Response of the Insolvency Practitioners Association to the HM Treasury Consultation Paper *"Public Financial Guidance Review – Proposal for Consultation"*

Closing date: 8 June 2016

Overview and general remarks

The current proposals for consultation reiterate a previously stated policy intention that publically funded guidance provision should be targeted at filling gaps in service provision. This approach is welcomed.

Additionally, it acknowledges that around 8m people in the UK face problems with debt and there appears to be a significant and increasing under-capacity in debt advice provision. However, the existing framework is fundamentally flawed in that it **creates a gap** in service provision that was previously filled by the insolvency profession.

HM Treasury has afforded a statutory exclusion from the requirements of FCA Authorisation for Licensed Insolvency Practitioners (and staff working under their control and supervision), when they are acting as an insolvency office holder (as officer of the Court), or in reasonable contemplation of their being appointed as such. The existence of this exclusion recognises that insolvency practitioners are appropriately qualified persons (arguably, the only qualified persons) to provide advice about the suitability and implications of insolvency processes.

However, the current drafting of this provision has resulted (whether intentionally or otherwise) in the precluding of insolvency practitioners from providing advice about Bankruptcy and Debt Relief Orders (DRO), unless the practitioner is dually regulated by both their Recognised Professional Body (RPB) and the FCA, (as there is no realistic prospect of that practitioner being appointed as the insolvency office holder in those cases).

According to Insolvency Service published statistics, there were 15,375 bankruptcy orders made in the 12 months to 31 March 2016, and a further 24,734 Debt Relief Orders granted.

It is assumed (and hoped) that these individuals were assisted and professionally advised in reaching their decision to enter a formal insolvency process, given the potentially serious implications of these processes.

Had this initial advice been provided by the insolvency profession, it would have an estimated value of **£12,032,700**[1].

Many practitioners are now reluctant to assist individual debtors as the limitations placed upon their ability to do so are such that they do not feel that they can fully serve their needs or adequately discharge their professional obligations as insolvency practitioners. According

[1] Calculated on the basis of a free 1 hour consultation with an insolvency practitioner or suitably qualified senior member of their staff, with a typical hourly chargeable rate of £300 per hour.

to a leading Insolvency Management Company, TDX Group Ltd, the IVA market has contracted significantly since the introduction of FCA Regulation, with 70% of IVAs now being generated by the 5 largest providers, compared to 55% 2 years ago[2].

Where a consumer has been assessed by an insolvency professional in the context of a possible Individual Voluntary Arrangement and it has been concluded that this is not the appropriate solution, the practitioner is then required to refer the individual to an alternative FCA authorised adviser in order that they can receive advice about a DRO or Bankruptcy. That advice is likely to be provided by a person unqualified to act as an insolvency practitioner themselves, and much less well versed in bankruptcy matters than a licensed and regulated insolvency practitioner. The “hand off” process creates a duplication of time and costs and renders the consumer’s journey confusing and unsatisfactory:

Comments from a Licensed Insolvency Practitioner:

“At the moment we are only able to give advice on and recommend an IVA. For all other solutions we can only give information. If an individual is suitable for more than one solution it is very difficult to ensure that they properly consider all the other solutions available if I cannot recommend the other solutions.

If an individual is referred to our IVA section and after discussions we establish that bankruptcy is the best solution for them we can’t advise them of this. We have to tell them that an IVA is not the most appropriate solution or we don’t recommend an IVA and then have to refer them to an FCA authorised provider for another full debt advice session but we can’t tell that provider what solution we think is most appropriate. The further session will go through all available solutions again but may or may not result in bankruptcy. This is complicated and confusing for everyone. Prior to FCA regulation we would simply have been able to give the individual advice so that they could then proceed with bankruptcy.

If an individual is referred to us with debts less than £20,000 and a low surplus of say £80 we can tell this individual that they do not meet the criteria for a DRO but cannot advise on this. If discussions lead to the individual making some changes to their budget so the surplus is less than £50 we then have to refer them to an FCA authorised provider to go through a another full debt advice session and if appropriate (same issues as above) they will then pass them to their DRO tem, if they have one. In the past we would have just been able to refer them directly to set up a DRO.

