objectives under the LSA will cover the bulk of those envisaged in the consultation. Any additional ones should only be interpolated if they are essential to the nature of insolvency work and differ or are in addition to those relevant to the individual professional. We also believe that the Insolvency Service should be flexible about the way in which the obligations are implemented by the RPBs. Given that it is in the public interest for different professionals to practise in this field, it makes sense for their regulatory obligations to be managed in a way which is consistent throughout. Therefore, an outcomes focussed approach should apply to the work of solicitor IPs and, provided that the outcomes meet the relevant objectives, the SRA should be able have the flexibility to set out the regulatory regime in a way which is consistent with its regime for other practitioners. We are concerned that, as currently set out, the objectives are unnecessarily prescriptive and in some cases inappropriate. For instance, objective 4 relates to the maximisation of returns to creditors. This may be an objective for an insolvency practitioner but is not the role for a regulator.

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

The Law Society recognises that the current regulatory framework leaves the oversight regulator with limited regulatory tools. However, we (and other RBPs) already have an oversight regulator in the form of the Legal Services Board (LSB). In the past, there have been occasions where the requirements of the LSB and the Insolvency Service have conflicted. While the difficulties were successfully resolved, we are concerned that with a wider range of powers, a regulatory sanction may have been applied to the Law Society for our failure to comply when, in fact, the SRA were restricted by the requirements of the LSB in what we were able to do. Before we can support any changes to the powers of the Secretary of State we would need to be assured that there was a framework in place to resolve conflicting demands of oversight regulators.

Given our concerns regarding the nature and drafting of the regulatory objectives we cannot support the extension of the Secretary of State’s powers to revoke recognition because of failure to comply with the objectives. We would also have particular concerns about the ability to impose a financial penalty, as there is limited information about the quantum of such a penalty and the basis it would be calculated upon.

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

See comments under question 2

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

See comments under question 2

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

See comments under question 2

6) Do you agree with the proposed arrangements for RPBs making representations?

See comments under question 2

7) 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?

We are concerned that by allowing the Insolvency Service to both oversee RPBs and directly regulate IPs it will provide a form of dual regulation for IPs, with IPs that have been exonerated by their regulator of any misconduct, finding that they are then re-investigated by the Insolvency Service. The Insolvency Service's role is as an oversight regulator and, as such, it should not be able to interfere in individual cases. We are unaware of evidence that would justify such a power.

8) 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?

See comments under question 7

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

Given, the implications of such a move, we do not believe this is a power that the Secretary of State should hold in "reserve". If the Secretary of State believes that a single regulator is the most effective option, then this should be fully debated and consulted upon.

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

Given the paucity of information about this option, we are unable to make any comment.

Part 2 – Insolvency Practitioner fee regime

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

The impact assessment concentrates on the potential costs of regulation on the Insolvency Service rather than the costs to the RPBs. The SRA's current remit does not include considering whether fees are value for money. We believe the costs of undertaking such a new role will be considerable and will include creating an additional regulatory framework, training staff and providing advice and guidance to the profession. These costs will be passed on to the profession and ultimately to creditors. There will also be additional costs for the profession in complying with a new regulatory regime.

We are particularly concerned about the costs of handling complaints about fees as opposed to those that relate to an element of poor service. The Law Society has experience of running a scheme that allowed applicants who considered that a bill was too high to have the quantum assessed. Our experience was that, for some clients, the use of the bill checking procedure became standard practice rather than a tool to challenge overly high bills. The cost of running such a process could be extensive and we are concerned that this has not been factored into the cost assessment.

12) 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?

The focus on fees ignores a wider problem that the legislative position of unsecured creditors leaves them in an inherently weaker position. We recognise that larger secured creditors, particularly repeat users are able to secure lower rates. However, this is not unique to this market and we do not think that these proposals, in isolation, will do much to improve the position of unsecured creditors or increase the returns they see in an insolvency process.

We have indicated our concerns about the concept of "value for money" in our answer to question 1 and we do not believe that this is a practical requirement for practitioners to comply with. Clearly there need to be controls to ensure that there is transparency and honesty in charging. However, it will place an entirely inappropriate burden on practitioners who may undertake reasonable work in good faith only for it to be questioned after the event. We are unaware of any business that has its fees checked on this basis after the event.

If there is evidence to suggest that greater compliance monitoring, oversight and complaint handling of fees is necessary, then we believe that other concepts would create less uncertainty. For example, requirements to keep creditors informed of progress and costs, monitoring to avoid over-charging etc could be achieved by other means. There is a real danger that the proposal will lead to regulators micro-managing the fees charged by IPs and creating a prescriptive regime. This will limit competition in the market as those IPs who do not rely on the work as their main source of income may leave the market.

13) 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?

Solicitors are already required to provide 'best possible information, both at the time of engagement and when appropriate as their matter progresses, about the likely overall cost of their matter'. We believe that a similar principle should apply to all IPs. We do not think that creating further prescriptive rules about the type of information that should be provided is helpful and indeed, research has indicated that prescriptive rules on the information that needs to be provided has led to lengthy reports that are not always helpful to creditors.

14) 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?

As noted above, we do not believe that creating prescriptive rules on how fees are charged is the right approach.

15) 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?

See comments above

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

We do not have any evidence to provide on this question.

17) 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?

See comments under question 14

18) 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?

See comments under question 14

19) 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?

We do not have any evidence to provide on this question.

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

See comments under question 14

Impact Assessment questions:

21) Do you agree with this estimation for familiarisation costs for the changes to the fee structure?

There is limited assessment on the costs to RPBs or IPs in implementing the proposed changes. As noted above, we believe that the cost could be significant.

22) 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?

No comment

23) To what extent do you expect the new fee structure to reduce the current level of overpayment?

No comment

24) 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?

N/A

25) 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?

We are surprised that the assessment provides no evidence as to how these changes might affect the fees charged. Given the reasoning behind making these changes is that they will lower the charges, we would expect some evidence of this to be provided.

26) 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?

No comment

27) Do consultees believe these measures will improve the market confidence?

No, as these changes do not tackle the wider issues regarding the position of unsecured creditors.

28) Do consultees believe these measures will improve the reputation of the insolvency profession?

See comments under question 27

“Strengthening the regulatory regime and fee structure for insolvency practitioners” Consultation Response

I am a licensed insolvency practitioner (“IP”) of nearly thirty years’ standing and I set out below my deep concerns at the document released in February 2014, which I believe to be poorly informed and misguided in a number of respects.

Title

The title of the document itself is, unfortunately, misleading. It suggests that both the regulatory regime *and* the fee structure are being strengthened, whereas the regulatory regime is the only thing for which strengthening measures are being proposed (and these, of course, may not be agreed upon by IPs).

There is nothing in the document which even attempts to “strengthen” fee structures, merely to change them. The use of the word “strengthen” in this context suggests a decision has already been made, without consultation, that the proposed changes will improve fee structures.

The remainder of my comments refer to paragraph numbers or question numbers within the document.

Para 19:

There is a wholly mistaken definition of “value” here. The assumption is that “value” relates solely to the amount realised and has nothing to do with work done that does not involve realising assets or the *quality* of work done overall. Moreover, some assets are easy and quick to realise and others are very difficult; a mere measure of quantum is irrelevant and absurd. See further comments on this below.

It is quite wrong to suggest that the IP should never take all the assets realised as fees. Often the work done is worth more than the value of the assets (because IPs are conscientious and do the job properly) and I regularly fail to recover the full amount I should be paid for a case. If IPs cannot take all the assets (where appropriate) and have to distribute something to creditors, however miniscule, it will simply make smaller cases uneconomic and impossible to undertake.

This discriminates against smaller firms of IPs (who generally do smaller cases) and reduces competition.

Para 46:

It is offensive to imply that solicitors and auditors are better regulated than IPs. There is no evidence contained in the document to support this assertion and I have not seen any elsewhere. I have often dealt with solicitors who have become insolvent and several of these have “borrowed” money from their client accounts. There is little evidence that their regulatory regime is something to aspire to.

Para 49:

Creditors do know how to complain. Every IP is obliged to give details of their licensing body and their own internal complaints procedure.

Para 50:

What is “value for money” in this context? Who will define it? Every pound an IP charges *could* be seen as a pound less for the creditors. Paragraphs 97 to 102 are unhelpful in addressing this question.

Para 79:

It is simply not correct to suggest that the RPBs are unable to discipline their own IPs. This paragraph talks about “addressing a perception”; if this perception exists, it is false and the RPBs should perhaps (if it exists) work harder to correct it. It is not appropriate to bring in the Secretary of State.

If an IP has done something really serious then presumably a prosecution might follow anyway.

Question 7:

This is wholly inappropriate and simply undermines and weakens the existing RPB regime.

Para 83:

This smacks of red tape and the unnecessary involvement of the State.

Para 88:

This is misguided. What about situations where secured creditors control fees but are paid in full? After that, they have no interest in controlling fees effectively. These are the cases where unsecured creditors are *most* likely to receive a payout – cases where the secured creditor has ceased to care. Hence the inference drawn in this paragraph is illogical.

Reference is made to this very point in para 113.

Para 90:

There can be no “competition for jobs” in the way suggested here; the creditors do not choose an IP except in creditors’ voluntary liquidations and even then, if the case is small it is not worth a “fresh” IP taking it over. This is simply a fact of life; assets are often worth very little, or there are no assets at all.

Real competition does, however, take place in the “non-bank” market; it centres around quality of service, reputation, transparency and to some extent chargeout rates. All these factors are ignored here.

Lack of oversight by creditors does not result in higher costs; in fact, the reverse is true and costs are lower if queries and reporting are kept to a minimum. However, as an IP I obviously welcome creditor involvement.

Para 92:

I welcome the comments at the end of this paragraph.

The references to inefficiencies are confused; in my own experience (which is considerable), inefficiencies are greater in larger firms where the work is given out and controlled by banks.

Para 93:

A bald statement is made about “clear evidence of harm”. This is unsubstantiated and is a ridiculous thing to say. It is either a very careless and ill-informed remark or simply a falsehood inserted to support the argument of the document.

Para 95:

It is often impossible to estimate the likely fees that will be charged in a case.

An unrealistic cap on fees will mean a cap on the amount of work done, even though the work done will obviously exceed the cap.

With regard to charging fees on a percentage basis, if realisations are tiny, will creditors accept a fee of 100% of realisations? Realistically, they should, but psychologically this may be difficult.

It is very important to note that creditors do *not* simply want IPs to realise assets; they recognise that this is only part of the IP’s job. Often, creditors are far more interested in CDDA work and resulting disqualifications and prosecutions.

Employees are, of course, most interested in the work IPs do in dealing with the RPS.

IPs have other statutory obligations relating to, for instance, pension schemes (including, recently, auto enrolment problems), environmental protection and money laundering issues.

The Government itself obviously wants IPs to do CDDA as well as general statutory work.

Question 11:

This question does not appear to follow on from the paragraphs that precede it, which seem to suggest that the RPBs should do something different to this.

Paragraph 101:

This seems sensible and feasible, as long as the time basis model is preserved. Otherwise it would be meaningless.

Question 12:

I would answer a cautious yes to this question. The RPBs should be able to review an IP’s handling of a case and the fee charged where appropriate, but it is impossible to create a rigid definition of value for money.

Para 105:

The reference to competitive quotes is misguided. It is not the unsecured creditors that obtain quotes, but the directors of the company concerned. Quotes are, of course, very difficult to give.

There might be scope for publishing a range of “acceptable” chargeout rates which creditors and directors could access online.

Question 13:

No.

Para 106:

Agreed and this point is well made.

Para 110:

The time basis is widely used because it is *fair*, to both creditors and IPs. Other bases are generally not, although of course they should be available for use if appropriate.

Para 111:

I believe this suggestion of the best “presumed method” to be totally misguided for the reasons set out elsewhere in my response.

Para 113:

See my comments above regarding paragraph 88.

Para 116:

The statutory scale is insufficient. For example, if the assets are only £5,000, the IP would only get £1,000 in fees. He would then (having suffered a large write off) have to distribute the remaining money to creditors for an even more derisory fee.

Para 117:

This is nonsense. Sometimes it is necessary for an IP to take all the (tiny) realisations as fees. The statutory scale is grossly insufficient and is clearly not suitable for percentage comparison purposes.

This basis does not, as is stated, give creditors tighter control over fees; it removes real control altogether, swapping it for an arbitrary scale.

Question 15:

I disagree with this; see my comments above.

Question 16:

Returns to creditors will reduce.

IPs will have to ask for a large fixed fee or a large percentage of realisations, so they are likely, if anything, to “overshoot” to protect themselves and charge *more*.

Question 17:

The changes should not apply to any type of case.

IVAs are already often charged on a percentage basis, due to pressure from unqualified staff at “voting houses” acting for banks. This has made most IVAs loss leaders as far as the small IP is concerned. An IP's work cannot be made up *entirely* of loss leaders. The only way a large firm makes IVAs economic is to dumb down the work done using lower paid junior staff in IVA "factories." This is reprehensible enough in IVAs already and cannot be desirable in *any* insolvency process.

Question 18:

Yes, but I disagree with the percentage approach in principle.

Question 19:

No, it is not.

I am reluctant to be drawn on the question of what a sensible scale should look like, as I believe the whole approach to be wrong. However, such a scale would have to provide for a *de minimis* level of assets below which the percentage taken as fees should be 100%. Otherwise the problem identified above in relation to paragraph 116 would apply. I would suggest this level should be at least £5,000.

There is also a bigger question of **the fee to be charged for paying a dividend to creditors**; if this is calculated as a percentage, whether by reference to a statutory scale or not, this fails to recognise the different amounts of work involved in paying (say) 5 creditors or paying 500. Agreeing 500 claims involves a huge amount of work. It is clearly nonsense to suggest that the fee should only be based on the total *amount* of money distributed.

Para 128:

The first sentence here offers a partial recognition of what IPs do, for which I am grateful. The rest of the paragraph identifies some real problems with defining categories of work and lends more weight to the argument that a time basis should be available as a means of charging fees on all aspects of a case.

Closing remarks:

I have a little anecdote relating to this issue. In 2012 I was appointed Joint Administrator over a large case. At the creditors' meeting (which 60 or so creditors attended, so they were definitely engaged with the process) the Administrators suggested that certain parts of the work should be charged on a percentage basis and others on a time basis.

The creditors rejected this idea, after careful consideration. They preferred that the Administrators charged on a time basis for all activities on the case, as it was "fair", "transparent" and "reflected the work actually done."

I should add that these were real creditors, not professional representatives (only one creditor was accompanied by an IP and that creditor still attended the meeting in person and spoke eloquently on his own behalf).

There is also the issue of "statement of affairs" fees, neglected in the consultation document. These are pre liquidation fees, generally charged as a fixed amount, agreed by the directors and then (if not paid by that point) by the creditors. Presumably this arrangement would continue? Often this is the only fee that an IP receives for a small liquidation.

It should be recognised that IPs suffer large write offs on many of their cases, so we do *not* actually recover costs on a time basis; it is just a model to get us reasonably close to what we should actually recover. (See my comments above regarding paragraph 19). We do a lot of work completely unpaid and are often called the "social workers" of the financial world.

We need to keep a flexible approach to fees and have every option available to us to enable us to attract and employ bright and humane people and to perform the valuable work that we do.

Steve.Spong

Subject: FW: Insolvency Practioner regulation and fees consultation

Subject: Insolvency Practioner regulation and fees consultation

I support some of the regulatory proposals; but am concerned that others don't address a number of difficulties.

As regards the proposals for fixed or scale fees, I have concerns that:

* fees are already under competitive constraints and already IPs frequently fail to recover all their costs
* the Insolvency Service does not recover their costs by such methods
* the underlying reports on which the consultation is based don't justify the approach being proposed
* the levels of fee complaints are very low
* scale rates don't relate to the work involved
* more red tape being created, not less
* there are more fundamental causes of low returns to unsecured creditors and the proposed changes to fees won't increase returns.

Overall I am concerned that the current proposals may have various unintended consequences and could damage the effectiveness of the UK's insolvency industry and its current skilled and diverse profession.

There may well be scope to improve the existing regime other ways which have not been explored. I think that the Insolvency Service could work with the professional bodies to consider this further, using up-to-date and verified data, with an extended timeframe if necessary.

This is a personal view from someone who has been employed in this area.

Jim Conibear

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www.bis.gov.uk/insolvency

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Philmore & Co
Business Rescue, Recovery & Insolvency

Jenny Willott MP
The Insolvency Service

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Date: 25 March 2014

Dear Minister,

BIS consultation: Strengthening the regulatory regime and fee structure for insolvency practitioners (March 2014)

I write in response to your consultation on Insolvency Practitioners (IP) fees. Whilst I support two out of the three government proposals to "improve returns to unsecured creditors; and improve the reputation of and confidence in the insolvency profession", I have very serious concerns that your third proposal (simplification of the fee structure) will cause significant 'harm' to creditors, small insolvency firms and the UK's globally renowned insolvency regime. I share your priorities to have a competitive, fair, transparent, world-renowned insolvency profession, which is currently 7th best in the world in terms of the amount returned to creditors and speed of the process, according to the World Bank. However I am worried that the proposal to simplify the fee structure through restricting the use of time-cost (where there is no secured creditor or no creditor committee) will severely undermine these common goals.

Before summarising my concerns, please note that I have significant concerns that the fees consultation is based on perception rather than fact and evidence. IPs' fees comprised just 2% of all complaints about IPs in in 2013 (down from 7% in 2010). To put this in perspective, in 2013, there were approximately 116,000 new insolvency cases, and there were just 13 complaints to the government about insolvency fees (0.01%). Even accounting for the fact that many of these 116,000 cases would have been handled by the Official Receivers – about whose fees there have also been complaints – the proportion of cases that are attracting official complaints about fees is negligible.

I support a number of the fee proposals set out in previous government reports. However the proposal to simplify the fee structure through restricting the use of time-cost was not recommended in any of those reports. Furthermore, I am unaware that the structure is used anywhere else in the world and so I am concerned that it has not been 'tried and tested'. I therefore ask that the government drops its proposals to restrict the use of time-cost as a method to charge fees, and ask that it reviews alternative recommendations as proposed by previous government reports that will address its goal of reforming IP fees and improving unsecured creditor engagement.

Speaking from our own Practice's point of view, in just over 3 years of trading I can only find 6 cases out of over 150 where time costs have been recovered in full and that was at an average hourly charge out rate of less than £180 per hour!

We are not talking about supermarket shopping. We are talking about an already heavily regulated profession, which on the whole works under difficult conditions trying to placate many competing interests. If the Insolvency Service believes that fixed fees are a panacea for creditors then I would contend that they are badly misguided, whether by professors or not.

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Rightly or wrongly I can foresee more appointments going the Official Receiver's way as IPs turn work down because of the increasing regulatory burden and diminishing returns. Where appointments are taken on a fixed fee, the profession will still be expected to carry out tasks such as free bankruptcy advice to insolvent individuals, deal with employee claims on behalf of the Insolvency Service and complete returns for HM Revenue & Customs.

If fixed fees are the way to go then perhaps we should go back to being recompensed for each employee claim processed on behalf of the RPO? In fact, perhaps a tariff of charges for furnishing Government departments with all required forms and returns should be introduced?

As for disqualification proceedings against directors, IPs on fixed fees will still be expected to provide detailed background information to BIS at considerable time and expense.

On the latter, I notice that in a recent article in the Insolvency News that the Insolvency Service stands accused of focusing on 'low hanging fruit' as director's disqualifications between 2012 and 2013 were up 52% on the previous year. It turns out that this statistic has improved predominantly due to tax debts owed to HMRC being the principle reason. Where directors have hidden assets away beyond creditors reach and are not subject to disqualification proceedings as it is 'not in the public interest', the creditors involved must be thinking 'well done'.

My other main concerns about restricting the use of time-cost and relying solely on fixed fee and percentage of realisations include:

- It does nothing to address the problem of a lack of engagement by unsecured creditors.
- It could lead to outsourcing of specific insolvency procedures to unregulated individuals. This would shift the cost rather than reduce it.
- It is impossible for an Insolvency Practitioner to 'guestimate' what might be involved in a case from the outset. Relying on an up-front fixed fee without an option to review the fee later would see IPs and creditors routinely short-changed.
- Because IPs cannot resign from a case, once they have reached their fixed fee level, they will almost certainly not optimise recoveries as there is no incentive to do so. This would lead to lower returns for creditors.
- Many cases would not be taken on by IPs at all because the fee could be too small to be economical, significantly increasing the workload falling on Official Receivers' office throughout the country.
- Creditors will lose out through the use of percentage of realisations where large returns might not reflect the amount of time an IP is required to dedicate to a case. IPs will lose out through the use of percentage of realisations where there are smaller cases with smaller returns which often involve greater investment in terms of hours and resources that would be reflected in the final settlement.

The UK's insolvency regime is the 7th best in the world based on returns and costs to creditors, the likelihood of business rescue and the speed of the insolvency process. Given it is one of the best in the world, and given concerns around IP fees are negligible, I ask that the government reviews alternative proposals which are in proportionate to the problem that it seeks to address.

Yours sincerely,

Jonathan Paul Philmore
Licensed Insolvency Practitioner

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Jenny Willott MP
Parliamentary Under Secretary
Department of Business, Innovation and Skills
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SW1H 0ET

25 March 2014

Dear Minister,

BIS Consultation: Strengthening the Regulatory Regime and Fee Structure for Insolvency Practitioners (March 2014)

I write in response to your consultation on Insolvency Practitioners ("IP") fees.

Whilst I support two out of the three government proposals to "improve returns to unsecured creditors; and improve the reputation of and confidence in the insolvency profession", I have serious concerns that your third proposal (simplification of the fee structure) will cause significant 'harm' to creditors, small insolvency firms and the UK's globally renowned insolvency regime. I share your priorities to have a competitive, fair, transparent, world-renowned insolvency profession, which is currently 7th best in the world in terms of the amount returned to creditors and speed of the process, according to the World Bank. However I am worried that the proposal to simplify the fee structure through restricting the use of time-cost (where there is no secured creditor or no creditor committee) will undermine these common goals.

Before summarising my concerns, please note that I have significant concerns that the fees consultation is based on perception rather than fact and evidence. IPs' fees comprised just 2% of all complaints about IPs in in 2013 (down from 7% in 2010). To put this in perspective, in 2013, there were approximately 116,000 new insolvency cases, and there were just 13 complaints to the government about insolvency fees (0.01%). Even accounting for the fact that many of these 116,000 cases would have been handled by the Official Receivers – about whose fees there have also been complaints – the proportion of cases that are attracting official complaints about fees is negligible.

I support a number of the fee proposals set out in previous government reports. However the proposal to simplify the fee structure through restricting the use of time-cost was not recommended in any of those reports. Furthermore, I am unaware that the structure is used anywhere else in the world and so I am concerned that it has not been 'tried and tested'. I therefore ask that the government drops its proposals to restrict the use of time-cost as a method to charge fees, and ask that it reviews alternative recommendations as proposed by previous government reports that will address its goal of reforming IP fees and improving unsecured creditor engagement.

My other main concerns about restricting the use of time-cost and relying solely on fixed fee and percentage of realisations include:

- It does nothing to address the problem of a lack of engagement by unsecured creditors.
- It could lead to outsourcing of specific insolvency procedures to unregulated individuals. This would shift the cost rather than reduce it.

- It is impossible for an IP to 'guestimate' what might be involved in a case from the outset. Relying on an up-front fixed fee without an option to review the fee later would see IPs and creditors routinely short-changed.
- Because IPs cannot resign from a case, once they have reached their fixed fee level, they will almost certainly not optimise recoveries as there is no incentive to do so. This would lead to lower returns for creditors.
- Many cases would not be taken on by IPs at all because the fee could be too small to be economical.
- Creditors will lose out through the use of percentage of realisations where large returns might not reflect the amount of time an IP is required to dedicate to a case. IPs will lose out through the use of percentage of realisations where there are smaller cases with smaller returns which often involve greater investment in terms of hours and resources that would be reflected in the final settlement.

The UK's insolvency regime is the 7th best in the world based on returns and costs to creditors, the likelihood of business rescue and the speed of the insolvency process. Given it is one of the best in the world, and given concerns around IP fees are negligible, I ask that the government reviews alternative proposals which are in proportionate to the problem that it seeks to address.

Yours sincerely

Louise Brittain
Licensed Insolvency Practitioner

STRENGTHENING THE REGULATORY REGIME AND FEE STRUCTURE FOR INSOLVENCY PRACTITIONERS

Memorandum of comment submitted in March 2014 by Jeremy Knight & Co, in response to The Insolvency Service consultation paper Strengthening the regulatory regime and fee structure for insolvency practitioners published in February 2014

Introduction

Jeremy Knight & Co LLP of 68 Ship St., Brighton BN1 1AE is a two partner firm of Chartered Accountants established in 1989 specialising in Insolvency. Both partners and two managers are IPs licensed by ICAEW. WJJ Knight, the senior partner, has been specialising in insolvency since 1976.

Summary

Part 1.

a) This proposal taken as a whole appears to be at best a misguided attempt to fix a problem that does not exist except in the minds of its authors. It appears to be an attempt to bring about by stealth a single regulator by imposing vague and subjective requirements on the existing RPBs which they will be criticised for failing to carry out thereby providing an excuse for their abolition. However the process will seriously damage what confidence the public has in the insolvency profession. If the Secretary of State wants a single regulator then he should simply legislate for one rather than creating a situation whereby it evolves out of the ashes of the destruction of the present RPB system. The one thing it will not do is to achieve its purported aims of bringing about greater competition in the market place and/or fairness for creditors.

Part 2.

a) Great emphasis is placed in these proposals on the results of the 2010 OFT Report which, whatever one may think of its conclusions, reported only on data relating to administrations and did not consider any other form of insolvency process except by extrapolation. Not only are its conclusions largely irrelevant but also out of date. The consultation document appears to ignore the effects of the 2010 Amendment Rules and only briefly refers to their existence in paras 108 & 110. These proposals have been drawn up apparently without reference to the improvements brought about in transparency and creditor engagement by the 2010 Rules as if they did not exist.

b) Prof. Kempson herself draws heavily on the same out of date OFT Report and both reports point a large share of the blame for lack of creditor engagement on government depts (see Kempson para 6.1.3).

c) Answers to Parliamentary questions given by the Consultation Document's sponsor, Jenny Willott MP (Hansard 11th March 2014 170W) show that in 2013 there were only 13 complaints against IPs relating to fees, which is 1.7% out of a total of 748 complaints. She also admitted that in 2013-14 there were 6 fee related complaints out of a total of 251 complaints against the Official Receiver (2.4%).

d) Not only does this indicate that the 2010 Rules changes are working effectively in reducing the already insignificant number and proportion of fee complaints against IPs but that there are proportionately 40% more fee complaints against the Official Receiver than against IPs.

e) Looking at the smallness of the absolute numbers it is clear that these proposals not only are trying to fix a problem which was already resolved 4 years ago but are trying to change the fee structure to one which causes proportionately more complaints.

f) Additionally, at a time when de-regulation is being sought elsewhere, the proposals seek to return to a complex hybrid system of multiple different fee bases which was discredited by the Cork Report and so changed to the present system.

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?

*A1. Para 47 proposes to introduce "clear regulatory objectives". The objectives stated in para 50 however are not clear. There is no attempt to define "public interest" (50.1). Words like "fair treatment" (50.2(i) are undefined and subjective. Objective 2(ii) makes neither grammatical nor logical sense. "Outcomes" (50.2(iii) cannot ever be consistent if not defined. 50.3 is a statement of the existing regulatory regime, while 50.4 is contradictory. 50.5 is unlikely to be achieved by the present proposals in cases where there is for example a single asset of a large bank balance**.***

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

A2. This has the appearance of an attempt to deliberately set the RPBs up for a fall by giving them responsibility for something which has not been clearly defined. By making RPBs, rather than the Courts, responsible for ensuring the "maximisation of returns to creditors and promptness in making those returns, whilst at the same time ensuring that the fees charged by Ips represent value for money, the law will be putting an impossible burden on them. They will be required to make subjective value judgements on what constitutes "value for money" and "promptness" with an implied requirement to reduce fees and interfere with the process of asset realisation in order to "maximise the value of returns to creditors". They would inevitably have to pass judgment on the IP's commercial decisions. If they fail to do so, in your subjective judgement, the Secretary of State will then have power to penalise them, fine them and remove their status as RPBs. This will drive a wedge between IPs and their professional bodies and cause many to leave the profession resulting in less competition. If the intention is to reduce the number of RPBs by this back-door method then it does not appear to follow the principles of fairness, accountability, transparency etc etc etc which seem to be so enthusiastically espoused by the proposal

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

A3. There does not appear to be any evidence of RPBs currently failing to comply with monitoring requirements. No case has been put in the proposal document indicating such a need. The only conclusion to be drawn therefore is that the Secretary of State is expecting that the RPBs will "fail to comply" in future. As has been explained above, in the absence of any objective objectives, such "failure" will only in fact be a difference of opinion on various subjective judgements.

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?

A4. The expression "Stealth tax" springs to mind.

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

A5. No RPB would allow itself to be publicly reprimanded without a challenge through a

Judicial Review. This would result in a public airing of the absurdity of subjective regulations which would be more likely to bring disrepute to the Secretary of State than the RPB.

Q6. Do you agree with the proposed arrangements for RPBs making representations?
A6. The arbitrary power being proposed to be given to the Secretary of State to give a direction to an RPB backed up by powers of sanction by penalty on such vague objectives without first being subject to representations and to Court scrutiny would be excessive and inequitable.

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?
A7. If the Secretary of State has the power to direct an RPB to sanction an IP then there would be no need for such an application. The matter would have been addressed already by the Court in the RPB's appeal (see above). It is not clear what grounds the author has for contemplating the situation whereby an RPB might refuse to sanction one of its members if directed to do so by the Secretary of State.

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?
A8. It is not clear what checks and balances are to be introduced to prevent over-use of such provisions or the incurring of unnecessary costs by the subjects of the requests.

Q9. Do you agree with the proposal to provide a reserve power for the Secretary of State to designate a single insolvency regulator?
A9. Yes, but with the reservations set out in 10 below.

Q10. Do you have any comments on the proposed functions and powers of a single regulator?
A10. A single regulator would be anti-competitive and tend to become a creature of the Insolvency Service which, bearing in mind the inadequacies of the regulation of its own licensed IPs under the existing arrangements, does not augur well. To void the dangers inherent in any monopolistic situation it would then be necessary to set up some additional bureaucratic tier to prevent unfairness. It would be inconsistent for any single regulatory regime to be imposed only upon IPs and not also the Official Receiver.

Part 2 – Insolvency Practitioner fee regime
Q11. Do you agree with the assessment of the costs associated with fee complaints being reviewed by RPBs?
A11. No. It should not be the purpose of a regulator to interfere with commercial decisions.

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?
A12. No. Except in the instance of monopolies, monitoring fee levels is something for the market-place not regulators. It will put an unfair onus on the RPBs to increase the scope of their monitoring to include fee calculations and even charge-out rates, and divert their attention from the more important work of ensuring regulatory compliance inevitably increasing costs.

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?
A13. a) Any further education of creditors is to be encouraged. As an IP in a small practice with charge-out rates considerably lower than most other firms I would be delighted if I thought for a moment that this might happen and would be enthusiastic for its adoption.
b) In most instances however the IP is appointed before any fees resolution is considered by creditors. It is unrealistic to expect a process of tendering prior to appointment. What is more likely is that if creditors take an interest they may be encouraged by such published information to refuse to agree a fee in excess of OR scale rates which may result in the IP having to go to Court more often than happens under the present system.
c) The proposed changes are more likely in practice to benefit the larger firms who inevitably tend to deal with larger cases where Committees are more common and where they have relationships with secured creditors. The smaller specialist IP firms will no longer be able to handle the smaller cases where scale fees will be inadequate to cover the statutory work and will disappear and those cases will fall to the OR.
d) The result will be less competition and ultimately higher fees and an additional workload for the OR.

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?
A14. I do not agree with the basic premise.
However, if there are government or other "sophisticated" creditors or too few to form a committee then it seems unfair that the IP should be penalised.

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?
A15. a) There is no explanation given in the proposals, the OFT Report or by Prof Kempson of why it is believed that creditor satisfaction over fees will be enhanced by returning to the fees regime which existed pre-1986 and which was changed to its present one as a result of the recommendations of the Cork Report (see paragraphs 883-895) and which I assume was studied in depth by the author of this proposal. No evidence has however been shown in the proposals or elsewhere of a need to go back to the regime which Cork recommended be changed as it did not work and caused confusion and dissatisfaction amongst creditors.

b) For the benefit of those reviewing my response who may not have been aware of this Report, Cork states inter alia ***"The various rules*** *[for having different bases of fees in different circumstances]* ***are unnecessarily complicated and seldom have any connection with the actual work done in a specific administration. There are occasions where the rules provide poor recompense for the liquidator or trustee in relation to the amount of work involved in a complex case; there are also occasions when the rules are over-generous as, for example, where the estate comprises little more than a bank account." (para 889).***
"We are firmly of the view that there should be uniformity in this matter and that there should be one set of rules or guidelines to be used in computing the remuneration of trustees, liquidators and administrators." (Para 890)
"We have been informed that difficulties often arise in bankruptcy or a creditors' voluntary liquidation where it has not been possible to form a committee of inspection ('The majority of cases, as one insolvency practitioner put it'). It is

necessary to send a circular to all creditors asking them to attend a meeting to fix the remuneration; the majority of the creditors do not reply and there is further delay in calling the meeting." (para 891)
"The Consultative Committee of Accountancy Bodies informed us that the ethical rules of their constituent members expressly forbid the charging of fees for audit, taxation, and virtually all other work on a percentage-related basis. They said that it would be desirable if liquidators' fees took account of the time occupied, the difficulties or ease of the case, the specialist knowledge and experience of the liquidator, the effectiveness of his actions, and lastly the amount of cash passing through his hands." (para 892).

d) Creditor apathy does not seem to have changed in the last 30 years but returning to a system of charging fees which bears no relation to the amount, quality or effectiveness of the work carried out is not the right way to reduce creditor complaints. Indeed it is likely to increase dissatisfaction not only among creditors but IPs too.

e) Then to throw the responsibility of dealing with that dissatisfaction onto the RPBs with threats of penalties and abolition indicates that these proposals have either been inadequately thought through or have some sinister sub-plot to destroy the RPBs and decimate the insolvency profession.

f) It is not just the Cork Report which considered scale rates to be inappropriate..

Ferris J in Mirror Group Newspapers v Maxwell 1998 BCC 324 at page 337G said
"… I do not think that the Official Receiver's scale rate has any part to play in the ascertainment of the remuneration of the Receivers in this case. By its very nature that scale is one applicable to the services of a public official, not a professional person in private practice. ….. It would not be right in my view in a case of the present kind to confine Receivers to remuneration on the basis of such a scale."

This was endorsed by Rimer J in Upton v Taylor & Colley 1999 BPIR 168 at page 183A.
"As to the mechanics of fixing the remuneration, Mr Taylor asks that the remuneration be fixed in accordance with the scale fees charged by the Official Receiver. I do not think that that scale is an appropriate one ….. *"*

g) It follows therefore that any IP dissatisfied with his fees would be encouraged by this to go to Court to have them fixed. The Courts will need to be prepared for an increase in the number of applications.

h) As for Annex A itself, the presentation of the proposals in the form of draft rules would be helpful were it not riddled with so many drafting errors. Also, by allocating Rule numbers the impression is reinforced that the consultation is a sham and that the outcome has already been decided.

Q16.What impact do you think the proposed changes to the fee structure will have on IP fees and returns to unsecured creditors?
A16. a) It will make the recovery of costs by IPs a lottery. The first risk will be whether there will be a Creditors Committee. Statistically there is very little likelihood of that happening. The IP will then have to guess at an early stage what complexities there may be in the case and assess his likely fees and recoveries before requesting a basis for his fees. Inevitably if he wants to stay in business he will have to err on the side of caution and over quote for his fixed price or scale of percentages. It is not clear why in

cases without a Committee IPs would not be allowed to charge a fixed fee for statutory compliance work plus a percentage of assets realised/distributed, which would reduce some of the risk. The proposed method is not conducive to bringing down fee levels.

b) In most cases, the IP will already have been appointed before asking creditors to fix his fee basis so there will be no mechanism for competitive tendering. (This is the problem of using the OFT & Kempson Reports as a basis for these proposals as they are based solely on Administrations and do not include any data or consideration of other insolvency processes)

c) If there is a trend for fees to be driven down to uneconomic levels then IPs will leave the profession thereby reducing their number which is further reducing competition. In those circumstances there is likely to be a move towards a profession run along the lines of IVA Factories where the work will be delegated to junior staff without sufficient qualifications, knowledge or experience to ensure effective realisation of assets. Whilst arguably this may work within the simplified area of consumer IVAs it would not be appropriate to bankruptcies, liquidations or administrations and would be likely to result in reduced returns to creditors as well as poorer levels of compliance.

d) The proposals assume that with voluntary arrangements, where there is greater creditor participation, it will not be necessary to revert to scale rates. That creditor participation is largely a result of HM Revenue & Customs having a Voluntary Arrangement Service dedicated to monitoring and approving VAs. A more effective solution might be for the Secretary of State to encourage HMRC (and Redundancy Payments Service and other government creditors) to take a similar interest in other insolvency processes.

e) Similarly while fees based on a scale of percentages may provide a good return in larger cases, at the smaller end of the sector IPs will not be encouraged to take on small CVLs (creditors are unlikely to agree to a 100% realisation fee) and they will end up as compulsory liquidations. Insolvency Service will need to ensure that the Official Receiver has sufficient resources to deal with a large increase not only in the numbers but also the retention of compulsory liquidations and bankruptcies. At OR's scale rate a case with £50,000 of assets would not be attractive to any IP.

f) Similarly cases with a significant number of employees would be unattractive to IPs to take on because of the ERA work which they would be required to do for no recompense. It may be that there may have to be a return to the earlier system whereby the Redundancy Payments Service has to pay IPs a fee for carrying out ERA work. If not, these insolvencies (usually presently small CVLs) will inevitably have to be dealt with by the Official Receiver as compulsory liquidations which apart from putting more pressure on the OR's workload will delay payments to employees by several months.

g) If the Secretary of State were really interested in value for money and improving returns to creditors then he would abolish, or substantially reduce, his ad valorem fees which start at 100% and go down to a "basic" 15% of realisations for which no benefit is received by creditors, and exceeds by a substantial margin the proposed scale rate for IPs who carry personal financial risk whilst carrying out their already heavily regulated work recovering assets for creditors.

h) The recent announcement of the Insolvency Service to raise the OR's fees by over 7% with effect from 1st April confirms that the improvement of returns to creditors is of secondary importance to them.

i) The return to creditors is unlikely to be improved by creating a system whereby the IP *is dis-incentivised from realising assets where the marginal scale rate of realisation fee is less than the cost of carrying out the work.*

j) It will also be likely to result in IPs outsourcing more work to debt collectors and solicitors whose fees will be payable in addition to the scale rates thereby possibly reducing returns to 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?
A17. They should not apply to any insolvency process. The only reason that it is being proposed that VAs be treated differently is that there is already unsecured creditor engagement through TiX and HMRC (VAS). HMRC, RPS and other branches of government should take the same interest in other insolvency processes. IPs should not be punished for their failure to do so.

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?
A18. They should not apply at all.

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?
A19. a) No. It should be noted that where, through the monopolistic influence of TiX, creditor pressure has forced a standard fee of 15% of assets in VAs the professional sector has all but given up and left this market to IVA "Factories" who through economies of scale and "dumbing down" by extensive use of unskilled call-centre style labour are possibly the only IPs who can survive. The present OR scale rate has 10% as its standard band. Professional IPs will be unable to continue in the market-place at this low rate, particularly taking into account the additional regulation and personal liability which can attach to other insolvency processes. If "Bankruptcy Factories" or "Liquidation Factories" were to open up, which appears to be the logical outcome of these proposals, even they would be unable to operate at that level.

b) The current scale was set by the Insolvency Fees Order 1975 with 10% starting after £10,000 of realisations. If adjusted for inflation since then they would be 20% on the first £35,000, 15% on the next £35,000, 10% on the next £640,000 and 5% thereafter. At this level it might be more realistic, although again the basic premise is not accepted.

c) In light of the proposals not to have a mix of fixed fee and scale rates, it would be logical to allow for the costs of statutory work to be paid for by making the first band of ,say, £10,000 at 100% before reducing the next, say, £25,000 to 20%. There is precedent in the Secretary of State fees of charging a 100% band.

Q20. Do you think there are further circumstances in which time and rate should be able to be charged?
A20. In all cases

Impact Assessment questions:

Q21. Do you agree with this estimation for familiarisation costs for the changes to the fee structure?
A21. The calculations seem a significant under-estimate considering the complexities of

the proposed changes and the need for IPs to re-design their systems and continuously monitor cases in case of changes to the Committee and or returns to secured creditors.

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?
A22. I am not a secured creditor so cannot comment.

Q23 To what extent do you expect the new fee structure to reduce the current level of overpayment?
A23. a) No evidence has been produced to show any level of overpayment other than the very restricted conclusions of the OFT Report which was based upon an out-dated unrepresentative sample of old Administrations and which they gave assurances would not be extrapolated into other areas of insolvency which this consultation document clearly does.

b) No part of this consultation document acknowledges the changes made by the 2010 Rules or attempts to give any statistical data regarding the number of fee challenges made by creditors since those changes. There is no evidence that such problems as may have been identified by OFT/Kempson have not already been fixed.

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?
A24. IPs will need to have the basis of their fees fixed by creditors regardless of the basis used. There will not therefore be likely to be any additional costs except to the extent that creditors become confused by the process and fail to agree a realistic basis so that applications to Court become necessary.

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?
A25. No. Nor do you.

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?
A26. All the cost/benefit figures are completely arbitrary.

Q27 Do consultees believe these measures will improve the market confidence?
A27. No

Q28 Do consultees believe these measures will improve the reputation of the insolvency profession?
A28. No

Steve.Spong

From: debtwise <debtwise@freenetname.co.uk>
Sent: 23 March 2014 13:14
To: Policy.Unit
Subject: Consultation on Regulatory Regime IP's

FAO Policy Unit: re response on Consultation on Regulatory Regimes and Free Structure for IP's

I provide a free bank debt dispute service having previously worked for a bank in debt recovery and dealt with IP's/solicitors on a regular basis.