This not only creates an issue for us but also leads to a more complicated and longer journey for the individual. Individuals ask why we can’t give advice and query whether we are hiding some of the solutions just to get an IVA in place. This is certainly not our intention but as things are we cannot recommend another solution.

In the past, I was able to review an IVA proposal and then speak to the individual to say that I have looked at their IVA but really I think that bankruptcy is the best advice for them. Now, I can’t do this. I can give information on bankruptcy but it’s not the same as saying that I recommend it.”

[2] See *Insolvency Market Trends – May Update* http://www.tdxgroup.com/images/IMT/IMT_May_FINAL1.pdf

(Further working examples of the limitations of the current IP exclusion may be found in Annex)

There is no reasonable justification for inhibiting a Licensed Insolvency Practitioner from providing advice about 2 of the 3 available statutory insolvency processes, the likely implications of them, and the available alternatives. When consulting an IP, additional consumer protection is afforded by the fact that Licensed Insolvency Practitioners carry Professional Indemnity Insurance in respect of the advice they give (in contrast with unqualified advisers).

The regime for the regulation of insolvency practitioners is an effective and mature one. It has recently undergone further strengthening in the form of enhanced oversight powers being granted to the Insolvency Service. ***If*** it is considered that this regulatory framework requires further reinforcement, then the case should be made for reinforcement, as opposed to the back-door imposition of burdensome dual-regulation on a long established profession; (in direct contradiction to the de-regulatory agenda and to *Better Regulation* principles).

We believe that given there are already effective regulatory mechanisms in force, the current framework is producing a significant distortion to the market place, and is resulting in detriment to consumers wishing to access **insolvency advice, from a qualified and insured insolvency professional.**

Moreover, it is resulting in unnecessary duplication of advice delivery and the associated additional cost of delivering that duplicated service - a cost which is needlessly being born by the public purse.

With the new online bankruptcy process having been recently launched it is anticipated by the Insolvency Service that bankruptcy numbers will increase. Currently, the portal signposts prospective applicants to the Money Advice Service and links to their website. The MAS site does not provide assistance, but merely signposts the consumer to a number of alternative advice providers that the individual may then contact. It is well established that the more protracted the process for obtaining information, the higher the drop-off rate in accessing that information will be. **It is vital that individuals make fully informed decisions about a step as potentially serious as filing for bankruptcy.**

The Insolvency Service already maintains a searchable register of Licensed Insolvency Practitioners and maintains a rota of practitioners in various locations who are willing to accept bankruptcy appointments. Cost effective use of these existing resources could easily be made and would provide a direct benefit to consumers by them maintaining a rota of practitioners content to provide free initial advice.

With a number of Debt Management providers being refused FCA authorisation, there is clearly a process of contraction and consolidation underway within the debt advice arena. When debt management portfolios change hands, it is understood there is a marked increase in “fall-out” rates. Vulnerable individuals are often reluctant to engage with a new provider who is unknown to them, and in many instances, a process of re-assessing their suitability for the product will need to be conducted. Some of these consumers will be better placed in Individual Voluntary Arrangements and, no doubt, others will consider bankruptcy or a DRO (whether with or without the benefit of professional assistance in making that decision).

Comments of a dually-regulated insolvency practitioner, who has recently assisted in the review of a Debt Management book, following FCA refusal to authorise the incumbent provider:

"Based on our experience, we are unable to engage with around 30% of these debt management clients and unable to assist a further 15%. These accounts will then go to into debt collection processes.

Creditors are still being asked to demonstrate forbearance, but again our experience is that collection activity is starting to increase. Many of these customers are vulnerable and/or elderly and do seriously struggle to engage, rather than actively choosing not to."

We anticipate a surge in demand for debt advice at a time when a profession of experienced advisers is effectively being excluded from bringing their acumen to bear, and when there is capacity and a willingness in the insolvency profession to provide much needed assistance.

The interests of creditors groups needs also to be considered, in that they have a reasonable expectation of being repaid in circumstances where an individual in able to do so. Creditors and their representatives have built constructive working relationships with the insolvency profession through bodies such as the Joint Insolvency Committee and the IVA Standing Committee and this continuing dialogue between them and the insolvency profession acts to promote the creation of a fair and sustainable approach to debt solutions, in the interests of the consumers that utilise them.

In conclusion, we respectfully request that HM Treasury reconsider the wording of the current exclusion afforded to Licensed Insolvency Practitioners (which is both limited and deficient), to ensure that they can play an economically and socially valuable role in assisting those with debt problems to reach appropriate solutions.

In response to a number of the specific questions posed in relation to debt advice provision:

5. Would limiting providers of debt advice to FCA authorised firms rule out any types of provider?

For the reasons explained above, limiting providers of debt advice to those authorised by the FCA would exclude the majority of Licensed Insolvency Practitioners from contributing to debt advice provision capability available to consumers, or effectively impose dual-regulation upon those practitioners who wished to continue to provide that service. This is borne out by the recent comments of Mark Dungworth, Senior Associate with the FCA, to which we would reply:

Mark Dungworth: *The FCA's main focus in the authorisations process for consumer credit is on firms' conduct, and how clients and customers are treated. Since April 2014, we have authorised over 30,000 consumer credit firms.*

- *We consider debt management to be a high-risk activity. We have been clear in setting out concerns over the quality of advice given to consumers in this sector, going back to our Thematic Review last year and our October 2014 press release making clear that firms in the sector needed to raise their game.*

Comment: If the DM sector is not performing as it is considered it should, why aren't the professional services of IPs being better utilised as an alternative?

- *Different debt advice and debt management providers have had different journeys into the new regime, e.g. with not-for-profit providers 'grandfathered' in – over 1,000 not-for-profit debt advice providers have been authorised. However, all providers are being held to the same standard where they are providing the same regulated activities.*

Comment: No tailored process has been made available for insolvency professionals. Our members have characterised the work required to be FCA ready as "significant, even tortuous", and the process fails to recognise the unique position of Licensed Insolvency Practitioners. This is acting to disincline many from even applying.

- *More than 100 commercial debt management firms have left the market, and no commercial firm offering debt management plans has yet been authorised. A substantial number of firms have been refused authorisation; two have sought to challenge the decision to Upper Tribunal, but were unsuccessful.*

Comment: This reinforces our assertion that there will be an increased demand for advice coupled with a reduction in supply of qualified and authorised advisers.

- *The authorisation process is taking longer for debt management firms than in other consumer credit sectors. In the main, this is due to the complexity of the assessments that we are having to make and the need to get a clear understanding of the outcomes for consumers from their engagement with firms.*

Comment: We are not aware of a fast-track process for insolvency professionals having even been considered. Delays in authorisation will necessarily limit supply into the market and disincline potential applicants, including insolvency practitioners.

- *Where firms do leave the market, some consumers may suffer disruption. We have worked with MAS and others to develop and implement a strategy to ensure that advice and support is available to consumers who are affected…..*

Comment: Consumer disruption could be minimised by better utilising the resource of the insolvency profession in the re-assessment of consumers' needs.

- *Early indications from MAS' triage process are that significant numbers of impacted consumers are seeking help after their firms exited the market, and that many of those consumers are moving to different debt solutions instead of debt management plans.*

Comment: "Different debt solutions" presumably encompasses the statutory insolvency alternatives that insolvency professionals would have been best placed to assist with at the outset, had they not been disenfranchised from doing so.

- *We do not yet know what the new debt advice landscape will look like after we complete the authorisations process, but it is clear that a significant number of commercial firms who were in the market will have left – more than half of those firms previously operating in this market have now ceased to do so.*

Comment: We would suggest that it is a matter of some concern that the FCA is not focussing upon the outcome of it activities in terms of the debt advice landscape. However, given there will be an acknowledged reduction in supply, this clearly highlights the need to better utilise the resources that are already available within the market place.

6. How could the new money guidance body work with the debt advice providers most effectively to ensure that their expertise is captured and informs contract design?