I have been helping with a complaint about a Creditors Voluntary Liquidation, which raised many issues with regards to the lack of an independent complaints system, and the costs of proceeding to court to challenge an IP.

I note that the consultation refers to a Complaints Gateway and the number of Recognised Professional Bodies.

The RPB's have a Code of Ethics and the IP's have Statements of Insolvency Practice but I consider that it is far too heavily weighted in favour of IP's and there should be far more accountability.

What I would like to see is the following:

1. That an independent IP complaints body be set up that can look at complaints from when the directors of a company first took advice regarding options. The insolvency lead up is just as important , if not more important ,as when an action is commenced and an IP takes over. I consider that an IP may on occasions give advice which is not of a professional standard, yet there is no accountability, except through highly expensive court action. I consider that all pre liquidation advice given by an IP needs to be covered by a Code of Ethics/Conduct and that such advice needs to be in writing and on what basis it is given and any fee charged. The recommendations need to be clear and precise to the directors, if that advice is to be followed. This aspect has been completely ignored in all the consultations I have seen, yet is a major issue in my opinion.

2. Whilst the Statements of Insolvency Practice refer to an IP acting in the interests of creditors, I feel that there should be more accountability to those directly involved in a limited company such as directors and shareholders. I realise that there is a big difference between company sizes, but many small companies who encounter difficulties surely need more protection from an IP who is out to gain fees, and have a go at directors, rather than look after creditors' interests, The Statements of Practice are there but from my enquiries, it is impossible for a creditor or director who has a complaint to have that complaint dealt with fairly, as the IP's can, it appears, do what they want, and claim an action is in the interests of creditors. The only way to challenge this is through the courts and this is simply not economic. Currently an RPB body will not intervene in a liquidation so that the complaints body needs to be able to examine what interventions are fair and reasonable and whether this would benefit creditors.

3. In the same way that an IP can report directors to BIS, I consider that directors should be able to report an IP. The directors lose control after a Liquidation, but if pre-liquidation advice given by an IP is to go down a certain route and that route is not taken, then since this currently is not covered by the RPB, there needs to be a way that a director can report the IP, and have a matter investigated if that is not through the proposed 'Complaints Gateway'

I appreciate that those involved in a consultation might take the view that the IP's are doing a good job in difficult circumstances, and that when companies fail, the directors are the ones to blame. In my experience I have seen both sides, from dealing with IP's and also assisting with a complaint. I am of the firm belief that the culture of an IP claiming vast fees for doing what he/she wants and having little or no accountability in reality, has to stop.

If you require clarification on any point above please let me know. I have previously replied to a consultation by Professor Kempson.

Ian Yarwood
DEBTWISE

Thursday 20th March 2014

The Policy Unit
The Insolvency Service
4 Abbey Orchard Street
London SW1P 2HT
By email (Policy.Unit@insolvency.gsi.gov.uk) and First Class mail.

Dear Sirs

CONSULTATION: STRENGTHENING THE REGULATORY REGIME AND FEE STRUCTURE FOR INSOLVENCY PRACTITIONERS

I write in response to the above Consultation (the Consultation) as an individual, and as an Honorary Life Member of the Civil Court Users Association (the Association), whose Members issue 85% of all civil proceedings in the County Court. Since retiring, I no longer regularly attend meetings of the Association, though I receive updates and minutes by email.

I have taken a particular interest in County Court litigation and personal insolvency in the past 25 years, and have had 100+ articles published in credit industry, most of them concentrating on comparative statistics and policy change.

MY RELEVANCE TO RESPOND

Eversheds Solicitors, of which I was a partner, has been a Member of the Association since its inception more than 25 years ago. I was elected Chairman of the Association in 1995, serving as such until I chose to step down in 2007, at which point I accepted the position of Honorary Vice President.

In 1996 I was invited by Yorkshire/Clydesdale Bank (the Bank) to set up and run an internal law firm in my name, to sue its unsecured creditors. I retired in 2012.

At Eversheds I acted for three hundred debt and litigation clients, and at the Bank I was solely responsible for a department carrying 16,000 County Court claims at any time. I dealt personally with all defended cases, and was also regularly involved with insolvent debtors, and their estates.

OVERVIEW

After finding the Insolvency Service's (IS) response to the *Red Tape Challenge* humdrum –albeit overdue - I was surprised and pleased to discover the Consultation a very different kettle of fish. Together with the intention to allow partial IP licences, this comprises a real breath of fresh air.

The lack of media take-up of Professor Elaine Kempson's report reviewing insolvency practitioner fees on publication was predictable. Her take on the OFT Report in 2010, asserting that unsecured creditors paid higher fees than estates with secured creditors, barely scratched the surface, but its take up in the Consultation may mean it ends up as a powerful impetus for change.

I hope I detect the same determination to act as in the recent Legal Aid and personal injury litigation areas. The three areas are distinctly different, but each amounts to closing an obvious loophole. In each case those using the loophole are perfectly well aware of the unsatisfactory nature of the existing legislation, but have been content to use the loophole for their own benefit. The Government is not free from blame either, since they have failed to frame the legislation correctly and/or to patrol the borders of their policy sufficiently.

Why wouldn't an IP consider value for money when dealing with a simple bankruptcy estate? Presumably IPs will say the Rules don't <u>say so</u>, but isn't the whole point of appointing a professional person to look after the estate exactly because he/she can use their experience to do what is necessary? In recent years certain large accountancy firms have built large departments to deal with Bankruptcy estates with assets, largely on hourly rates, unknown to the general public.

At the same time, due to supposed commercial sensitivity, creditors who brave the twin chicanes of elitism and indifference to take part in choosing the best IP to deal with their debtor's estate are denied the information to make the decision. Although copies of each completed insolvency job must be lodged at the IS, and each job has been carried out using creditor money, this information is not available to creditors!

They are not even allowed *typical* figures, based on all suitable estates. Having said that I genuinely doubt whether the Insolvency Service, despite having all the figures to hand have ever taken the trouble to calculate average figures - better still comparative figures between firms - despite having all the figures to hand as part of their management role.

As a final point, and putting this unreality into sharp relief, Government is increasingly demanding <u>no rigour whatsoever</u> where there are no unsecured creditor funds. This has always included the insolvent estates which remain with the Official Receiver, but since 2009 it also includes Debt Relief Orders, presently for debts up to £15,000, and with the IP bodies R3 now suggesting that this should increase to £30,000.

It is creditor money which funds insolvency, and unless there are good objective reasons to carry out regulated work, I believe the creditors should decide whether it should be carried out. If creditors grasp the new opportunity offered by a personal insolvency licence, they should be able to deal with their own debtors' insolvent estates sooner rather than later.

QUESTIONS AND ANSWERS

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?

Answer: Yes they are. They bring some reality to what has been an unstructured financial free-for-all by IPs for many years.

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

Answer: I am pleased to see options with real teeth between Q2 and Q9, and I believe they will discourage IPs from simply doing regulated work without thought, and without having to justify it.

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

Answer: A sensible preliminary action.

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?

Answer: A practical further action.

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

Answer: PR is important, and will help to keep RPBs in line, but I like the idea of public reprimands for the purpose of informing creditors about those not playing the game.

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

Answer: I'm quite happy, so long as this process does not bog down the whole process.

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?

Answer: A good way of cutting to the chase in serious cases.

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?

Answer: That looks fine.

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

Answer: This is the best way forward, and the process should start as soon as possible.

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

Answer: Not until this change approaches, when practicalities will emerge.

Part 2 – Insolvency Practitioner fee regime

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

Answer: Yes, but I would not wish to see this treated as an area of expansion! What is needed is swift practical scrutiny by experienced people, not a wallow in the minutiae of matters, representing a perpetuation of the present unsatisfactory situation.

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?

Answer: That's the billion dollar question! Value for money is a perfect lens, through which to look at everything, so long as the concept is not complicated unnecessarily.

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?

Answer: Not a lot. This is the sort of dry-as-dust worthy material which has turned off creditors (and debtors) for generations, making them feel not intelligent and educated enough to understand personal insolvency. Indeed, canny creditors are aware this material has been used as deliberate complicating factor to dissuade creditors from taking part, leaving the field to IP 'experts'.

Once one is actually involved in personal insolvency - whether as creditor, debtor or adviser - its mystique quickly drops away, and becomes a relatively simple and down-to-earth process which can be understood by all.

The word picture (in paragraph 104) of crown creditors suddenly becoming joined-up, and taking a proactive stance in order to exert influence on fees frankly boggles the mind! I would however want to understand any specific proposals, which would presumably involve other creditors too.

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?

Answer: That would be a start. The Red Tape Challenge has not dealt seriously with the amount of regulated work necessary. Few personal insolvency estates contain either financial complication or fraud, and I do not see why straightforward estates cannot move into the territory presently occupied by estates without assets, and DRO's, and in future perhaps debt management plans with some modest formality, all dealt with by creditors as part of their debt recovery process, overseen by the Ministry of Justice (MoJ).

Fortuitously, along with regulation change there are proposals for a licence limited to personal insolvency, enabling suitably qualified employees of creditor businesses to deal practically with their insolvent debtors. Minister Jo Swinson said she hoped the proposal would open up the insolvency industry to increased competition, leading to lower costs, and this could be the vital breakthrough enabling creditors to drag personal insolvency into the real world. It doesn't remotely fit within an agency of the Government's business department, and the MoJ, already responsible for the litigation aspects of insolvency, is a much better fit.

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?

Answer: The mere existence of a creditor committee does not give me confidence about the automatic rightness of hourly rates, as those serving on creditor committees are of an extremely wide range of both insolvency knowledge and endeavour.

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

Answer: The potential is enormous, hence my effusive welcome of these changes. However, it remains to be seen if the insolvency industry will be able to hobble that potential.

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?

Answer: Probably not as regards the first two, and I have insufficient knowledge of corporate insolvency to judge. However, potentially the same situations arise in individual voluntary arrangements as with the cases I have mentioned in my answer to Q14 above. Hopefully the cases which require specific scrutiny will have been identified by IPs, and for standard cases creditors (and debtors too, probably) would prefer an increased premium to unnecessary regulated work.

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?

Answer: I am not familiar with the current or proposed scales, not least because most work seems to be carried out at hourly rates. Certainly the Scales are not modest. Compare them with the fact that R3 is looking to have no scrutiny at all for DROs with £30,000 of debt. As regards variation, it must be emphasised that this should be the exception, rather than the rule

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?

Answer: Perhaps the question should be are they <u>creditor</u> viable! On the other hand, I could see creditors accepting such fees to collect their own or others debt, on a partial licence in future.

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

Answer: I suggest not.

Please acknowledge receipt. I will be happy to comment further if appropriate, and look forward to hearing the views of others.

Yours faithfully

JJO SUTCLIFFE

Policy Unit
Insolvency Service

By email only

21 March 2014

Dear Sir/Madam

Strengthening the regulatory regime & fee structure for insolvency practitioners

We welcome the opportunity to respond to this consultation.

The Financial Reporting Council (FRC) is the UK's independent regulator responsible for promoting high quality for corporate reporting and governance. As part of this role we provide independent statutory oversight of the regulation of auditors by the Recognised Supervisory Bodies (RSBs). We also oversee, on a non-statutory basis, the way in which the RSBs plus two other professional bodies regulate their members outside of audit. Four of these bodies are also Recognised Professional Bodies (RPBs) for the purpose of insolvency and we have a keen interest in the work of the Insolvency Service in this area. We also operate an independent disciplinary scheme which investigates those cases of potential misconduct by auditors, chartered accountants and actuaries which are deemed to raise important issues affecting the UK public interest.

In strengthening the current regime for insolvency, it is important to avoid regulatory gaps and to minimise overlap between the various regulators in this area. We have confined our detailed response to the first section of the consultation (on strengthening the regulatory regime). We support the objectives of transparency and value for money for creditors and other stakeholders but we do not have the knowledge or expertise to comment in detail on issues surrounding the fee structure for insolvency work. We would note the need for safeguards to minimise the risk that a move towards fixed percentage scales results in overcharging in simple cases.

Our comments on strengthening the regulatory regime are as follows.

1 Objectives and powers to sanction RPBs (Questions 1 – 6)

We support the proposed regulatory objectives and the consultation's proposals to introduce additional powers for the Secretary of State to sanction, direct and reprimand RPBs. We

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agree that the proposed mechanisms for doing so appear appropriate. In 2012 the FRC acquired similar powers with respect to the RSBs as part of our Reform process and these are now an important part of our regulatory toolbox, allowing proportionate action without the need for the "nuclear option" of derecognition.

2 New powers to sanction insolvency practitioners directly (Question 7)

The consultation proposes a new power for the Secretary of State, via the Insolvency Service, to investigate and to impose sanctions directly on an individual insolvency practitioner (IP).

We support the principle that there should be a provision for an independent regulator to investigate potential misconduct by IPs. The consultation suggests that this power would only be exercised in "exceptional circumstances" and goes on to indicate that these would be cases which raise important issues affecting the public interest. We agree that is an appropriate definition and is one which mirrors the FRC's "public interest test" for commencing an investigation. This is however an area where there is some overlap with the FRC's own professional disciplinary function and we are keen to ensure that there is clarity in this area.

Four of the RPBs have signed up to the FRC's Accountancy Scheme, which provides for the FRC to investigate and to sanction their members for misconduct. The Scheme is not limited to audit and covers all members of participating bodies regardless of their professional role, including those acting as IPs, although to date we have not taken an insolvency case. Some participating bodies challenge whether the Scheme was intended to cover IPs, although the basis for this challenge is not clear from the Scheme itself, the drafting of which clearly covers all members regardless of their particular role. We would like to explore how the current Accountancy Scheme might interact with the proposed independent investigation/disciplinary arrangements IPs.

There appear to be three possible options:

(1) With the agreement of the participating bodies, we amend the Accountancy Scheme so that matters relating to regulated work by insolvency practitioners are explicitly excluded. We note however that the sanctions proposed in the consultation paper are limited to:

- An order to refund some or all of the IP's fees; and/or
- A warning, reprimand, suspension or revocation of the IP's authorisation.

The Accountancy Scheme provides for additional powers, including the imposition of a financial penalty in excess of the fees charged and the exclusion of the individual from his professional body. If this option is chosen we suggest that the Insolvency Service's new arrangements also provide for these outcomes either directly or via directions to RPBs.

(2) The Accountancy Scheme continues to operate alongside the new arrangements, and the decision on who deals with a public interest case involving a member of one of the bodies for which we share regulatory responsibility is taken on a case by case basis.

(3) The FRC participates in the Insolvency Service's complaints gateway and public interest cases involving members of RPBs which also participate in our Scheme are referred to us directly for investigation. Other arrangements would need to be made for lawyers and IPA members.

On balance our preference would be option 2. The flexibility offered by this option is particularly important in cases where the alleged misconduct straddles both insolvency and other types of accountancy work; it is more effective and efficient for such cases to be dealt with by a single regulator. We would welcome the opportunity to discuss with the Insolvency Service how this might work in practice to ensure there was appropriate clarity as to which regulator took the lead in which circumstances.

3 Power to require information (Question 8)

We support the proposal for the Secretary of State, acting through the Insolvency Service, to require information from an RPB, IP or other specified person. We suggest that the Insolvency Service consider whether the list of persons from whom information can be required is sufficient. For example, it is possible to envisage situations where it might be helpful to require a debtor or creditor to provide information.

In this context we would find it helpful for it to be made clear that IPs are also required to supply information relevant to FRC investigations in respect of companies to which they have been appointed administrator. Other regulators may welcome similar clarity. We would ask the Insolvency Service to consider whether it is possible to incorporate this into any proposed changes.

Finally, this may be an opportunity to formalise arrangements between the FRC and Insolvency Service so that there can be no doubt that we can share information with each other.

4 Reserve power to designate a single regulator (Questions 9 and 10)

We recognise the arguments for and against a single regulator but can see the value of a reserve power. The Insolvency Service might wish to consider adopting a similar arrangement to that envisaged for audit in the draft European Directive ie a single competent authority with the ability to delegate certain activities to professional bodies. Under such a framework the Insolvency Service would be best placed to take on the competent authority role.

In this context we would also note the trend for regulators to be independent of both government and the profession or industry which is being regulated. As part of the proposed strengthening of the regulatory architecture for insolvency, we suggest consideration be given to greater independence for the Insolvency Service.

5 Other issues

There are three areas which are not covered by the consultation but which we wished to flag up as matters which we believe the Insolvency Service should seek to address in the near future:

(1) **Conflicts of interest.** From time to time the FRC receives complaints about alleged conflicts of interest on the part of insolvency practitioners. These complaints typically refer to previous work done by the insolvency practitioner's firm for the insolvent company or individual or for one or more parties otherwise related to the insolvent company or individual. The current Guidance on Professional Conduct and Ethics prohibits insolvency appointments where the IP or his firm has had a prior "material professional relationship" with the individual or company in relation to which the appointment is taken. However, other than in the case of an audit relationship, the decision what constitutes a material professional relationship is largely left to the discretion of the IP. More definitive rules on what is and is not permissible in this area would improve consistency.

(2) **Insolvency practitioner vs firm**. Insolvency practitioners are licensed and appointed individually rather than via their firm. We question the extent to which this reflects the reality of modern professional service firms. The insolvency practitioner will make use of his firm's staff, systems and technical specialists and where things go wrong will be supported by the firm's legal teams. We believe that consideration should be given to moving towards a regime which more closely resembles that in audit, where the firm's responsibility for the overall quality system is acknowledged as well as the actions of the individual partner.

(3) **Thought leadership**. We note the public policy debate around aspects of insolvency legislation and practice (such as the use of "prepacks"). It would be helpful to understand the extent to which the Insolvency Service intends to engage with and to lead the public debate in this area.

Please let me know if any clarification is required.

Yours faithfully

Paul George

Paul George
Executive Director Conduct
p.george@frc.org.uk

IP regulation and fee consultation question response sheet
(Consultees may wish to respond just to those questions that are of relevance to them)

Name: Richard Monds
Organisation (if appropriate): Northern Ireland Insolvency Service
Contact Details: Tel. 028 90548614

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?

A1: We agree that it would be useful to have regulatory objectives although we wonder how performance against those objectives would be measured in practice.

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

A2: Our comments on the proposed procedure are as follows:

We think that publication of notice of intention to revoke an RPB's recognition should take the form of targeted notification of insolvency practitioners authorised by that body. Wider publicity, for example in the press, could be expected to cause damage to the RPB, which would not be desirable when a final decision as to whether or not its recognition should be withdrawn has not been taken.

The period of notice of SoS intention to the RPB should be extended to **60 days** within which written representations may be made.

The Notice should not be published until the final decision of revocation is made.

The revocation order takes effect 28 days after final notice has been given to the RPB.

A suggested procedure would be:

1. Issue notice of revocation to RPB giving **60 days** for written representations
2. **The Notice should not be published until the final decision of revocation is made**
3. After considering any representations from the RPB or any other affected persons the Secretary of State must make his decision.
4. 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.
5. The Secretary of State must publish the notice on the same day the final decision is given to the RPB.
6. **The revocation order takes effect 28 days after final notice has been given to the RPB.**

7. 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.
8. An RPB wishing to challenge the Secretary of State's decision would do so by judicial review.

Other comments-
How will notice of revocation be published, is it in the Press, by email to IP's etc?
How long do the IP's have to register with another RPB? Would a maximum time limit be set?
Are there arrangements in place to ensure IP's will be accepted by another RPB?
What happens to complaints against IP's in the interim period, while they are not authorised by 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?

A3: We think that the notice period should be 28 days instead of 14.

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?

A4: We think that the notice period should be 28 days instead of 21. We wonder if guidelines as to the size of the financial penalty should be provided. We suggest that non-payment of a financial penalty could be dealt with by revoking the RPB's recognition.

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

A5: In our view a public reprimand could be a more severe penalty in terms of reputational damage than a financial penalty or a direction. What is the suggested hierarchy in terms of action taken? For example, stage 1: financial penalty; stage 2: public reprimand: stage 3: revocation of RPB recognition?

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

A6: We have concerns about the notice periods; see our answers to questions 3 and 4.

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?

A7: We think that it would be desirable for the Secretary of State to have direct intervention powers. This would enable him to act as an honest broker in cases where those affected by IP's conduct felt that an RPB was not taking a sufficiently robust approach.

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?

A8: We are generally content with the suggested procedure. However we wonder if it powers to search IPs' premises should be included as it is difficult to see how the Secretary of State will be aware of what information to ask for if they are not.

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?

A9&10: We think that the proposal to provide power to have a single regulator should form the subject of a separate consultation. We can foresee problems with a single regulator. A single regulator could certainly be expected to ensure uniform standards. However if its standard of regulation were to deteriorate to such an extent as to merit revocation of its recognition there would be no other recognised professional body in place to take over responsibility for authorising insolvency practitioners. A single regulator would also be in a monopoly position as regards charging fees to insolvency practitioners. Competitiveness would be compromised.

Part 2 – Insolvency Practitioner fee regime

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

A11: We agree.

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?

A12: Yes. We think that to place RPB's under a duty to ensure that the fees charged by IP's represent value for money and to provide for the Secretary of State acting as oversight regulator to check that they are fulfilling that duty should go a long way to address any problem of overcharging by IPs.

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?

A13: We consider that publication of this information would be beneficial.

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?

A14: No further exceptions occur to us.

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?

A15: We do not think that it would be desirable to remove the option of charging by time and rate apart from the two exceptions. Cases can be complex, and realisation of assets can be a long drawn out process. However in cases where fees are set by time and rate anyone aggrieved should have the clear right to have the fee reviewed by the RPB and if the IP is found to have over-charged he should be required to refund the excess. We suggest postponing any decision to do away with the option of charging by time and rate to afford an opportunity to see if its use can be satisfactorily managed and controlled through the other measures being put in place.

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

A:16: We think that they will achieve some reduction if fees charged by insolvency practitioners and a better return for 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?

A:17: Yes, as creditors are routinely more actively involved in these procedures.

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?

A:18 Yes but we have difficulty seeing why such a scale should be set as a default position. We find it difficult to envisage creditors ever sanctioning a higher percentage if they know that not doing so will always result in the lower scale rate applying.

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?

A: 19: We think that this would be a question for IPs and RPBs. .

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

A 20: See answer 15.

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?

Yes. We think that providing individuals who are unhappy with what IPs are charging with the option of having their fees assessed for reasonableness free of charge by an RPB would go a long way towards alleviating concerns about IPs' charging practices.

Q28: Do consultees believe these measures will improve the reputation of the insolvency profession?

A:28 Yes, since the main reason for it being tarnished at the moment seems to relate to levels of charging.

Steve.Spong

Subject: FW: Response to Consultation on IP Regulation and Fees

Subject: Response to Consultation on IP Regulation and Fees

This input is made on behalf of Crown Currency Exchange, (CCE), creditors and has been placed for comment on the Facebook CCE website.

It is disappointing that, while problems faced by unsecured creditors have been recognised, little or nothing is said or proposed about special measures needed in large insolvencies with many disparate creditors. Key matters are:

* facilitation of creditor communication, organisation and representation and proper management of data protection and confidentiality by IPs towards this

* larger creditor committees with access to creditor data. Without the latter, creditor value cannot be determined as a basis for any complaint.

Answers to questions are as follows:

Q1: A key objective for the regulatory system should be to inspire consumer confidence through independence, objectivity and impartiality. This is inconsistent with the use of RPBs, particularly in dealing with complaints.

Q2 – Q8: No comment

Q9: The SofS should not reserve position on designating a single insolvency regulator. This is essential for consistent and fair standards across the board.

Q10: The option of a separate and independent Ombudsman for complaints on fees and other matters has apparently been rejected or not considered. Other regulatory functions could be left with the RPBs.

Q11: In line with the answer to Q1, using RPBs to assess complaints or fees must always raise concerns of bias.

Q12: It is vital that emphasis is placed on the need for fees to represent value for money and that the responsibility for demonstrating this is placed clearly on IPs. IPs should also be clearly accountable for their actions and decisions. While this is mentioned several times, there appears to be no clear conclusion nor is this dealt with in the draft legislation, which like most legislation, is a masterpiece of obfuscation.

Q13: Unsecured creditors need access to better information on all aspects of insolvency. Published information on paper or the internet, may be insufficient. Some accessible help/support service is badly needed. For CCE such matters were pre-empted as Directors appointed IPs with standard company fees.

Q14: No comment

Q15: Fixed fee or Percentage of Realisations may not be appropriate if there are uncertainties in what needs to be done. However, if Percentage of Realisations is possible this should be encouraged against a prescribed scale.

Q16: No comment.

Q17: Changes to the basis for fees should also apply to company voluntary arrangements.

Q18 A prescribed scale is essential.

Q19: No comment

Q20: See Q15.

Q21 to Q26: No comment

Q27 and Q28: No

Dr N R Ogg for Crown Currency Exchange Creditors printing or copying is strictly prohibited. You should contact the sender by return then delete all the material from your system.

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Steve.Spong

From:	Elliot Green <Elliot.Green@ouryclark.com>
Sent:	04 March 2014 14:31
To:	Policy.Unit
Subject:	RE: Consultation on strengthening the regulatory regime and fee structure for Insolvency Practitioners

Dear Sirs

Please can you add my additional points herein to the relevant team – apologies for any repetition incorporated:

1) As a simple matter of human rights/free market, creditors should be allowed to pay an IP on the basis they as creditors determine. 10% of realisations might be too high, if time costs are 5% of realisations. Creditors themselves should have this choice

2) Conversely, many cases might require an uncertain amount of time to be spent by the IP for an uncertain recovery. People should be able to agree what each of them is happy to work for/pay for the service. If a case's fee must exclusively be a percentage of realisations, IPs will refuse to accept some cases. The major loss will be to HMRC, who benefit greatly from IPs taking cases at risk on the understanding they can have a fee reflecting their own costs, as opposed to a mere percentage of recovery that is unconnected to the difficulty of the work done or time spent. HMRC are fully literate already in how to refuse to accept the level of time costs charged against a case, as are most creditors

3) Some cases require much more difficult work to achieve the same result. These cases will be avoided if the reward is the same in each

4) Much time has recently been spent reforming solicitor's fees, but no one has suggested that their fees can only be paid from recoveries. Why should IPs be different? IPs will have many cases where, through no fault of their own, there is no recovery

5) Many cases start out with no assets, and must be investigated to lead to recovery. Fees will therefore be set based on a percentage of nothing at the outset, ignoring the complexity of how the case may develop

6) Some parties may say that IPs can be funded by creditors on cases to achieve what that creditor wants, outside of the percentage due from realisations. This occurs now, with some creditors, but only in cases where the creditor has a clear majority of the debt due to them and stands to benefit substantially from recovery. In a case where there is no 99% creditor, but 100 creditors each owed 1% of total debt, no single creditor will have an interest in funding

7) IPs refusing to take over this work means it will remain the obligation of the Official Receiver, leading to expense to the state

Yours faithfully

Elliot Green

From: Policy.Unit [mailto:Policy.Unit@insolvency.gsi.gov.uk]
Sent: 19 February 2014 13:43
To: Elliot Green
Subject: RE: Consultation on strengthening the regulatory regime and fee structure for Insolvency Practitioners

Dear Mr Green

Thank you for your response. Its been passed on to the team and will be consider along with all other responses. A government response will be issued in due course.

From: Elliot Green [mailto:Elliot.Green@ouryclark.com]
Sent: 19 February 2014 12:36
To: Policy.Unit
Subject: RE: Consultation on strengthening the regulatory regime and fee structure for Insolvency Practitioners

Dear Sirs

The key issue that I have with IP fees restricted via % of realisations, is such a position takes insufficient account of cases that a number of IPs such as myself will take on at the request of creditors where the only route to a return for creditors is by the IP litigating personally (at the personal risk of adverse costs) without funding from creditors. Records reconstruction cases (where there a few or no records delivered up by Directors) are very time consuming and this should be recognised. HRMC is a major creditor in many of these cases and also can be instrumental in appointing an IP. It will simply lose out with IPs not taking on those cases perhaps. The Official Receiver does not litigate for creditors and therefore this is prejudicial to such creditors if they will simply not receive money that otherwise they used to receive from such fraud cases. I do not understand how % based remuneration could work in such cases. The IP's solicitors would be paid on a time costs basis but it seems odd that the IP could not.

I take on many cases speculatively for creditors and I say to creditors where there are no assets save for the possibility of investigation litigation orientated recoveries, these are my rates and if they are not approved at a creditors meeting which you are perfectly at liberty to reject, then I will be unable to progress the case. I cannot recall such a case when creditors rejected the basis of my remuneration. They are usually very grateful that I am taking on such matters recognising there is a material risk that I might never get paid.

There are of course many reasons why restricting IPs to % of realisations is not likely to be a good thing generally and lead to creditors being severely disadvantaged. This will further strain the resources of the Official Receivers. You will have fewer cases taken on by IPs where the assets are of a lower value as creditors will be reluctant to agree to 100% of realisations being paid to the IP when that will ordinarily be the result of a time costs based approach. Creditors risk ending up far worse off in terms of reporting and provision of information. Unsecured creditors should not be discriminated against relative to secured creditors where fees rules are concerned such that there is one rule for secured and another rule for unsecured creditors. Unsecured creditors have matters harder in insolvency cases without the system making it worse for them.

The problem with ending time costs based remuneration is that insolvency by its nature is an IP entering office as a stranger and often entering into a contentious environment. Until he or she is in office they may have no idea of the time consuming issues (which can change during a case) that will crop up. There has to be some correlation between the time someone spends dealing with issues and their remuneration, particularly as we are a heavily regulated profession with many regulatory obligations which are imposed on us and have to be undertaken whether or not there are sufficient realisations available to discharge the costs of dealing with the same.

Further, the key issue for the excessive fee situations is that they usually can be spotted with relative ease. To deal with the same perhaps a sensible approach would be to enable creditors to convene as of right a meeting of creditors (with no requirement for a deposit) to seek a declaration that fees be reduced by for example only 30%, and if the IP objects her or she needs to apply to Court for ratification of entitlement to drawn the additional 30% that creditors have rejected.

I am also in favour of enabling creditors to have greater SIP 9 rights. Rather than having the information in a tabular form, why not give creditors as of right a complete breakdown of all time costs so they can properly understand unit by unit how time has been spent. This should enable greater illumination of the excessive remuneration cases.

The other issue that the question of fees can be linked to indirectly is the IPs willingness to provide information to creditors. Frequently when acting for creditors I encounter some difficulties in getting the IP to release information over and above what is set out in the progress report. If the regulations were changed to reflect the fact that an IP has an obligation to provide information to creditors (individually) save where the same is above a particular threshold then this in my view will go a considerable way to a) ensuring creditors have access to the IP b) have a better understanding of the problems the IP is facing (which can be explained and often will not be in a progress report) and c) avoid situations where creditors frustrations turn towards fees needlessly.

Yours faithfully

E H Green
Partner

From: Policy.Unit [mailto:Policy.Unit@insolvency.gsi.gov.uk]
Sent: 17 February 2014 11:02
Subject: Consultation on strengthening the regulatory regime and fee structure for Insolvency Practitioners

Dear Recipient

I am writing to inform you that today our Minister, Jenny Willott, has launched a consultation on strengthening the regulatory framework and fee structure for Insolvency Practitioners ("IPs"). This consultation builds on earlier consultations, following the Office of Fair Trading (OFT) market study into corporate insolvency in 2010,[1] and is in response to Professor Elaine Kempsons' review of IP fees[2], published in July 2013.

The very nature of insolvency means that some people will not recover all that they are owed but what is important is that creditors have confidence that they will recover the maximum amount possible under the circumstances. Both the OFT and Professor Kempsons' report conclude that there is clear evidence of the difficulty unsecured creditors face in controlling fees, which can result in over-charging in some circumstances. Both reports highlight the need to strengthen the regulatory framework in this area.

Part 1 of the consultation sets out measures to strengthen the regulatory framework 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. These measures will bring the regulation of IPs into line with other regulatory systems, such as for auditors.

Part 2 includes a package of measures aimed at providing enhanced monitoring of fees by the regulators and simplifying the fee structure for unsecured creditors. IPs are entitled to be paid for the work they do but it is important to ensure that in doing so creditors get a fair deal. The proposed changes would in many insolvency proceedings limit the use of charging at an hourly rate, to cases where fees are tightly controlled by creditors. This will ensure that fees charged will be based on the value of the work done, and will more closely align the interests of IPs and unsecured creditors.

We are very keen to hear your views on these proposals, how they might work in practice and the benefits that they would bring for creditors. I have attached a copy of the consultation, which can also be found on our website at www.gov.uk/government/consultations <http://www.gov.uk/government/consultations> along with a template for response and a copy of the press release issued today. The consultation will run for 6 weeks and close on Friday 28th March 2014.

Responses can be sent by email to Policy.Unit@insolvency.gsi.gov.uk or in respect of the changes to the fee structure, submitted online at www.surveymonkey.com/s/RVC65FW.

We look forward to hearing from you.

Yours sincerely

Nick Howard

Head of IP Regulation

The Insolvency Service | Floor 4, 4 Abbey Orchard Street, London, SW1P 2HT | www.bis.gov.uk/insolvency

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SPECIALISTS IN FORENSIC INSOLVENCY & ASSOCIATED LITIGATION

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[1] http://www.oft.gov.uk/shared_oft/reports/Insolvency/oft1245
<http://www.oft.gov.uk/shared_oft/reports/Insolvency/oft1245> .

[2] http://www.bis.gov.uk/insolvency/insolvency-profession/review-of-ip-fees
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Policy.Unit@insolvency.gsi.gov.uk

(By Email Only)

26 March 2014

Dear Minister,

BIS consultation: Strengthening the regulatory regime and fee structure for insolvency practitioners (March 2014)

I write in response to your consultation on Insolvency Practitioners (IP) fees. Whilst I support the government proposals to "improve the reputation of and confidence in the insolvency profession", I have serious concerns that your third proposal (simplification of the fee structure) will cause significant 'harm' to creditors, small insolvency firms and the UK's globally renowned insolvency regime. I share your priorities to have a competitive, fair, transparent, world-renowned insolvency profession, which is currently 7th best in the world in terms of the amount returned to creditors and speed of the process, according to the World Bank. However I am worried that the proposal to simplify the fee structure through restricting the use of time-cost (where there is no secured creditor or no creditor committee) will undermine these common goals.

Before summarising my concerns, please note that I have significant concerns that the fees consultation is based on perception rather than fact and evidence. IPs' fees comprised just 2% of all complaints about IPs in in 2013 (down from 7% in 2010). To put this in perspective, in 2013, there were approximately 116,000 new insolvency cases, and there were just 13 complaints to the government about insolvency fees (0.01%). Even accounting for the fact that many of these 116,000 cases would have been handled by the Official Receivers – about whose fees there have also been complaints – the proportion of cases that are attracting official complaints about fees is negligible.

I support a number of the fee proposals set out in previous government reports. However the proposal to simplify the fee structure through restricting the use of time-cost was not recommended in any of those reports. Furthermore, I am unaware that the structure is used anywhere else in the world and so I am concerned that it has not been 'tried and tested'. I therefore ask that the government drops its proposals to restrict the use of time-cost as a method to charge fees, and ask that it reviews alternative recommendations as proposed by previous government reports that will address its goal of reforming IP fees and improving unsecured creditor engagement.

My other main concerns about restricting the use of time-cost and relying solely on fixed fee and percentage of realisations include:

- It does nothing to address the problem of a lack of engagement by unsecured creditors.
- It could lead to outsourcing of specific insolvency procedures to unregulated individuals. This would shift the cost rather than reduce it.

- It is impossible for an Insolvency Practitioner to 'guestimate' what might be involved in a case from the outset. Relying on an up-front fixed fee without an option to review the fee later would see IPs and creditors routinely short-changed.
- Because IPs cannot resign from a case, once they have reached their fixed fee level, they will almost certainly not optimise recoveries as there is no incentive to do so. This would lead to lower returns for creditors.
- Many cases would not be taken on by IPs at all because the fee could be too small to be economical.
- Creditors will lose out through the use of percentage of realisations where large returns might not reflect the amount of time an IP is required to dedicate to a case. IPs will lose out through the use of percentage of realisations where there are smaller cases with smaller returns which often involve greater investment in terms of hours and resources that would be reflected in the final settlement.

I have set out a more detailed response in the attached questionnaire.

The UK's insolvency regime is the 7th best in the world based on returns and costs to creditors, the likelihood of business rescue and the speed of the insolvency process. Given it is one of the best in the world, and given concerns around IP fees are negligible, I ask that the government reviews alternative proposals which are proportionate to the problem that it seeks to address, or merely takes the time to ascertain whether changes to the regulatory regime has the necessary impact on these perceptions.

Yours sincerely,

Nathan Jones
Licensed in the United Kingdom to act as an insolvency practitioner by the Institute of Chartered Accountants in England and Wales

Encl. IP regulation and fee consultation question response sheet

IP regulation and fee consultation question response sheet
(Consultees may wish to respond just to those questions that are of relevance to them)

Name: Nathan Jones *(IP Number: 9326)*
Organisation (if appropriate):
Contact Details: Email: nathan.jones@frpadvisory.com
Telephone: 0116 303 3250

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?

I have not had opportunity to consider the proposals with my recognised professional body, ICAEW, nor have I had the time to consider the implications of the consultation document in detail. In the limited time available, and bearing in mind my work commitments and commitments outside of work, I have not had the time to review regulation of other sectors to enable me to provide an informed comment on the proposals suggested in relation to Insolvency. In general terms, I am satisfied with the multiple RPB regulation as it currently stands, although I consider that the removal of the Secretary of State/IPA from operating as an RPB will be beneficial. Provided that the cost of compliance and monitoring of a regulatory objective regime is not too burdensome, then it seems appropriate an objectives framework is put in place.

I believe that the proposed objectives set out at paragraph 50 of the consultation document may need some further refinement. In particular, point 4 (at para 50) may encourage unintended consequences. By way of an example:

- a business sale may remove employee claims (by virtue of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”);
- Putting together and completing the sale may incur costs of the insolvency process (e.g. the Insolvency Practitioner’s Fees (“IP”), legal fees, consultation with employees, etc.);
- By virtue of the added employee liabilities that the business sale transfers to the purchaser, the realisations may not be any higher (they may even be marginally lower) than could be achieved on a forced sale of the assets after the staff have been made redundant.
- In this example, saving a number of jobs and the resultant removal of liabilities from the insolvent company’s balance sheet improves the aggregate outcome for creditors (the gross losses are smaller), however, the extent of any “return” to creditors is unchanged or may be marginally lower. It would seem to me that in the majority of circumstances, the rescue of the business and retention of staff (with potential future profits that the creditors may earn) is a better outcome than the redundancy of staff and a straightforward asset realisation.
- My interpretation of para 50 (4) is that the sale of the business as a going concern in the example above would be in contravention of the framework, which appears to be contrary to the public interest.

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

In the limited time available I have not had chance to consult with ICAEW concerning the proposals. Given the seriousness of a revocation, are the timescales proposed reasonable? If an appeal is made for judicial review, would this be expedited, and what would happen in the meantime? How would the costs of a judicial review be met?

In relation to publishing sanctions (para 61 of consultation document), is it not more transparent to publish sanctions? Would publishing also not encourage the RPB's to work harder to follow the framework?

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

In the limited time available I have not had chance to consult with ICAEW concerning the proposals. How would the costs of a judicial review be met?

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?

My main concern regarding financial penalty, is how is it proposed that this is funded? Fundamentally, it appears that each RPB will be seeking to create a war chest to meet any financial penalty that may be imposed, which will need to be met by IP's through fees, charges for services that are currently free, etc. Ultimately, this is likely to be passed on to creditors / insolvent estates through higher charges, or if this is not possible it will be a cost that an IP's firm will need to meet which may impact on operational capability.

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

There appears to me to be a contradiction between paragraphs 61 and 64 and 75 of the consultation document. On the one hand you do not to propose the Insolvency Service to publish the imposition of sanctions other than revocation (para 61), yet it is proposed that where there is a sanction the Secretary of State **will** publish notice of it (para 64). In addition to publishing sanctions, it appears that the consultation is also proposing to publish reprimands.

The over-arching proposal for publishing / not publishing is not clear to me. Furthermore, the costs of calling a Judicial Review is likely to make it impractical to ever challenge a public reprimand.

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?

I do not see the benefit in having the Secretary of State apply to Court to impose a sanction directly on an IP. I would have thought that any sanction could be effectively achieved through the target IP's RPB. It would seem that if there were a public interest case, then the appropriate action might be for the RPB to effectively suspend the IP's authorisation to accept new cases.

I note that the IP or RPB does not have a clear or guaranteed right to appeal. The final bullet point of paragraph 81 advises that they "could" be able to appeal the decision, not "would" be able to appeal the decision.

I also believe that the Secretary of State's proposed power to apply to Court to sanction an individual IP directly is likely to undermine the credibility of any and all RPB's. I do not consider that this would address the "perception" concerning the current disciplinary procedures as referred to at paragraph 79. I am not clear where the evidence to support the stated current "perception" has been obtained from.

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?

If the proposals are adopted, then it is apparent that there will need to be some mechanism to require compliance and the supply of information. My concern is that this is a further cost that will need to be met by the profession, which may ultimately impact on returns to creditors. Are there any proposals to recompense people where they have to spend time and/or money collating the information requested?

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

No, I do not agree with the proposal to provide a reserve power to designate a single insolvency regulator.

The consultation document advises that there is no intention to appoint a single regulator, however, there are suggestions within the consultation document that this is being sought in the medium to long term (e.g. paragraph 14 effectively states that a single regulator will be put in place if you are dissatisfied with the extent of change).

I am also not clear where the evidence is to support statements such as "widespread impression that the current regulatory regime is not fit for purpose" (para 3). If such statements can be evidenced, are the respondents a statistically significant sample size, and are they independent, knowledgeable and otherwise engaged to have a valid opinion on the regulation of insolvency?

As the reserve power would not be invoked without further consultation, it appears appropriate that it should be addressed in the future when it becomes more clear whether or not it is practically likely to be used.