The Insolvency Service already maintains a register of Licensed Practitioners and has established an online facility for those wishing to file for their own bankruptcy. Extending this facility to include a list of insolvency practitioners who are willing to provide free consultations (an "Insolvency Advisers Rota"), would be inexpensive and would act to ensure that these existing resources are properly utilised. This could readily be monitored by the Recognised Professional Bodies with existing regulatory processes.

7. How do organisations currently monitor outcomes? Do you have any suggestions for the outcomes which should be monitored?

Creditor groups already maintain significant volumes of data; including statistics on the performance of firms, attrition rates, dividend rates and more. Recognised Professional Bodies are in a position to monitor the performance of their Licensed Insolvency Practitioners and to require statistical information from them.

We would suggest that better and more cost effective use of outcome data could be achieved by working collaboratively with related sectors, rather than excluding them from the debt advice arena.

8. How could "hand off" arrangements be most effectively built into contracts?

In the context of Licensed Insolvency Practitioners, the solution would be to make it a term of their inclusion upon an Insolvency Advisers Rota that they pass those consumers they assessed as requiring a non-statutory solution, free of charge, to an FCA authorised provider of non-statutory debt solutions.

More generally, the Money Guidance Service should ensure that appropriate levels of due diligence are undertaken on any organisations that are recipients of "hand off" (whether FCA authorised or "grandfathered in") to ensure that they are meeting expected standards. It does not necessarily follow that because a service is not provided for profit that it is necessarily being provided as well as it ought to be, and the regulatory framework should ensure that the performance of all providers is monitored and quality assured.

9. **How should the new money guidance body seek to understand the gaps in the provision of money guidance?**

As a precursor to assessing how to fill gaps in provision of money advice, consideration should be given to why those gaps exist and whether existing resource is being effectively utilised. Greater dialogue with both the insolvency profession and creditor groups, as well as with consumer groups, may assist in providing a fuller picture.

The FCA is already in receipt of detailed management information on a weekly basis from commercial providers on the outcome of their reviews with customers who end up with no solution provider. This information should be shared with MAS, the RPB's, trade organisations and creditors and working groups established to discuss the gaps and how these are best filled.

The tools produced by MAS, whilst very useful, are unlikely ever to be able to replace the need for professional advice which properly balances the particular needs of the individual with the likely demands and expectations of their creditors. Individual circumstances are invariably complex and cannot necessarily be distilled into a simple decision tree. Such tools should be illustrative and informational in nature, rather than determinative of a particular path or outcome.

10. **Is the planned focus on local and digital financial capability raising projects the right one?**

Digital technologies will invariably present cost-effective mechanisms for providing advice to those with the willingness and capability to engage with them. For many, they will be perfectly adequate. However, given the potential seriousness of insolvency proceedings, we consider that many individuals would continue to benefit from one-to-one consultation; whether that be in person or by remote means such as telephone of video call. For vulnerable consumers, as many are, retaining the option of personal interaction will be particularly important.

Currently, it is the small, local insolvency practitioner firms that are withdrawing from the market place, as it is not cost effective for them to submit themselves to dual regulation. These are the very practitioners who would formerly have delivered advice on a local level to those within their communities who were contemplating insolvency. The establishment of an Insolvency Advisers' Rota could assist in the delivery of face to face advice, on a local level, where this was needed.

As mentioned above, there will be many others, including insolvency practitioners, that are withdrawing from providing debt advice as the cost burden of compliance will mean their business models are no longer viable.

Losing the capability of multi-channel delivery by overly focusing on digital delivery will not ensure that the needs of the most vulnerable are appropriately met. State funding provision that forces professional advisers from the market place is counter-intuitive within a capitalist model and fails to balance the interests of other stakeholders, such as lenders who have a reasonable expectation of repayment and non-defaulting borrowers who pay higher interest rates as a consequence.

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 577 are currently Licensed Insolvency Practitioners (479 of whom are authorised to take insolvency appointments). 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. The IPA also undertakes monitoring visit work 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.