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

See my response to Q9 above. In my opinion, there should not be a single regulator, and consequently I will not be drawn as to any functions or powers that such a regulator might have.

Part 2 – Insolvency Practitioner fee regime

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

On the basis of the limited information within the consultation document, I am not in a position to meaningfully comment on this.

At paragraph 100 there is reference to an impact assessment, which is cross referenced to pages 11-12. In the limited time available, I have not been able to find the impact assessment. It transpires that it was not attached to, or referred to within the body of the email sent by policy.unit@insolvency.gsi.gov.uk on 17 February 2014. As a consequence, I am not able to comment on whether the assumptions, calculations or principles are correct.

In so far as the assessment is incorrect, is there any recourse proposed against either Professor Kempson, or will the government put a statutory fund in place to meet any shortfall?

Clearly any error or variance between the impact assessment and reality is likely to result in increased costs for the RPB's which will need to be met by the IP's through their licence fees and equivalent, unless the government or Professor Kempson are willing to underwrite the calculations.

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?

Measuring value for money is subjective. Furthermore, the work that IP's undertake, and the specific circumstances of each case, is extremely varied.

In the environment in which an IP operates, it is difficult to see how any RPB (even a single regulator) would be able to ascertain on a like for like basis whether value for money had been achieved. In practical terms, it may be possible to identify specific instances where value for money had not been achieved, and I would expect that investigating by exception would form the practical basis of future regulatory reviews.

It would seem to make sense that some form of "value for money" review should improve creditor confidence. My concerns are:

- Can such a review be undertaken cost effectively and consistently?
- If we assume that Professor Kempson's assertions are correct, there appears to be a 9% swing in potential fees charged. As we work in an environment of complex and unique solutions, would a review looking at value for money realistically pick up a 9% swing and require some form of reinstatement to the estate, or would it in reality simply be a protracted process to document the extent of additional work and costs that were experienced. It is noted that Professor Kempson appears to be unclear about how great the swing (if any) is, which seems to be a fundamental uncertainty about the underlying facts as stated in her report;
- If we assume that Professor Kempson's assertions are incorrect, and the swing in fees is much less than 9%, then we are potentially adding costs to a process which ultimately will be passed on to creditors (either through increased IP fees to meet the overhead costs, or through the loss of high calibre individuals in the insolvency profession).

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?

To the best of my knowledge and belief, the consultation document has not considered the issue of why creditors might not be engaged in the Insolvency process and the setting of IP's fees. This, to me, appears to be the fundamental question that needs to be addressed and considered.

I believe that there are a multitude of reasons why creditors may not engage. I would like to believe that they have faith in the people that act as IP's (and some of them do), and that they believe that we can largely be left to our own devices to complete the work that we need to undertake. There are occasions where creditors entered in to some transactions knowing that they were potentially throwing good money after bad, and as a consequence they are not expecting anything back from the insolvency process and would prefer to emotionally distance themselves from the historic "bad" decisions and concentrate on taking their business forward. There are undoubtedly hundreds of other good reasons, which will include the complexity of understanding the fee regime, the reporting templates and the authorisation process. There is also, no doubt, the fact that most businesses have finite resources and focusing those resources at engaging with an insolvency process is not a beneficial use of that scarce resource.

At para 104, the consultation document highlights that Government creditors are not always engaged. Government creditors must surely be considered to be sophisticated and understand the current statute and fee authorisation regime. It seems a ready source of information that has not been tapped to understand why the government creditors have not engaged with insolvency.

I would question whether creditors would actually benefit more from advice and guidance and improved procedures *before* a business goes in to an insolvency process. If creditors felt more in control in managing the demise of a business, they are more likely to engage with the actual insolvency process, in my opinion. For example, statute could be changed to require that, in given circumstances, a director acquired some degree of personal liability for any unsatisfied CCJ granted against the business more than (say) 6 weeks before the commencement of an insolvency process. This would encourage directors to address their problems earlier and give real “teeth” to creditors to pursue recovery of monies. I appreciate that this example is not likely to be workable as it stands, but it is merely offered as a principal that might engage creditors to be more pro-active with distressed businesses, and also give them a bit of an incentive to support the business.

If we are not fundamentally changing the way that creditors might feel engaged with an insolvency process, I do not see that providing them with more paperwork (or directing them to web pages with it on) is going to improve matters.

I would have no objection to the Insolvency Service hosting a website with a standardised set of guides dealing with such matters as how to appoint an IP, obtain quotes and negotiate fees.

I consider that collating and providing comparative data of fee by asset size is misplaced and is a cost that is not worth incurring. In my experience, the asset size of a business has much less to do with the amount of work undertaken on a case than numerous other factors (for example, director compliance).

In my opinion, it would no doubt be useful for creditors if certain reports at Companies House were made available free of charge, to facilitate cross referencing by creditors. The reports that I would suggest are periodic reports and proposal documents in Administrations and the equivalent for other processes. These reports could be hosted elsewhere (e.g. the insolvency service), with a search index (say) by IP, firm, business sector, company name, start date of case, etc.

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?

I have significant concerns regarding the simplification of the fee structure that is being proposed.

Please note that in the limited time that has been provided in the consultation process, I have not had chance to read the proposed Draft legislation at Annex A. The brief glance at Annex A that I did have time for, has identified that the exceptions referred to at para 113 appear to be incorrect / misleading. In particular the nuance of the "and" before proposed Rule 17.14(2)(b) is omitted.

The UK Insolvency Profession is well recognised as having an extremely tough job, working in challenging circumstances and largely does its job well to support the regeneration (or closure) of businesses as well as identifying misdemeanours and pursue them. The foreword to the report recognises these issues.

It is suggested (I have not analysed the evidence) that unsecured creditors face difficulties in controlling IP's fees. This is not my experience in practice. The report also states that unsecured creditors are not engaged with insolvency processes, and the reasons for this have not been addressed or even considered in so far as I can tell (see my responses above).

On the basis of the evidence, and without understanding the fundamentals concerning the lack of creditor engagement (including HMR&C), it is proposed that there are some far reaching changes to the way that IP's are remunerated which would (in my opinion) drive many good practitioners to pursue other careers. This would be to the detriment of all creditors, and the economy more widely.

The proposal for a fixed fee/percentage basis of approving an officeholder's remuneration is flawed. Just a few thought on this are set out below:

- See my answer to Q1 in which I give an example where more work is undertaken by an IP to save a business and jobs, but without necessarily increasing realisations. If I am paid by reference to realisations, as an educated and commercial individual, I am incentivised to maximise the marginal recovery of each hour that I and my team work. If I can get 90% of my maximum fee for 50% of the effort, then that is what I am being encouraged to do, irrespective of whether I save 200 people's jobs;
- Cases where a significant proportion of the assets are contingent (e.g. actions against directors). The time and effort to pursue those assets might not be worthwhile when compared to the enhanced fee that might be recovered. The IP is therefore not incentivised to progress actions with directors "getting away with it". In the longer term, this could be exploited by rogue directors;
- Director co-operation makes a huge difference to the amount of time taken to run an insolvency case;

I could list more, but however long my list, it would not be exhaustive.

The proposal seems to be fundamentally flawed. As IP's we often get involved in a business relatively blind and find out as things go along as to whether the information we were provided with upfront was accurate or not. The extent of our work and effort does not directly correlate to the size of the assets under our control.

At paragraph 105, it is clear that Professor Kempson has not looked in to fee data by asset size and/or sector. It seems preposterous that some sort of "one size fits all" fee structure by reference to asset size is being proposed when there is no data to suggest where that might fall.

The consultation document highlights that IP's generally charge on a time cost basis. In my opinion, the reason for this is straightforward: as IP's our cost base is linked to the hours that are expended on a case, and there is significant uncertainty about how long a case will take to manage at the outset. Charging on a time cost basis therefore limits our risk of losses, which enables us to have competitive hourly rates. We still run the risk that our costs will exceed the asset values, and we will therefore not get a recovery of all of our fees. If we were not permitted to charge on a time cost basis, then I consider that there is a risk that the following could happen:

- IP's would not consent to act for certain companies; and/or
- IP's would outsource certain of their functions to get around the restrictions

I do not see that this provides an improved outcome for creditors.

I would expect that a fixed fee basis will likely to lead to a lower level of service and will penalise the recovery of more difficult assets.

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?

Please see my comments to Q14. I have not read Annex A, but on the basis of the body of the consultation document, I do not believe that there is merit in removing the time cost basis for remuneration in any circumstance. The current regime permits various alternative basis of remuneration.

This section of the consultation paper seems to ignore the first half, and in particular the effect of any change to the regulatory regime and the framework that is put in place. In particular, having RPB's concerning themselves with value for money is likely to have some effect on the profession, which appears to have been largely ignored.

The restriction of the fee basis for IP's adds additional cost and risks to the IP's personally and their firms, which may drive practitioners out of the market.

I believe that the conclusions drawn on the reasons why fees on secured creditor controlled work appear lower than those cases where the fees are in the hands of the unsecured creditors is flawed. Blended rates are often agreed with secured creditors which is normal in the industry and part of the agreement of securing a place on bank panels where a regular flow of work is derived. Furthermore when a secured creditor is involved there is often good communication between the IP and the secured creditor which enables approval and agreement of strategy to be established promptly thereby enabling certain cost savings. There is also often access to certain management information (e.g. asset schedules) which makes it easier to manage the case, or to challenge directors and staff early on where information provided is potentially misleading.

The consultation document appears to draw the conclusion that costs are inflated when control of costs rests with the unsecured creditors, which I believed is also flawed. A substantial proportion of work is undertaken by IP's where full recovery of time costs is not made, this is in respect of cases controlled by both secured and unsecured creditors. This is generally due to asset realisations being insufficient to pay all or sometimes any fee. This is not always known at the outset of a case.

As a profession we accept this is part of the business risk in accepting appointments. Taking appointment over cases where there are "potential" assets if robust investigations/proceedings are taken against rogue directors and others is part of an IP's work. These type of cases often have high time costs and are often undertaken with a commercial risk to the IP. The change in fee structure as proposed will result in IP's not being prepared to accept these assignments or be willing to undertake sufficiently robust investigations within an appointment which could result in recoveries being diminished; a reduction in return to creditors and a reduction in sanctions being taken against directors.

A percentage basis for agreement of fees is only likely to be attractive if the value of the assets is substantial, this does not in any way relate to the amount of work required in realising the asset and is likely to result in a lower return to creditors than the current time cost basis.

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

I would assume that you are able to take a view on recent fees (say the last 3 years), and create a matrix that would ensure that in aggregate the fees remain consistent. On a case by case basis, there would be differences and it is then an issue as to whether IP's would have the foresight, or be willing to accept an appointment, where their fees were likely to be lower. Where fees were likely to be considerably lower the level of service is likely to be diminished, and so it is unclear whether creditors would receive anything more. Where cases would recover more for the IP, then clearly creditors will receive less.

If the matrix is set so that IP's fees are lower (in aggregate) than historically the case, then IP's would need to look at their own internal operations. As you will appreciated, IP's remuneration is not the equivalent to their take home pay but is used to pay staff, cover overheads, Professional Indemnity Insurance, staff training, IT infrastructure, etc. A widespread reduction in fee income is likely to lead to restructuring by outsourcing roles (which might get around the restrictions), or otherwise reducing the quality and breadth of service offered. I do not consider that any of this would benefit 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?

I think it will be confusing for all stakeholders to have a different approach across different types of insolvency.

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?

For the avoidance of doubt, I do not consider a percentage of realisations basis as appropriate.

For the purpose of answering this specific question: If anything consideration should be given to some sort of fixed basis to deal with statutory compliance issues. This is relatively known at the outset of a case and the time taken should be broadly comparable across the industry. A percentage based on realisations is unlikely to result in a fair result to creditors as this would only be the preferred option if the value of the assets is significant. We would anticipate that if creditors engaged in the process they would reject this basis.

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?

No this is not viable. The starting point is not that in all cases the creditors will get a return. Any return to creditors is after certain costs are met which must include the IP's fees. There is a substantial amount of compliance that all IP's have to conduct in every case regardless of case size/asset values or creditor numbers. In a low asset value case even these minimum costs would not be recovered utilising a scale rate.

Furthermore, there is, in my opinion, insufficient correlation between the work required to conduct an insolvency assignment and the assets available in a case to justify putting in place a commercial scale rate. Should such a scale rate continue to be pursued, I consider that it is likely to drive distortions in to the delivery of IP services which ultimately will not benefit creditors, nor will it enhance the UK's global ranking for insolvency services.

Please also see my answer to Q16.

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

The existing basis of charging for time and rate is appropriate in the majority of circumstances; the hours involved in any assignment are always uncertain.

Impact Assessment questions:

Q21: Do you agree with this estimation for familiarisation costs for the changes to the fee structure?

This was not included in the attachments sent by Policy.Unit@insolvency.gsi.gov.uk on 17 February 2014. I have consequently not had chance to locate and view this document.

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?

I do not believe that there is currently a level of over-payment. I believe that there might be a perception of over-payment, but a significant proportion of people do not understand the role of an insolvency practitioner, the burden of taking on a case and the work levels required.

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?

I have not had opportunity to assess this. What I am not clear on though, is how changing the basis of remuneration to a multi-track system is going to make creditors understanding any more thorough and increase creditor engagement.

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?

I have not had opportunity to review this to pass comment.

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?

I have not had opportunity to review this to pass comment.

Q27: Do consultees believe these measures will improve the market confidence?

I have not had opportunity to review this to pass an informed comment, however, I do not consider that the proposed measures to IP fees will improve market confidence as I believe that they will distort behaviour including by encouraging IP's and senior staff to leave the profession, or increasing less well controlled or regulated out-sourced solutions, which will ultimately result in a worse outcome for creditors.

A percentage of asset basis for remuneration is also likely, in my opinion, to undermine the credibility of the profession as it will reinforce the incorrect perception that our role as IP's is solely restricted to selling assets. Any fee matrix that is put in place is likely to look comparatively high when compared against other parties (e.g. estate agents or chattel asset agents), which will further damage the profession, as it will continue to appear that our fees are expensive whether or not they ever cover the costs of dealing with an insolvency. Furthermore, it may encourage directors of insolvent businesses to dispose of the assets pre-appointment (which will then need investigating) as a mechanism for the directors to demonstrate that they are doing the right thing by creditors by simply restricting the IP's fees.

Q28: Do consultees believe these measures will improve the reputation of the insolvency profession?

For a variety of reasons set out in the covering letter and to other answers in this consultation, I believe that measures to fundamentally change the fee structure for IP's will distort behaviour and will ultimately lead to a reduction in the reputation of the insolvency profession.

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Date: 27 March 2014

Reply to: **IVYBRIDGE**

Email: hamish.adam@richardjsmith.com

Dear Sir

Consultation on strengthening the regulatory regime and fee structure for Insolvency Practitioners

Response by Hamish M Adam, Licensed Insolvency Practitioner of Richard J Smith & Co, 53 Fore Street, Ivybridge, Devon PL21 9AE

I refer to the above consultation and respond as follows:

Part 1 – Regulation of Insolvency Practitioners

Q1: Paragraph 50, Objective 1 states that the regulatory objectives should protect and promote the public interest. The public interest in relation to insolvency needs to be defined. I query whether it is in the public interest to reduce fees and IP's remuneration to such a level that IPs are put out of business, thereby reducing competition or conducting their work sufficiently only to "meet budget". Such important investigation work may be ruled out and realisations missed in the process. Objective 2(ii) is too widely drafted. Any other principle considered to represent best regulatory practice leaves the door unacceptably open to interpretation. Objective 3(ii) does not reflect the reality of insolvency work. Sometimes certain creditors have no interest in a case and never will and occasionally there are conflicting interests. Objective 5 requires a value judgement which will vary from party to party. Value for money is not definable as a general objective.

Q2: No comment on the proposed procedure for revoking the recognition of an RPB. It seems sensible.

Q3: No comment on the proposed scope and procedures for the Secretary of State to issue a direction to an RPB.

Q4: I am not in favour of the proposals for the Secretary of State imposing a financial penalty on an RPB. The cost of such a penalty will simply be passed on to IPs who may have little control over the conduct of regulatory bodies. I am also opposed to an open ended fine. There should be a limit set in law comparable to other regulatory situations.

Q5: I have no comment on the proposed scope and procedures for the Secretary of State publicly reprimanding an RPB. It seems reasonable.

Q6: I agree with the proposed arrangement for RPBs to be able to make representations about a proposed reprimand.

Q7: I take issue with the proposal for the Secretary of State to be able to apply to Court to impose a sanction directly on an IP in exceptional circumstances. I believe this may place the IP in the invidious position of being dealt with by the RPB in a proper manner and perhaps being cleared of any disciplinary action then be subject to further actions by the Secretary of State for public interest reasons over which he has no control. This is a form of double jeopardy. The RPB's decisions should be upheld and supported. There is no evidence that the current disciplinary procedures for IPs are ineffective in delivering fair, effective and prompt outcomes. Quite the opposite, often the complainants are aggrieved at the insolvency procedure itself rather than the IP who undertakes the insolvency. Debtors, directors and creditors often make unjustified complaints and false allegations to create a fog of maltreatment, when in reality there can be little or no basis for any complaint.

Q8: I am comfortable with the Secretary of State requiring information from the persons specified to be delivered up. I would also include on that list all local and central government departments, including H M Revenue & Customs and Banks and should include a time frame for the provision of such information., failing which fines will be levied.

Q9: I am comfortable with the proposal to provide a reserve power for the Secretary of State to designate a single regulator. However this power should be only used with the majority consent of the IP members of all those regulatory bodies.

Q10: The proposed function and powers of a single regulator appear to be sensible. My view is also that the Official Receivers and staff of the Insolvency Service should also be subject to the same regulations to ensure staff are fit and proper to do insolvency work and that standards and procedures are maintained. Official Receivers do not have the same qualifications and training as IPs at present and this has always seemed to be quite unfair and unbalanced. Official Receivers and their staff also should be capable of being investigated.

Part 2 – Insolvency Practitioner Fee Regime

Background

I question the 2010 OFT findings about liquidation and administration fees being higher when "secured" creditors are absent. I have analysed the 70 Creditors' Voluntary Liquidations (CVLs) of my firm that were open between January 2011 and December 2013 and note that on average fees were 15% being proportionally higher where the liquidations were small with limited assets. The liquidations were split between those which had company debentures (security) in place and those that were not after having removed those liquidations where there was no remuneration charged to date and also eliminating a very large liquidation (M Thomas Management Limited), where fees were high but realisations were greater, which distorts the data. The results show no significant difference between liquidations with a debenture and those without. Furthermore, when cases were eliminated if the cases had not closed in the period then cases with debentures had higher costs than those without. I attach the three analyses referred to above. I therefore am of the conclusion that there has not been a "market failure" and creditors may not have been prejudiced. In addition, it would not be a surprising conclusion if smaller cases had fees that used a greater proportion of realisations because there is an inherent "fixed cost" aspect to liquidation work (namely employee matters, statutory reporting, D Reports) which must be incurred whatever the cost. In the very smallest cases all the assets are commonly used to defray the costs and remuneration of the liquidation. This is not a market failure but simply the real life facts of insolvency work, that the costs of dealing with insolvent small companies often means that creditors are unlikely to receive a dividend.

Paragraph 90

Not all firms/IPs are able to be on Bank panels nor wish to be. Where there are no secured creditors it is simply not true to say there is no competition. In my firm's practice area in Devon & Cornwall there are approximately ten competitors for such work. It is difficult for creditors to work together but not impossible. Is it the government's role to compensate for commercial apathy? In most non debenture cases H M Revenue & Customs and Banks (as unsecured creditors) are significant creditors but there is no involvement from these parties in most cases. In most cases creditors do not question the fees of IPs (certainly the fees of my firm) because we do a good job in difficult circumstances and they see that as valuable work. This does not amount to market failure.

Paragraph 91

I disagree that creditors need a detailed understanding of the insolvency process to understand time and rate based fees. SIP9 disclosures are now quite detailed and revealing. The four main areas of concern amongst stakeholders are: (i) charge out rates, (ii) inefficient working and staff management, (iii) time recording and (iv) costs in effective working.

Charge out rates typically comprise an element to recover direct wage costs, an element to recover overheads (rent, rates, power, transport, subscriptions, compliance costs etc.) and an element of profit for the business. Traditionally this has been split 33/33/33. The absolute rates are higher in the cities and the South East where costs are higher. Charge out rates have increased because of inflation, continuous overhead increases including in most cases the increased cost of regulation and compliance (e.g. voluminous checklists to ensure compliance with ever more complex rules and regulations). A case in 2014 probably costs twice or three times as much as it did in 1994 during the last recession due to increased regulation and compliance procedures required.

There is no evidence to support inefficient working and staff management. I do not believe it is possible to commoditize insolvency work in a production line manner. The work is too complex and varied in nature.

Time recording in most practices is now at the rate of 1 unit each 6 minutes. Formerly most IPs recorded time in 15 minute blocks. It is simply not practical or feasible to record time in smaller units. Time recording does involve an element of professional judgement but staff keep daily and weekly timesheets to ensure accuracy.

There is no evidence to support cost ineffective working.

Insolvency work cannot be commoditised like a production line. There has to be "thinking" time and opportunities for discussion and suchlike on case work. This time is important to the successful conduct of cases.

In conclusion, I do not believe there has been a market failure but I do believe that creditors/the public have little or no appreciation of the volume or complexity work involved in insolvency case work and expect it to be provided and remunerated at charge out rates which cannot support the skills required.

Paragraph 94

H M Revenue & Customs is by far the larger creditor in most of our insolvency work. Other than their VAS team who deal with Individual Voluntary Arrangements and Company Voluntary Arrangements, they rarely take any part in the proceedings. This is a resource issue that the government chooses not to address or is unable to address due to budget cuts.

Paragraph 95

<u>Transparency measures</u> – SIP9 reporting and analysis is sufficiently clear.

<u>Estimates of fees and caps</u> -- Fee estimates are almost impossible to provide because of the nature of the work. A cap would be unfair on the IP because his costs may be far in excess of the work which merits those costs.

Creditor protection agencies may be a solution to creditor representation.

<u>Simplification of fee structure</u> – Time and rate is a simple fee structure. Percentage realisation fees and fixed fees may only be appropriate for certain types of cases where outcomes are more certain. Realisation fee scales and fixed fees need to reflect the current costs of cases and not result in an abandonment of certain areas of the market by IPs and reduced competition which may be an unintended outcome.

I disagree that there needs to be greater oversight of fees. Which other areas of the professional private sector have their fees and costs fixed by the government? This is not a regulation issue, it is a market issue. A dumbing down or commoditisation of the work of Insolvency Practitioners which will occur if fees are forced downwards irrespective of costs, will not benefit creditors because the net result will be the use of low grade unqualified staff who may not have the skills to undertake the work effectively and produce the best outcomes.

Q11: I do not believe that cost of monitoring fees should be met by the profession, RPBs and IPs. If the Secretary of State wishes fees to be monitored then the cost has to be born through general taxation.

Q12: I do not believe that assigning IP fees to the regulatory framework, greater compliance monitoring, oversight and complaint handling of fees can be dealt with by the regulators without significant costs. This will be a further overhead for IPs I suspect unless paid for by general taxation. I do not believe that this extra cost will benefit creditors. It is not possible to build in "value for money" into regulations. Value for money is not definable; it depends on the view of the user of the services and not just the nature and complexity of the work done although the latter are important in that decision. In a supermarket identical products are often sold for widely differing prices (e.g. cornflakes), but this does not mean that the lowest priced cornflakes are value for money. There are other brand and taste factors. This is also the case for insolvency work.

Q13: Publishing information on approving fees, how to appoint an IP, obtaining quotations and negotiating fees and comparative fee data by asset size may assist unsecured creditors to negotiate competitive rates and would be helpful to improve the involvement of unsecured creditors. It should be noted however that information relating to fees is already available to unsecured creditors at any fee request due to the requirements of SIP9.

Q14: Paragraph 106 reiterates the point that the nature of limited liability means that unsecured creditors are likely to suffer a shortfall in any insolvency. Frequently there will never be funds available to unsecured creditors in the smallest insolvencies after the costs of conducting the liquidation.

I do not agree with the proposal to restrict time and rate <u>only</u> to case where there is:

- A creditors committee
- Where secured creditors are not paid in full
- IVAs, CVAs and MVLs.

Time and rate is appropriate in all cases. It is a valid and effective way of charging professional time to a case. The nature of insolvency work means that it is often not possible to estimate the work required in any insolvency to enable a fixed fee or a percentage realisation fee. This has the potential to leave IPs seriously out of pocket and make such work unviable. Ironically such a policy will not increase competition and drive down fees; it will reduce competition and increase fee costs. Existing IPs may exit this market and the remaining IPs may increase their charges. Creditors may be worse off and the Official Receiver may have to step in to deal with many more small liquidations and it is currently not resourced to do so.

If the profession is forced into fixed fee/realisation scale insolvencies then further exceptions should be considered:

- Small insolvencies where a de minimis asset realisation level should apply (I would advocate that this level should be set at £20,000 of gross assets. Where gross realised asset levels are less than £20,000 the IP should be permitted time and rate in any circumstances.

- Where a majority in value of unconnected creditors voting at the meeting agree by way of a resolution proposed prior to the meeting of creditors at the convening stage and in the notices.

The fall-back position of the statutory scale is not an economic option. The scale rates are totally inadequate. If scale rates are the preferred option, IPs should also be able to charge an ad valorem fee equivalent to the Secretary of State fees drawn by the Official Receiver in compulsory liquidations which are:

First £2,500	0%
Next £1,700	100%
Next £1,500	75%
Net £396,000	15%
To limit of £80,000 fees	1%

<u>In addition</u> the IP should be able to charge realisation fees and distribution fees as set out. This then creates parity with the Insolvency Service.

Alternatively the scales should be combined and the following is proposed (after settlement of disbursements and third party costs). This reflects commercial reality at present.

Gross Assets Realised		Fees for £10,000 of Assets £		Fees for £20,000 of Assets £		Fees for £50,000 of Assets £		Fees for £100,000 of Assets £	
£0 - £5,000	100%	5,000		5,000		5,000		5,000	
£5,001 - £10,000	75%	3,750		3,750		3,750		3,750	
£10,001 - £20,000	50%			5,000		5,000		5,000	
£20,001 - £50,000	25%					7,500		7,500	
£50,001 - £100,000	10%							5,000	
£100,001 +	5%								
		8,750	87.5%	13,750	68.75%	21,250	42.5%	26,250	26.25%

Paragraph 117

- Creditors currently do have control over fees charged by IPs but they choose not to exercise that control at creditors meetings. I would argue that they are comfortable at the fees that IPs charge for a difficult job.

- In the smallest of cases (< £20,000 of gross assets) the asset values are simply too low to support dividends to unsecured creditors and creditors are being unrealistic as to the time spent and costs involved in the process and tasks involved.

- The existing statutory scale rate is flawed. Only if IPs are permitted to charge:

  - ad valorem fee and
  - realisation fees and
  - distribution fees

  is it workable. An alternative scale needs to be devised as suggested above.

- It is often impossible to determine the outcome of liquidations because realisation levels and often costs are unknown. IPs could provide an estimate of their time costs based on previous experiences or an estimated outcome statement after the first meeting.

- There is in reality very little interest in creditor committees.

Paragraph 118

IPs should be able to take remuneration as a fixed amount but this will be rarely used where there is a risk that the fixed estimate will not cover time costs.

Paragraph 119

Is it the role of professional bodies to control fees? Should it not be left to the market to decide? Price fixing rarely produces the right results historically.

Paragraph 121

The right to apply to Court to have inappropriate fee bases changed should be retained. The statutory scale needs to be revised.

Q15: The proposals set out in Annex A should reflect the comments and proposals set out above. My view is that time and rate should remain applicable in all circumstances and the government should not interfere in a market that has functioned well over many recessions and years.

Q16: The proposed fee structure will drive down fees inappropriately. In smaller cases, liquidations and administrations will become uneconomic for IPs to conduct. Many IPs will leave the market, there will be less competition, the Official Receiver will end up with many small cases that it is not resourced to deal with.

Q17: The proposed changes should not apply to CVAs, IVAS or MVLs or indeed to any insolvencies.

Paragraph 125

A revised prescribed scale may be appropriate as set out above but there has to be acceptance of reality that there will rarely be <u>any</u> return to creditors in small liquidations (< £20,000) of asset realisations.

Paragraph 127

A properly based prescribed scale which takes account of the real costs of liquidations will remove the need for creditors to become involved in simpler cases and also in larger cases.

Q18: A prescribed scale needs to reflect commercial reality and be <u>at least</u> equal to the Official Receiver's remuneration in Compulsory Liquidations and Bankruptcies. (Please see above.)

Q19: The current statutory scale is not commercially viable. I have set out an acceptable scale above. The scale needs to be revised annually to take account of market changes and inflation and interest rates.

Paragraph 128, Paragraph 129 & Q20:

There are aspects of the IPs job that ought to be time and rate.

- D Reports and investigation work
- Agreement of creditors' claims
- Taxation work
- Property and realisation work (where no auctions)
- Reporting to banks and creditors
- Realising book debts (especially contract debts)
- Completion of checklists for compliance purposes
- MLR/POCA checks
- Trading and monitoring costs
- Dealing with employees and the RPO

Paragraph 129

Experience shows that H M Revenue & Customs and Banks and Directors in cases where there is only unsecured debt have little or no interest in forming committees. The government should not be forcing creditors to form committees if they do not want to be involved. The IP is quite prepared to act independently but he needs to be paid properly for that responsibility.

Yours faithfully

Hamish M Adam

H M Adam
Partner

Breakdown of Liquidations From January 2011 to date:

Date: 19-Feb-14

Type	Case Name	Appointed	Closed	Admin	Asset Value (Value Taken from S of A)	Rem to Date (Value Taken from ECB)	Receipts to date (Value Taken from ECB)	Fess as a % of Receipts	Debenture in place
LIQ	AMA Consulting Engineers Ltd	13-Sep-02	10-Mar-11	Karen	59,787	16,148.16	140,253.25	11.51%	NO
LIQ	Freakfish Limited	26-Mar-10	18-Mar-11	Becky	30,435	21,232.00	40,313.38	52.67%	NO
LIQ	Plymouth Tile Centre Limited	06-Jul-10	03-May-11	Toby	9,113	5,907.00	10,645.30	55.49%	NO
LIQ	Talling Construction Co Ltd	08-Aug-08	18-May-11	Sam	564,612	68,300.00	516,383.27	13.23%	NO
LIQ	Terrys Farm & Country Supplies Ltd	21-Dec-10	26-Aug-11	Rob	27,372	14,796.00	30,474.30	48.55%	NO
LIQ	Parman (Commercial) Limited	15-Jul-10	09-Sep-11	Toby	52,537	34,639.50	53,184.12	65.13%	NO
LIQ	Billingtons Limited	05-May-10	09-Dec-11	Becky	11,603	13,913.00	22,107.98	62.93%	NO
LIQ	Tim England Developments Ltd	05-Jul-07	04-Jan-12	Sue	1,000	5,797.50	13,083.56	44.31%	NO
LIQ	Rent a Fence Limited	13-Oct-10	09-Jan-12	Rob	18,720	10,945.00	18,676.71	58.60%	NO
LIQ	Global Classics Limited	04-Mar-10	15-May-12	Karen	7,865	8,506.00	23,895.43	35.60%	NO
LIQ	Redruth Electrical Co Limited	23-Sep-09	18-May-12	Becky	61,950	28,400.00	60,803.04	46.71%	NO
LIQ	Compatix International Ltd	16-Mar-11	06-Jul-12	Sam	29,741	11,168.00	14,800.36	75.46%	NO
LIQ	Smart Repairs (SW) Ltd	23-Sep-08	13-Jul-12	Becky	1,100	2,653.00	5,583.75	47.51%	NO
LIQ	P R Dogs Limited t/a P R Dogs	14-Jul-11	11-Sep-12	Becky	18,673	6,352.00	12,560.34	50.57%	NO
LIQ	Total Employment (SW) Ltd	04-Nov-11	01-Nov-12	Sam	55,668	11,082.50	59,906.82	18.50%	NO
LIQ	Elliotts (South West) Limited	14-Nov-07	14-Nov-12	Becky	16,334	32,809.00	77,292.70	42.45%	NO
LIQ	County Environmental Services Ltd	24-Feb-11	21-Dec-12	Becky	458,382	20,160.50	470,648.92	4.28%	NO
LIQ	R J Crane Electrical Contracting Ltd	03-Sep-10	22-Mar-13	Becky	37,569	16,243.00	25,819.12	62.91%	NO
LIQ	Plymouth Metal Fabrications Ltd	22-Nov-11	11-Sep-13	Rob	46,670	23,485.50	46,449.86	50.56%	NO
LIQ	Riviera Roofing Limited	09-Dec-10	25-Sep-13	Becky	66,473	12,927.00	37,261.89	34.69%	NO
LIQ	Toyopia Limited	05-Sep-12	08-Oct-13	Karen	9,210	1,381.50	11,143.52	12.40%	NO
LIQ	Golden Down Festivals Ltd	15-Aug-12	01-Nov-13	Rob	14,048	9,840.50	16,265.96	60.50%	NO
LIQ	Eclipse Partnership UK Limited	20-Oct-10	19-Nov-13	Karen	218,791	68,380.00	350,403.21	19.51%	NO
LIQ	Telecom IC Limited	14-Oct-13		Rob	18,563	1,000.00	11,570.00	8.64%	NO
LIQ	AC1 Recruitment Limited	12-Jun-13		Sue	14,456	3,883.00	10,419.93	37.27%	NO
LIQ	Infiniti Black Ltd	06-Mar-12		Rob	14,389	4,678.00	12,657.64	36.96%	NO
LIQ	NHC 2013 Limited	29-Nov-13		Sam	20,304	6,497.00	20,605.04	31.53%	NO
LIQ	WCA Contracts Limited	27-Feb-13		Sam	33,033	6,710.00	16,637.30	40.33%	NO
LIQ	R P Davis Construction Ltd	02-Aug-13		Rob	7,300	7,000.00	10,114.05	69.21%	NO
LIQ	Heathfield Car Recovery Ltd	18-Jul-11		Becky	26,820	8,405.00	15,217.42	55.23%	NO
LIQ	DAB Building Contractors Ltd	02-Oct-12		Becky	46,060	14,256.50	35,204.42	40.50%	NO
LIQ	Connoisseur Windows Ltd	14-Oct-11		Becky	78,006	20,350.00	48,026.21	42.37%	NO
LIQ	Thompson Construction Services Ltd	22-Feb-12		Karen	29,188	21,388.50	39,306.03	54.42%	NO
LIQ	Swercots Limited	16-Mar-12		Sam	469,249	26,265.50	529,511.43	4.96%	NO
					2,575,021	565,500	2,807,226	20.14%	
LIQ	C J Contracting Limited	22-Dec-08	05-Jan-11	Sam	63,075	14,416.00	54,875.59	26.27%	YES
LIQ	Streamline Protect Limited	23-Oct-09	12-Jan-11	Karen	4,883	4,770.50	6,618.84	72.07%	YES
LIQ	Central Cleaning Contractors Ltd	16-Dec-09	03-Feb-11	Karen	247,018	32,693.50	269,309.25	12.14%	YES
LIQ	A & T Construction Cornwall Ltd	22-Oct-09	14-Apr-11	Sue	91,209	16,106.00	94,361.57	17.07%	YES
LIQ	S P Carpentry & Construction Ltd	22-Feb-06	27-Apr-11	Ken	7,500	4,014.50	6,377.27	62.95%	YES
LIQ	W Y S Realisations Limited	29-Apr-10	20-Jul-11	Becky	16,759	9,744.86	25,074.56	38.86%	YES
LIQ	Powercats Limited	11-Dec-08	27-Jan-12	Becky	182,176	40,881.00	107,773.29	37.93%	YES
LIQ	Hall Merrill & Hall Ltd	24-Jun-11	26-Jun-12	Becky	40,561	14,763.50	42,449.47	34.78%	YES
LIQ	Andsty Limited	31-Mar-10	26-Mar-13	Sue	11,489	7,700.50	13,111.92	58.73%	YES
LIQ	BFEC Solutions Ltd	24-Apr-12	23-Apr-13	Sam	30,635	5,854.25	21,240.21	27.56%	YES
LIQ	BFEC Holding Company Ltd	24-Apr-12	13-May-13	Rob	2,396	2,140.50	4,301.42	49.76%	YES
LIQ	BFEC Design Solutions Ltd	24-Apr-12	13-May-13	Rob	2,400	3,616.75	6,100.46	59.29%	YES
LIQ	BFEC Project Management & Admin Ltd	24-Apr-12	13-May-13	Rob	6,494	5,537.25	8,508.36	65.08%	YES
LIQ	Dartmoor Design Limited	14-Oct-10	20-Aug-13	Sue	31,162	6,875.50	11,483.00	59.88%	YES
LIQ	Sowden Brothers (Roofing) Ltd	14-Feb-12	13-Sep-13	Sam	32,286	17,381.00	39,934.48	43.52%	YES
LIQ	Rose Opticians Limited	24-Jul-12	19-Sep-13	Sam	23,800	14,477.50	37,037.37	39.09%	YES
LIQ	SFDN Realisations Ltd	01-Oct-12	08-Nov-13	Rob	14,000	4,289.50	33,354.35	12.86%	YES
LIQ	Overhead Surf Limited	22-Feb-13	20-Nov-13	Becky	11,744	8,203.50	15,281.83	53.68%	YES
LIQ	Right Price PVCu Products Ltd	19-Dec-12	23-Dec-13	Becky	46,154	19,096.00	57,917.47	32.97%	YES
LIQ	C A Print & Stationers Limited	12-Jan-11		Becky	93,255	1,000.00	10,275.43	9.73%	YES
LIQ	Touchstone Brickwork Contractors (London) Ltd	06-Dec-12		Karen	42,607	10,208.00	28,044.89	36.40%	YES
LIQ	Mardon Properties Ltd	01-Nov-12		Becky	245,463	24,429.00	221,604.35	11.02%	YES
LIQ	Dutch Flower Import Cornwall Ltd	20-Mar-12		Becky	97,464	25,000.00	65,157.75	38.37%	YES
LIQ	B&B Builders Limited	21-Aug-12		Becky	53,400	26,922.00	49,236.45	54.68%	YES
LIQ	Frontweb Limited	31-Jan-12		Rob	170,707	30,286.00	129,731.77	23.35%	YES
LIQ	BFEC Limited	24-Apr-12		Sam	54,805	48,543.50	499,962.05	9.71%	YES
	Totals:				1,623,442	398,951	1,859,123	21.46%	

Breakdown of Liquidations From January 2011 to date:

Date: 19-Feb-14

Type	Case Name	Appointed	Closed	Admin	Asset Value (Value Taken from S of A)	Rem to Date (Value Taken from ECB)	Receipts to date (Value Taken from ECB)	Fess as a % of Receipts	Debenture in place
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LIQ	Freakfish Limited	26-Mar-10	18-Mar-11	Becky	30,435	21,232.00	40,313.38	52.67%	NO
LIQ	Plymouth Tile Centre Limited	06-Jul-10	03-May-11	Toby	9,113	5,907.00	10,645.30	55.49%	NO
LIQ	Talling Construction Co Ltd	08-Aug-08	18-May-11	Sam	564,612	68,300.00	516,383.27	13.23%	NO
LIQ	Terrys Farm & Country Supplies Ltd	21-Dec-10	26-Aug-11	Rob	27,372	14,796.00	30,474.30	48.55%	NO
LIQ	Parman (Commercial) Limited	15-Jul-10	09-Sep-11	Toby	52,537	34,639.50	53,184.12	65.13%	NO
LIQ	Billingtons Limited	05-May-10	09-Dec-11	Becky	11,603	13,913.00	22,107.98	62.93%	NO
LIQ	Tim England Developments Ltd	05-Jul-07	04-Jan-12	Sue	1,000	5,797.50	13,083.56	44.31%	NO
LIQ	Rent a Fence Limited	13-Oct-10	09-Jan-12	Rob	18,720	10,945.00	18,676.71	58.60%	NO
LIQ	Global Classics Limited	04-Mar-10	15-May-12	Karen	7,865	8,506.00	23,895.43	35.60%	NO
LIQ	Redruth Electrical Co Limited	23-Sep-09	18-May-12	Becky	61,950	28,400.00	60,803.04	46.71%	NO
LIQ	Compatix International Ltd	16-Mar-11	06-Jul-12	Sam	29,741	11,168.00	14,800.36	75.46%	NO
LIQ	Smart Repairs (SW) Ltd	23-Sep-08	13-Jul-12	Becky	1,100	2,653.00	5,583.75	47.51%	NO
LIQ	P R Dogs Limited t/a P R Dogs	14-Jul-11	11-Sep-12	Becky	18,673	6,352.00	12,560.34	50.57%	NO
LIQ	Total Employment (SW) Ltd	04-Nov-11	01-Nov-12	Sam	55,668	11,082.50	59,906.82	18.50%	NO
LIQ	Elliotts (South West) Limited	14-Nov-07	14-Nov-12	Becky	16,334	32,809.00	77,292.70	42.45%	NO
LIQ	County Environmental Services Ltd	24-Feb-11	21-Dec-12	Becky	458,382	20,160.50	470,648.92	4.28%	NO
LIQ	R J Crane Electrical Contracting Ltd	03-Sep-10	22-Mar-13	Becky	37,569	16,243.00	25,819.12	62.91%	NO
LIQ	Plymouth Metal Fabrications Ltd	22-Nov-11	11-Sep-13	Rob	46,670	23,485.50	46,449.86	50.56%	NO
LIQ	Riviera Roofing Limited	09-Dec-10	25-Sep-13	Becky	66,473	12,927.00	37,261.89	34.69%	NO
LIQ	Toyopia Limited	05-Sep-12	08-Oct-13	Karen	9,210	1,381.50	11,143.52	12.40%	NO
LIQ	Golden Down Festivals Ltd	15-Aug-12	01-Nov-13	Rob	14,048	9,840.50	16,265.96	60.50%	NO
LIQ	Eclipse Partnership UK Limited	20-Oct-10	19-Nov-13	Karen	218,791	68,380.00	350,403.21	19.51%	NO
					1,817,653	445,067	2,057,957	21.63%	
LIQ	C J Contracting Limited	22-Dec-08	05-Jan-11	Sam	63,075	14,416.00	54,875.59	26.27%	YES
LIQ	Streamline Protect Limited	23-Oct-09	12-Jan-11	Karen	4,883	4,770.50	6,618.84	72.07%	YES
LIQ	Central Cleaning Contractors Ltd	16-Dec-09	03-Feb-11	Karen	247,018	32,693.50	269,309.25	12.14%	YES
LIQ	A & T Construction Cornwall Ltd	22-Oct-09	14-Apr-11	Sue	91,209	16,106.00	94,361.57	17.07%	YES
LIQ	S P Carpentry & Construction Ltd	22-Feb-06	27-Apr-11	Ken	7,500	4,014.50	6,377.27	62.95%	YES
LIQ	W Y S Realisations Limited	29-Apr-10	20-Jul-11	Becky	16,759	9,744.86	25,074.56	38.86%	YES
LIQ	Powercats Limited	11-Dec-08	27-Jan-12	Becky	182,176	40,881.00	107,773.29	37.93%	YES
LIQ	Hall Merrill & Hall Ltd	24-Jun-11	26-Jun-12	Becky	40,561	14,763.50	42,449.47	34.78%	YES
LIQ	Andsty Limited	31-Mar-10	26-Mar-13	Sue	11,489	7,700.50	13,111.92	58.73%	YES
LIQ	BFEC Solutions Ltd	24-Apr-12	23-Apr-13	Sam	30,635	5,854.25	21,240.21	27.56%	YES
LIQ	BFEC Holding Company Ltd	24-Apr-12	13-May-13	Rob	2,396	2,140.50	4,301.42	49.76%	YES
LIQ	BFEC Design Solutions Ltd	24-Apr-12	13-May-13	Rob	2,400	3,616.75	6,100.46	59.29%	YES
LIQ	BFEC Project Management & Admin Ltd	24-Apr-12	13-May-13	Rob	6,494	5,537.25	8,508.36	65.08%	YES
LIQ	Dartmoor Design Limited	14-Oct-10	20-Aug-13	Sue	31,162	6,875.50	11,483.00	59.88%	YES
LIQ	Sowden Brothers (Roofing) Ltd	14-Feb-12	13-Sep-13	Sam	32,286	17,381.00	39,934.48	43.52%	YES
LIQ	Rose Opticians Limited	24-Jul-12	19-Sep-13	Sam	23,800	14,477.50	37,037.37	39.09%	YES
LIQ	SFDN Realisations Ltd	01-Oct-12	08-Nov-13	Rob	14,000	4,289.50	33,354.35	12.86%	YES
LIQ	Overhead Surf Limited	22-Feb-13	20-Nov-13	Becky	11,744	8,203.50	15,281.83	53.68%	YES
LIQ	Right Price PVCu Products Ltd	19-Dec-12	23-Dec-13	Becky	46,154	19,096.00	57,917.47	32.97%	YES
	Totals:				865,741	232,562	855,111	27.20%	