The comments and opinions expressed below represent the views of the IPA's Personal Insolvency Committee, a committee comprised of practitioners with a specialism and particular expertise in the area of personal insolvency, 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). This response is limited to those sections of the consultation as are within our area of knowledge and expertise; predominantly the delivery of debt advice and the ability of the insolvency professional to contribute in a meaningful way to cost effective delivery of those services.

For further information or assistance, contact us at:

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Annex – Working Examples of Limitations to the IP Exclusion

Debtors often make contact/attend for interview frightened and misinformed. At an initial meeting the IP (who has no prior knowledge of the individual) is presented with a set of circumstances and gives best advice based on that.

There are many areas where there is scope to fall outside the current IP exclusion and that would (unnecessarily) require an FCA authorisation in order to properly advise the client, in addition to an IP authorisation. There follow working examples of situations that have been presented to practitioners, where they would be unable to assist in the manner they consider most appropriate to the individual's needs, unless they had applied for dual regulation:

1. Debtor has unsecured debts of £50k. No surplus income and his property is in negative equity. Bankruptcy is the only realistic option, but the practitioner is precluded from explaining why this is the case:

   He has nothing to offer in an IVA or debt management and does not qualify for a debt relief order. The debtor wants to fully understand what Bankruptcy means before making a decision. There is no prospect of the IP being appointed as that is the creditors decision plus there are no assets in the estate to justify an appointment. The case will therefore remain with the Official Receiver. The IP, having extensive experience of Bankruptcy is able to explain the practical and legal answers to questions posed such as:

   - Will I be able to keep my bank account?
   - Will I lose my house?
   - Are there any home visits?
   - How long will the stigma remain?
   - What happens in relation to ancillary relief orders?

2. A Director of a limited Company needs advice in relation to the Company's position and his personal position as he has given 3 personal guarantees totalling £75k and incurred credit card debt to support the Company. He also has an overdrawn Director's Loan account (£100k) that a Liquidator would pursue against him personally in the event the Company was liquidated.

   He has no personal assets but surplus income from another Company venture of £750 per month. The IP explains the implications of Bankruptcy and an IVA.

   The debtor confirms that as he would be expected to make payments for 5 years in an IVA and only 3 in Bankruptcy and given the size of the debts he intends to declare himself bankrupt (and resign as a Director-having been made aware that an undischarged Bankrupt cannot be a Director of a limited Company). However, given that an element of the debt concerned consists of consumer credit, the practitioner is unable to recommend bankruptcy (and may have inadvertently "advised" bankruptcy, by virtue of illustrating the different contribution periods).

3. The partners of an unincorporated legal practice attend and explain that the partnership is in financial difficulty. It has been presented with a winding up petition and they want to consider their options. This involves the IP advising on the 3 entities-the partnership and the 2 personal estates and explaining the implications of insolvency for each. Both agree that the partnership petition should be allowed to proceed but one partner has no personal assets and the other has equity in property and investments. One elects to go Bankrupt whilst the other wishes to explore an IVA. The practitioner may only advise the latter.

4. A debtor is 55 years old and has debts of £60k. His pension has a fund value of £100k.He wants to understand the implications of an IVA and Bankruptcy. In an IVA he could elect to draw some or all of his pension. In Bankruptcy recent case law suggests that an undrawn pension is beyond the scope of an IPO. This is a complex and evolving area and the debtor needs advice from someone who fully understands the options and implications of the alternative routes. The practitioner is hindered in assisting.

5. A debtor (barrister) owes HMRC £250K in assessed personal tax and a Bankruptcy petition has been presented. He has a good income stream although given the nature of his work this can be patchy. He also has equity in his property of £100k.He does not want to sell it for 2 years but an experienced IP will know that HMRC as the majority creditor will in an IVA insist on a sale within 12 months. Before embarking on the preparation of a full IVA proposal and to save costs the debtor has asked the IP to liaise with HMRC to ascertain if his proposal is likely to be accepted. At that stage it is difficult for the IP to say categorically that he is acting in reasonable contemplation of an insolvency appointment as HMRC could say no in which case Bankruptcy would be the only option.