Breakdown of Liquidations From January 2011 to date:

Date: 19-Feb-14

Type	Case Name	Appointed	Closed	Admin	Asset Value	Rem to Date	Receipts to date	Fess as a % of Receipts	Debenture in place
					Value Taken from S of A	Value Taken from ECB	Value Taken from ECB		
LIQ	Car & Commercial (Bridgnorth) Ltd	17-Jan-14		Becky	41,649	-	4,703.45	0.00%	NO
LIQ	Delta Construction (SW) Limited	18-Feb-14		Sam	-	-	-	#DIV/0!	NO
LIQ	G&D Haulage Limited	22-Jan-14		Rob	3,542	-	3,542.36	0.00%	NO
LIQ	Hart Electrical Services Ltd	24-Jan-14		Sue	12,324	-	6,510.71	0.00%	NO
LIQ	T C Distribution (SW) Ltd	30-Nov-12		Sam	39,000	400.00	15,018.65	2.66%	NO
LIQ	Telecom IC Limited	14-Oct-13		Rob	18,563	1,000.00	11,570.00	8.64%	NO
LIQ	Toyopia Limited	05-Sep-12	08-Oct-13	Karen	9,210	1,381.50	11,143.52	12.40%	NO
LIQ	Smart Repairs (SW) Ltd	23-Sep-08	13-Jul-12	Becky	1,100	2,653.00	5,583.75	47.51%	NO
LIQ	AC1 Recruitment Limited	12-Jun-13		Sue	14,456	3,883.00	10,419.93	37.27%	NO
LIQ	Infiniti Black Ltd	06-Mar-12		Rob	14,389	4,678.00	12,657.64	36.96%	NO
LIQ	Tim England Developments Ltd	05-Jul-07	04-Jan-12	Sue	1,000	5,797.50	13,083.56	44.31%	NO
LIQ	Plymouth Tile Centre Limited	06-Jul-10	03-May-11	Toby	9,113	5,907.00	10,645.30	55.49%	NO
LIQ	P R Dogs Limited t/a P R Dogs	14-Jul-11	11-Sep-12	Becky	18,673	6,352.00	12,560.34	50.57%	NO
LIQ	NHC 2013 Limited	29-Nov-13		Sam	20,304	6,497.00	20,605.04	31.53%	NO
LIQ	WCA Contracts Limited	27-Feb-13		Sam	33,033	6,710.00	16,637.30	40.33%	NO
LIQ	R P Davis Construction Ltd	02-Aug-13		Rob	7,300	7,000.00	10,114.05	69.21%	NO
LIQ	Heathfield Car Recovery Ltd	18-Jul-11		Becky	26,820	8,405.00	15,217.42	55.23%	NO
LIQ	Global Classics Limited	04-Mar-10	15-May-12	Karen	7,865	8,506.00	23,895.43	35.60%	NO
LIQ	Golden Down Festivals Ltd	15-Aug-12	01-Nov-13	Rob	14,048	9,840.50	16,265.96	60.50%	NO
LIQ	Rent a Fence Limited	13-Oct-10	09-Jan-12	Rob	18,720	10,945.00	18,676.71	58.60%	NO
LIQ	Total Employment (SW) Ltd	04-Nov-11	01-Nov-12	Sam	55,668	11,082.50	59,906.82	18.50%	NO
LIQ	Compatix International Ltd	16-Mar-11	06-Jul-12	Sam	29,741	11,168.00	14,800.36	75.46%	NO
LIQ	Riviera Roofing Limited	09-Dec-10	25-Sep-13	Becky	66,473	12,927.00	37,261.89	34.69%	NO
LIQ	Billingtons Limited	05-May-10	09-Dec-11	Becky	11,603	13,913.00	22,107.98	62.93%	NO
LIQ	DAB Building Contractors Ltd	02-Oct-12		Becky	46,060	14,256.50	35,204.42	40.50%	NO
LIQ	Terrys Farm & Country Supplies Ltd	21-Dec-10	26-Aug-11	Rob	27,372	14,796.00	30,474.30	48.55%	NO
LIQ	AMA Consulting Engineers Ltd	13-Sep-02	10-Mar-11	Karen	59,787	16,148.16	140,253.25	11.51%	NO
LIQ	R J Crane Electrical Contracting Ltd	03-Sep-10	22-Mar-13	Becky	37,569	16,243.00	25,819.12	62.91%	NO
LIQ	County Environmental Services Ltd	24-Feb-11	21-Dec-12	Becky	458,382	20,160.50	470,648.92	4.28%	NO
LIQ	Connoisseur Windows Ltd	14-Oct-11		Becky	78,006	20,350.00	48,026.21	42.37%	NO
LIQ	Freakfish Limited	26-Mar-10	18-Mar-11	Becky	30,435	21,232.00	40,313.38	52.67%	NO
LIQ	Thompson Construction Services Ltd	22-Feb-12		Karen	29,188	21,388.50	39,306.03	54.42%	NO
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LIQ	Parman (Commercial) Limited	15-Jul-10	09-Sep-11	Toby	52,537	34,639.50	53,184.12	65.13%	NO
LIQ	Talling Construction Co Ltd	08-Aug-08	18-May-11	Sam	564,612	68,300.00	516,383.27	13.23%	NO
LIQ	Eclipse Partnership UK Limited	20-Oct-10	19-Nov-13	Karen	218,791	68,380.00	350,403.21	19.51%	NO
LIQ	AV Concepts Limited	19-Dec-13		Becky	33,670	-	19,246.82	0.00%	YES
LIQ	D2 Investments Limited	27-Sep-13		Becky	10,700	-	6,698.09	0.00%	YES
LIQ	Devon Tees Limited	06-Feb-14		Becky	15,914	-	10,800.00	0.00%	YES
LIQ	C A Print & Stationers Limited	12-Jan-11		Becky	93,255	1,000.00	10,275.43	9.73%	YES
LIQ	BFEC Holding Company Ltd	24-Apr-12	13-May-13	Rob	2,396	2,140.50	4,301.42	49.76%	YES
LIQ	BFEC Design Solutions Ltd	24-Apr-12	13-May-13	Rob	2,400	3,616.75	6,100.46	59.29%	YES
LIQ	S P Carpentry & Construction Ltd	22-Feb-06	27-Apr-11	Ken	7,500	4,014.50	6,377.27	62.95%	YES
LIQ	SFDN Realisations Ltd	01-Oct-12	08-Nov-13	Rob	14,000	4,289.50	33,354.35	12.86%	YES
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LIQ	Andsty Limited	31-Mar-10	26-Mar-13	Sue	11,489	7,700.50	13,111.92	58.73%	YES
LIQ	Overhead Surf Limited	22-Feb-13	20-Nov-13	Becky	11,744	8,203.50	15,281.83	53.68%	YES
LIQ	W Y S Realisations Limited	29-Apr-10	20-Jul-11	Becky	16,759	9,744.86	25,074.56	38.86%	YES
LIQ	Touchstone Brickwork Contractors (London) Ltd	06-Dec-12		Karen	42,607	10,208.00	28,044.89	36.40%	YES
LIQ	C J Contracting Limited	22-Dec-08	05-Jan-11	Sam	63,075	14,416.00	54,875.59	26.27%	YES
LIQ	Rose Opticians Limited	24-Jul-12	19-Sep-13	Sam	23,800	14,477.50	37,037.37	39.09%	YES
LIQ	Hall Merrill & Hall Ltd	24-Jun-11	26-Jun-12	Becky	40,561	14,763.50	42,449.47	34.78%	YES
LIQ	A & T Construction Cornwall Ltd	22-Oct-09	14-Apr-11	Sue	91,209	16,106.00	94,361.57	17.07%	YES
LIQ	Sowden Brothers (Roofing) Ltd	14-Feb-12	13-Sep-13	Sam	32,286	17,381.00	39,934.48	43.52%	YES
LIQ	Right Price PVCu Products Ltd	19-Dec-12	23-Dec-13	Becky	46,154	19,096.00	57,917.47	32.97%	YES
LIQ	Mardon Properties Ltd	01-Nov-12		Becky	245,463	24,429.00	221,604.35	11.02%	YES
LIQ	Dutch Flower Import Cornwall Ltd	20-Mar-12		Becky	97,464	25,000.00	65,157.75	38.37%	YES
LIQ	B&B Builders Limited	21-Aug-12		Becky	53,400	26,922.00	49,236.45	54.68%	YES
LIQ	Frontweb Limited	31-Jan-12		Rob	170,707	30,286.00	129,731.77	23.35%	YES
LIQ	Central Cleaning Contractors Ltd	16-Dec-09	03-Feb-11	Karen	247,018	32,693.50	269,309.25	12.14%	YES
LIQ	Powercats Limited	11-Dec-08	27-Jan-12	Becky	182,176	40,881.00	107,773.29	37.93%	YES
LIQ	BFEC Limited	24-Apr-12		Sam	54,805	48,543.50	499,962.05	9.71%	YES
LIQ	M Thomas Management Limited	29-Sep-09		Sam	790,604	136,822.00	2,392,846.00	5.72%	YES
	Totals:				5,104,217	1,101,673	7,121,012	15.47%	

Breakdown of Liquidations From January 2011 to date: Date: 19-Feb-14

Type	Case Name	Appointed	Closed	Admin	Asset Value (Value Taken from S of A)	Rem to Date (Value Taken from ECB)	Receipts to date (Value Taken from ECB)	Fess as a % of Receipts	Debenture in place
LIQ	AMA Consulting Engineers Ltd	13-Sep-02	10-Mar-11	Karen	59,787	16,148.16	140,253.25	11.51%	NO
LIQ	Freakfish Limited	26-Mar-10	18-Mar-11	Becky	30,435	21,232.00	40,313.38	52.67%	NO
LIQ	Plymouth Tile Centre Limited	06-Jul-10	03-May-11	Toby	9,113	5,907.00	10,645.30	55.49%	NO
LIQ	Talling Construction Co Ltd	08-Aug-08	18-May-11	Sam	564,612	68,300.00	516,383.27	13.23%	NO
LIQ	Terrys Farm & Country Supplies Ltd	21-Dec-10	26-Aug-11	Rob	27,372	14,796.00	30,474.30	48.55%	NO
LIQ	Parman (Commercial) Limited	15-Jul-10	09-Sep-11	Toby	52,537	34,639.50	53,184.12	65.13%	NO
LIQ	Billingtons Limited	05-May-10	09-Dec-11	Becky	11,603	13,913.00	22,107.98	62.93%	NO
LIQ	Tim England Developments Ltd	05-Jul-07	04-Jan-12	Sue	1,000	5,797.50	13,083.56	44.31%	NO
LIQ	Rent a Fence Limited	13-Oct-10	09-Jan-12	Rob	18,720	10,945.00	18,676.71	58.60%	NO
LIQ	Global Classics Limited	04-Mar-10	15-May-12	Karen	7,865	8,506.00	23,895.43	35.60%	NO
LIQ	Redruth Electrical Co Limited	23-Sep-09	18-May-12	Becky	61,950	28,400.00	60,803.04	46.71%	NO
LIQ	Compatix International Ltd	16-Mar-11	06-Jul-12	Sam	29,741	11,168.00	14,800.36	75.46%	NO
LIQ	Smart Repairs (SW) Ltd	23-Sep-08	13-Jul-12	Becky	1,100	2,653.00	5,583.75	47.51%	NO
LIQ	P R Dogs Limited t/a P R Dogs	14-Jul-11	11-Sep-12	Becky	18,673	6,352.00	12,560.34	50.57%	NO
LIQ	Total Employment (SW) Ltd	04-Nov-11	01-Nov-12	Sam	55,668	11,082.50	59,906.82	18.50%	NO
LIQ	Elliotts (South West) Limited	14-Nov-07	14-Nov-12	Becky	16,334	32,809.00	77,292.70	42.45%	NO
LIQ	County Environmental Services Ltd	24-Feb-11	21-Dec-12	Becky	458,382	20,160.50	470,648.92	4.28%	NO
LIQ	R J Crane Electrical Contracting Ltd	03-Sep-10	22-Mar-13	Becky	37,569	16,243.00	25,819.12	62.91%	NO
LIQ	Plymouth Metal Fabrications Ltd	22-Nov-11	11-Sep-13	Rob	46,670	23,485.50	46,449.86	50.56%	NO
LIQ	Riviera Roofing Limited	09-Dec-10	25-Sep-13	Becky	66,473	12,927.00	37,261.89	34.69%	NO
LIQ	Toyopia Limited	05-Sep-12	08-Oct-13	Karen	9,210	1,381.50	11,143.52	12.40%	NO
LIQ	Golden Down Festivals Ltd	15-Aug-12	01-Nov-13	Rob	14,048	9,840.50	16,265.96	60.50%	NO
LIQ	Eclipse Partnership UK Limited	20-Oct-10	19-Nov-13	Karen	218,791	68,380.00	350,403.21	19.51%	NO
LIQ	Telecom IC Limited	14-Oct-13		Rob	18,563	1,000.00	11,570.00	8.64%	NO
LIQ	AC1 Recruitment Limited	12-Jun-13		Sue	14,456	3,883.00	10,419.93	37.27%	NO
LIQ	Infiniti Black Ltd	06-Mar-12		Rob	14,389	4,678.00	12,657.64	36.96%	NO
LIQ	NHC 2013 Limited	29-Nov-13		Sam	20,304	6,497.00	20,605.04	31.53%	NO
LIQ	WCA Contracts Limited	27-Feb-13		Sam	33,033	6,710.00	16,637.30	40.33%	NO
LIQ	R P Davis Construction Ltd	02-Aug-13		Rob	7,300	7,000.00	10,114.05	69.21%	NO
LIQ	Heathfield Car Recovery Ltd	18-Jul-11		Becky	26,820	8,405.00	15,217.42	55.23%	NO
LIQ	DAB Building Contractors Ltd	02-Oct-12		Becky	46,060	14,256.50	35,204.42	40.50%	NO
LIQ	Connoisseur Windows Ltd	14-Oct-11		Becky	78,006	20,350.00	48,026.21	42.37%	NO
LIQ	Thompson Construction Services Ltd	22-Feb-12		Karen	29,188	21,388.50	39,306.03	54.42%	NO
LIQ	Swercots Limited	16-Mar-12		Sam	469,249	26,265.50	529,511.43	4.96%	NO
					2,575,021	565,500	2,807,226	20.14%	
LIQ	C J Contracting Limited	22-Dec-08	05-Jan-11	Sam	63,075	14,416.00	54,875.59	26.27%	YES
LIQ	Streamline Protect Limited	23-Oct-09	12-Jan-11	Karen	4,883	4,770.50	6,618.84	72.07%	YES
LIQ	Central Cleaning Contractors Ltd	16-Dec-09	03-Feb-11	Karen	247,018	32,693.50	269,309.25	12.14%	YES
LIQ	A & T Construction Cornwall Ltd	22-Oct-09	14-Apr-11	Sue	91,209	16,106.00	94,361.57	17.07%	YES
LIQ	S P Carpentry & Construction Ltd	22-Feb-06	27-Apr-11	Ken	7,500	4,014.50	6,377.27	62.95%	YES
LIQ	W Y S Realisations Limited	29-Apr-10	20-Jul-11	Becky	16,759	9,744.86	25,074.56	38.86%	YES
LIQ	Powercats Limited	11-Dec-08	27-Jan-12	Becky	182,176	40,881.00	107,773.29	37.93%	YES
LIQ	Hall Merrill & Hall Ltd	24-Jun-11	26-Jun-12	Becky	40,561	14,763.50	42,449.47	34.78%	YES
LIQ	Andsty Limited	31-Mar-10	26-Mar-13	Sue	11,489	7,700.50	13,111.92	58.73%	YES
LIQ	BFEC Solutions Ltd	24-Apr-12	23-Apr-13	Sam	30,635	5,854.25	21,240.21	27.56%	YES
LIQ	BFEC Holding Company Ltd	24-Apr-12	13-May-13	Rob	2,396	2,140.50	4,301.42	49.76%	YES
LIQ	BFEC Design Solutions Ltd	24-Apr-12	13-May-13	Rob	2,400	3,616.75	6,100.46	59.29%	YES
LIQ	BFEC Project Management & Admin Ltd	24-Apr-12	13-May-13	Rob	6,494	5,537.25	8,508.36	65.08%	YES
LIQ	Dartmoor Design Limited	14-Oct-10	20-Aug-13	Sue	31,162	6,875.50	11,483.00	59.88%	YES
LIQ	Sowden Brothers (Roofing) Ltd	14-Feb-12	13-Sep-13	Sam	32,286	17,381.00	39,934.48	43.52%	YES
LIQ	Rose Opticians Limited	24-Jul-12	19-Sep-13	Sam	23,800	14,477.50	37,037.37	39.09%	YES
LIQ	SFDN Realisations Ltd	01-Oct-12	08-Nov-13	Rob	14,000	4,289.50	33,354.35	12.86%	YES
LIQ	Overhead Surf Limited	22-Feb-13	20-Nov-13	Becky	11,744	8,203.50	15,281.83	53.68%	YES
LIQ	Right Price PVCu Products Ltd	19-Dec-12	23-Dec-13	Becky	46,154	19,096.00	57,917.47	32.97%	YES
LIQ	C A Print & Stationers Limited	12-Jan-11		Becky	93,255	1,000.00	10,275.43	9.73%	YES
LIQ	Touchstone Brickwork Contractors (London) Ltd	06-Dec-12		Karen	42,607	10,208.00	28,044.89	36.40%	YES
LIQ	Mardon Properties Ltd	01-Nov-12		Becky	245,463	24,429.00	221,604.35	11.02%	YES
LIQ	Dutch Flower Import Cornwall Ltd	20-Mar-12		Becky	97,464	25,000.00	65,157.75	38.37%	YES
LIQ	B&B Builders Limited	21-Aug-12		Becky	53,400	26,922.00	49,236.45	54.68%	YES
LIQ	Frontweb Limited	31-Jan-12		Rob	170,707	30,286.00	129,731.77	23.35%	YES
LIQ	BFEC Limited	24-Apr-12		Sam	54,805	48,543.50	499,962.05	9.71%	YES
	Totals:				1,623,442	398,951	1,859,123	21.46%	

Steve.Spong

From: Simon Glyn <Simon.Glyn@frpadvisory.com>
Sent: 26 March 2014 16:35
To: Policy.Unit
Subject: Response to BIS consultation: Strengthening the regulatory regime and fee structure for insolvency practitioners (March 2014)

Dear Minister,

BIS consultation: Strengthening the regulatory regime and fee structure for insolvency practitioners (March 2014)

I write in response to your consultation on Insolvency Practitioners (IP) fees. Whilst I support two out of the three government proposals to "improve returns to unsecured creditors; and improve the reputation of and confidence in the insolvency profession", I have serious concerns that your third proposal (simplification of the fee structure) will cause significant 'harm' to creditors, small insolvency firms and the UK's globally renowned insolvency regime. I share your priorities to have a competitive, fair, transparent, world-renowned insolvency profession, which is currently 7th best in the world in terms of the amount returned to creditors and speed of the process, according to the World Bank. However I am worried that the proposal to simplify the fee structure through restricting the use of time-cost (where there is no secured creditor or no creditor committee) will undermine these common goals.

Before summarising my concerns, please note that I have significant concerns that the fees consultation is based on perception rather than fact and evidence. IPs' fees comprised just 2% of all complaints about IPs in in 2013 (down from 7% in 2010). To put this in perspective, in 2013, there were approximately 116,000 new insolvency cases, and there were just 13 complaints to the government about insolvency fees (0.01%). Even accounting for the fact that many of these 116,000 cases would have been handled by the Official Receivers – about whose fees there have also been complaints – the proportion of cases that are attracting official complaints about fees is negligible.

I support a number of the fee proposals set out in previous government reports. However the proposal to simplify the fee structure through restricting the use of time-cost was not recommended in any of those reports. Furthermore, I am unaware that the structure is used anywhere else in the world and so I am concerned that it has not been 'tried and tested'. I therefore ask that the government drops its proposals to restrict the use of time-cost as a method to charge fees, and ask that it reviews alternative recommendations as proposed by previous government reports that will address its goal of reforming IP fees and improving unsecured creditor engagement.

My other main concerns about restricting the use of time-cost and relying solely on fixed fee and percentage of realisations include:

· It does nothing to address the problem of a lack of engagement by unsecured creditors.

· It could lead to outsourcing of specific insolvency procedures to unregulated individuals. This would shift the cost rather than reduce it.

· It is impossible for an Insolvency Practitioner to 'guestimate' what might be involved in a case from the outset. Relying on an up-front fixed fee without an option to review the fee later would see IPs and creditors routinely short-changed.

· Because IPs cannot resign from a case, once they have reached their fixed fee level, they will almost certainly not optimise recoveries as there is no incentive to do so. This would lead to lower returns for creditors.

· Many cases would not be taken on by IPs at all because the fee could be too small to be economical.

· Creditors will lose out through the use of percentage of realisations where large returns might not reflect the amount of time an IP is required to dedicate to a case. IPs will lose out through the use of percentage of realisations where there are smaller cases with smaller returns which often involve greater investment in terms of hours and resources that would be reflected in the final settlement.

The UK's insolvency regime is the 7th best in the world based on returns and costs to creditors, the likelihood of business rescue and the speed of the insolvency process. Given it is one of the best in the world, and given concerns around IP fees are negligible, I ask that the government reviews alternative proposals which are in proportionate to the problem that it seeks to address.

Yours sincerely,

Simon Glyn

Partner & R3 member

FRP Advisory
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www.bis.gov.uk/insolvency

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Insolvency Service
4th Floor
4 Abbey Orchard Street
London
SW1P 2HT

7 March 2014

Dear Sirs,

I am writing to contribute my observations and suggestions with regard to the consultation on "Strengthening the Regulatory Regime and Fee Structure for Insolvency Practitioners". I have attached Appendices I - IV, which provide details of my complaint to the Insolvency Practitioners Association, submitted in October 2010, the Investigation Committee's findings and the outcome of the subsequent review. The Appendices are intended to illustrate the reasoning behind my suggestions.

I was wholly dissatisfied with the Investigation Committee's decisions since, despite the extensive written evidence which I had provided in support of many of my allegations, the Committee could only find some relatively minor faults to which they attributed mitigating factors (Appendix I). After almost 21 months of gathering and reviewing evidence (Appendix II) the Committee issued the former Supervisor with a formal warning.

I requested that my complaint be reviewed by the Reviewer of Complaints, a QC appointed by the IPA. I eventually received his report some twelve months later, in which he concurred fully with the decisions of the Investigation Committee. It is my conclusion that the limitations placed on the Reviewer of Complaints are such that it is highly unlikely that the Investigation Committee's decisions about complaints will ever be referred back to them (Appendix III).

Having exhausted the complaints procedure offered by the IPA I have to accept that, without amendments to the way in which insolvency practice is regulated, the more unscrupulous firms in the profession will continue to abuse the powers available to them to the detriment of those unfortunate enough to have to deal with them. I hope to have my opinions taken into account.

<u>Independent regulator</u>

I do not see how the RPBs, can be capable of delivering an insolvency regulatory regime that is "transparent, consistent, accessible, independent and accountable" (Para 43). It is my strongly held view that the insolvency profession should have a truly independent regulator, preferably with an ombudsman, to ensure robust regulation. The role of professional association, existing to promote and protect the interests of members is not, in my experience, compatible with that of a Regulator, which should exist to ensure that the interests of the wider public and affected organisations are protected.

Additionally, the current system of multiple RPBs carrying out regulatory activities allows an IP to avoid being held responsible for their actions.

Please refer to Appendix IV for details.

Complaint and investigation processes

I was left with a very strong impression that there are considerable shortcomings in the current procedures for investigating and resolving complaints on the part of the IPA, and believe it is likely that similar procedures are followed by other RPBs. The terms under which the Reviewer of Complaints is engaged also make it very unlikely that a decision will be referred back to the Committee. Please refer to Appendices II and III.

Additional Regulatory Powers

1. It is my view that voluntary arrangements should be included within the proposed reforms. Most, if not all, of the consultation focuses on the interests of unsecured creditors and the consultation only mentions debtors briefly. It also proposes excluding IVA's from the strengthened fee structure.

   However, where a debtor is liable for all the fees and expenses of an IVA because they have committed to provide a return of 100p/£, there is no protection for them against less than scrupulous practitioners. I make this proposal following first hand experience of an IVA for which I had no choice but to pay £11,000 in fees in order to bring the arrangement to an early and successful conclusion. The terms of the arrangement originally required monthly payments over five years with fees capped at £5,000.

   In my view, debtors, as well as creditors should be entitled to services which offer value for money and should have recourse to the Regulator (or RPB) to remedy over-charging of fees.

2. I believe an independent regulator should have the power to carry out unannounced annual audits/inspections of insolvency practitioners to ensure accountability and, at the very least, to confirm that:

   - practitioners are adhering to professional standards
   - hours and rates charged are accurate and tally to what work was done and by whom
   - hours charged are realistic i.e. a practitioner is not charging for more hours worked than was possible.

3. I also believe that the regulator should be able to intervene in cases where there is evidence of a breach of the professional and ethical codes or of statute. I contacted the IPA during the fourth year of my arrangement when the Supervisor became hostile to my offer to bring the arrangement to an early and successful conclusion. I was told that they cannot intervene in ongoing cases although I was free to make a complaint. In effect, any debtor in an ongoing

arrangement has no recourse, since they are unlikely to have the financial resources to go to the courts.

4. It is my view that a debtor in an IVA should have the right to change Supervisor, through an appropriate mechanism, at least once, whether to another practitioner in the same firm or to another practitioner in a completely unconnected firm, to enable them to release themselves from the malicious hold of a Supervisor intent on abusing their powers.

Professional standards and best practice for IP's

Although these next points are not addressed within the consultation, I should like to add the following suggestions.

There should be a period of time available to a debtor during which they can explore their options through a free consultation (such as is offered by solicitors) with an insolvency practitioner without pressure from creditors. It is my view that a debtor should have the right to a comprehensive consultation on the options available for their particular circumstances, what to expect and the likely timescale. At present, confirmation of having read a leaflet entitled "Is a Voluntary Arrangement right for me" is deemed sufficient and insolvency practitioners are able to require that a debtor signs a letter of engagement before a full consultation is offered.

At present, an insolvency practitioner can draft the terms of a Voluntary Arrangement and in so doing is in a position to grant themselves draconian powers. At the time of the setting up of my IVA, I queried certain terms which appeared vague or ill defined. I was assured by the IP that this was an advantage as it enabled a degree of flexibility. It transpired towards the end of the arrangement and throughout my dispute with the Supervisor as to the meaning of the Standard Terms, that the Supervisor was free to apply whatever interpretation served her purposes in the conduct of the arrangement. I would suggest that the standards for such agreements should be strengthened so that ambiguities are removed.

I hope that these thoughts and suggestions make a contribution of some value to the consultation.

Yours faithfully,

Judith Stuart

WILLIAM STURGES
SOLICITORS

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12 March 2014

The Policy Unit
Insolvency Service
via email only: policy.unit@insolvency.gsi.gov.uk

ML/SJW/30141-17

Your Reference

Dear Sirs,

Consultation on Fee Structure for Insolvency Practitioners

I refer to your email dated 17th February seeking views from Practitioners on proposals to monitor and deal with the fee structure for the benefit of unsecured creditors.

I suspect that you will receive resistance from the Institutes that represent the Accountancy profession. I say this from experience having on a personal basis questioned the fees of Deloitte LLP in the administration of Comet. I enclose copies of correspondence that I have had with the ICAEW. It related to my complaint that Deloitte's had an average charge-out rate in the administration of £522 per hour across all grades of staff. An average charge out at that rate means that some of the fee earners would be charging £750 per hour or more.

My point made to the Institute is that creditors, particularly in large liquidations or administrations, have little say in the fees charged by the Insolvency Practitioners. Invariably the appointments go to the large Firms because of the voting power of the Banks and other major institutions who are the major creditors. The ordinary creditors in such situations have very little say, and indeed rarely receive a dividend. Nor do they feature on any Creditors' Committee.

Whilst there is competition amongst the large Firms for the work there rarely is any form of fee tendering. There is also little control over the amount of time that is charged out, or the hourly rates.

I would suggest that there needs to be a system of assessment, similar to the way in which Solicitors fees are controlled by the Courts. There would, of course, be a cost involved, but this could surely be met by way of an assessment fee with provision for the Assessor to not only reduce the costs claimed, but also to penalise the Insolvency Practitioner for the costs of the assessment if the amount claimed is deemed to have been too high and/or unreasonable.

Yours faithfully,

MICHAEL H LAWSON
PARTNER
WILLIAM STURGES LLP
(DIRECT FAX: 020 7233 4595)

British Printing Industries Federation

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E1 8BU

Telephone 0845 250 7050
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Chief Executive
Kathy Woodward

Sam Roberts
Assistant Director
The Insolvency Service
Policy Unit
Floor 4
4 Abbey Orchard Street
London
SW1P 2HT

21 March 2014

Dear Mr Roberts

RESPONSE TO THE INSOLVENCY SERVICE CONSULTATION PAPER *STRENGTHENING THE REGULATORY REGIME AND FEE STRUCTURE FOR INSOLVENCY PRACTITIONERS*

I am pleased to enclose a response from the British Printing Industries Federation to the consultation paper *Strengthening the Regulatory Regime and Fee Structure for Insolvency Practitioners.*

We welcome the Government's aim of assisting creditors in insolvency situations by simplifying the fee structure to align the interests of IPs more closely to those of creditors, which in our view should increase returns to the latter. However while the consultation questions set out in the paper are clear, they are directed at specific reforms being put forward by the Insolvency Service. We were somewhat disappointed that comments were not invited on other aspects of IPs' fee-earning activities, and in this respect the consultation does appear rather closed in its approach. In particular, we have a long-standing concern that an IP who has previously provided advice to a company on the potential for a pre-packaged sale in administration has an inherent conflict of interest should they later accept a formal appointment as administrator with a view to subsequently executing a pre-pack sale. In the absence of any question inviting comments on potential reforms not otherwise suggested in the consultation paper, we have commented on this in our response to Question 13.

While we appreciate that these proposed reforms are unlikely to be supported by the insolvency profession, we believe that they are essential to restoring public confidence in the handling of insolvencies and in helping to ensure that the profession delivers the best possible outcomes for creditors. The BPIF therefore welcomes these proposals and we are pleased to support them.

Yours sincerely

Andrew Brown

Andrew Brown
Public Affairs Adviser

Tel: 07801 981 306
Email: andrew.brown@bpif.org.uk

RESPONSE FROM THE BRITISH PRINTING INDUSTRIES FEDERATION (BPIF) TO THE INSOLVENCY SERVICE CONSULTATION PAPER - *STRENGTHENING THE REGULATORY REGIME AND FEE STRUCTURE FOR INSOLVENCY PRACTITIONERS*

1 ABOUT THE BPIF

The British Printing Industries Federation (BPIF) is the leading trade association and business support organisation representing companies in the printing, packaging and graphics communications industry. The UK printing industry is the fifth largest in the World and one of the largest industries in the UK, with sales of around £14 billion. It employs around 135,000 people in about 10,000 companies spread throughout the UK. The printing industry is an advanced manufacturing sector, utilising leading edge technologies and skills. Printed products make a positive contribution to the UK trade balance, with exports exceeding imports by around £700 million.

2 INTRODUCTION

Printing companies serve customers in every sector of the UK economy. Although the majority of printing companies employ less than 25 people, the industry's customers are significant in size and include major corporates in markets such as publishing, banking and insurance, multiple retail, and pharmaceuticals. The relative bargaining power of this customer base frequently results in terms of business being applied to commercial contracts that require printing companies to extend significant levels of credit in order to secure or retain business. Many printing companies therefore have a high level of exposure in the event of a major customer becoming insolvent and this invariably results in them becoming unsecured creditors when this occurs.

The printing industry also suffers from the impact of pre-packaged sales in administration. These controversial business rescue arrangements enable the debts of previous owners to be written off, and have rightly attracted fierce and justifiable criticism from creditors and competitors alike. Creditors are aggrieved because they have lost money owed to them, and competitors because they are now faced with a rival who now has an unfair trading advantage. In an over-capacity industry such as printing, which is dominated by small companies, the incidence of pre-pack administrations in the industry is relatively high and the damage caused to both creditors and competitors alike has been significant.

3 RESPONSE TO THE CONSULTATION

<u>Part 1 – Regulation of Insolvency Practitioners</u>

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

Yes. The insolvency regulatory regime should seek to protect the public interest, deliver fairness and transparency, encourage competition and best practice within the IP profession, and maximise returns to creditors by ensuring that fees charged by IPs represent value for money

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

Given that 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", it is important that the Insolvency Service publishes the criteria by which the performance of an RPB is to be assessed. This would help ensure fairness and assist any party concerned about the conduct of an RPB to evaluate whether it was appropriate for them to make a complaint that the RPB had failed to meet one or more of the regulatory objectives.

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

The proposed scope and procedures, and the proposed criteria for determining when these would apply, are reasonable and appropriate

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

It would be useful to have more detail on the level of fines envisaged beyond the indication that these would be of a sufficient size to deter future transgression. However the proposed scope and procedures appear to be reasonable and appropriate

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

The proposed scope and procedures appear to be reasonable and appropriate

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

We contend that the RPB should be given *up to* 28 days (as opposed to *not less than* 28 days) to make written representations to the Secretary of State. Similarly, if the Secretary of State decides to vary the wording of the proposed statement and issue further notice to the RPB he should allow another period of up to 21 days for representations(as opposed to *at least* 21 days).

7 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?

We agree that in exceptional circumstances, the Secretary of State should be able to apply to the court directly to sanction an IP who is authorised by an RPB. However in any such instance, the Secretary of State should be required to explain why he did not consider the RPB competent to deal, in an effective and timely manner with the act or omission on the part of the IP that had caused him to take this course of action

8 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?

The proposed procedure appears to be reasonable and it is appropriate that those people specified should be able to be required to provide information by the Secretary of State it

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

We concur with Professor Kempson's conclusion that there is a case for reducing the number of RPBs and ultimately for having a single regulator. A single regulator structure should be introduced in the event that the current proposals to strengthen the regime do not succeed in improving public confidence in the regime. We therefore support the proposal to introduce a power to allow the Secretary of State to appoint a single body to authorise and regulate IPs.

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

The proposed functions and powers of a single regulator appear to be reasonable and appropriate

<u>Part 2 – Insolvency Practitioner fee regime</u>

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

We agree that existing codes of practice and associated regime for compliance monitoring are inadequate when it comes to remuneration. Given the cost, complexity, and time involved, an application to the court is unlikely to be pursued by unsecured creditors. This could only realistically happen through a collective action, and there are obvious practical difficulties that make such actions difficult to organise. Independent oversight by the RPB would therefore be helpful in ensuring that time charged is for work that is necessarily and properly performed.

12 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?

We consider that “ensuring that fees charged by IPs represent value for money” should be added as a regulatory objective. It can be delivered by the regulators in our view, and would represent an important re-focus to their activities toward building greater creditor confidence, We believe that this would help reassure the public that fees are fairly set and should help tackle misconduct as well as reduce the number of complaints and challenges relating to fees.

13 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?

Publishing information about fees would be of assistance to unsecured creditors in negotiating rates. Equally it is important that unsecured creditors are able to work collaboratively and the role of crown creditors is especially important here. We agree that they can play a key role in overseeing and negotiating competitive rates in cases where a potential dividend is due to unsecured creditors, something that will not only benefit other unsecured creditors but which should also help reduce unnecessary drain on the public purse.

We also believe that an IP who has previously provided advice to a company on the potential for a pre-packaged sale in administration has an inherent conflict of interest should they later accept a formal appointment as administrator with a view to subsequently executing a pre-pack sale. We therefore consider that an IP advising a company prior to on a pre-pack sale should be precluded from becoming the administrator for the company concerned, in order to curb the incidence of cases where an IP attempts to secure new business by inviting distressed businesses to enter a pre-pack before other options (such as open marketing of the business for potential sale) have been properly explored.

We further believe that such a conflict extends to circumstances where an IP practitioner has had an ongoing prior relationship with the company in the context of undertaking review work for a secured lender, given that the secured lender would have a commercial interest in the new company that would have been enhanced by the act of pre-packing the company and releasing it from previous debts. The introduction of a requirement for a different IP to accept appointment as administrator would improve confidence that pre-packs are only used in appropriate circumstances, by ensuring that conflicts of interest are avoided and that this would enhance the confidence of creditors in the insolvency practitioners handling the administration. We do not believe that a requirement to use two separate IPs in such circumstances would increase costs and delay (thereby reducing the returns available to creditors), as the overall amount of work to be performed would be unchanged. The Insolvency Service would need to keep this matter under close review, and the Secretary of State should be given powers to require IPs to share information in any case where there is evidence that work would otherwise be duplicated, thus creating unnecessary additional costs.

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

We believe that the only exceptions that should apply to the requirement that IPs take their remuneration either as a percentage of realisations or as a fixed fee should be those cases in which a creditors' committee is established and those where secured creditors will not be paid in full and so remain in control of fees.

15 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?

Restricting the use of time and rate as a basis for remuneration to cases where there is tight control over the work being done (i.e. by a creditors' committee or by secured creditors) would enable unsecured creditors to be confident that fees charged will be based on the value of the work done by the IP. Percentage of realisations should be the presumed method for setting remuneration, with other methods of charging adopted only for specific aspects of casework (e.g. using fixed fees for statutory duties and time and rate only for investigation work).

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

We consider that the proposed changes should align the interests of IPs and unsecured creditors more closely and would offer greater value for money.

17 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?

The proposed changes need not apply to voluntary arrangements unless it proves impossible to secure the agreement of a majority of creditors to the use of time and rate, in which case percentage of realisations should be the default charging method for setting remuneration,

18 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?

Yes, we would favour this approach, subject to prior public consultation on the proposed prescribed scale (should this differ from the current statutory scale) and on any future changes proposed to this

19 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?

The current statutory scale is considered to be commercially viable

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

We do not believe that there are any further circumstances in which time and rate should be able to be charged

<u>Impact Assessment questions:</u>

21 Do you agree with this estimation for familiarisation costs for the changes to the fee structure?

We do not have sufficient information on this from our member companies to comment on this question

22 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?

Most BPIF member companies affected by these changes will be unsecured creditors

23 To what extent do you expect the new fee structure to reduce the current level of overpayment?

We expect that the new fee structure should reduce the current level of payments in cases involving unsecured creditors to one that is closer to that which currently obtains in like-for-like cases than where secured creditors ‘control’ an IPs fees.

24 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?

Yes, we agree with this statement

25 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?

We do not have data to enable us to comment on this

26 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?

Broadly, we would agree that it logical to do this. However we do not have data to enable us to comment on the level of weight that should be applied.

27 Do consultees believe these measures will improve the market confidence?

Yes, particularly if the Insolvency Service publishes in due course a future review of the impact of these measures in practice that shows that the proposed changes to the fee structure have had a measurable and significant positive will impact on the fees currently charged

28 Do consultees believe these measures will improve the reputation of the insolvency profession?

Yes, provided that any instances of non-compliance with the new measures are highlighted publicly, together with any steps taken RPBs or by the Insolvency Service to sanction these and to prevent recurrence.

CONTACT

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BPIF
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