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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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.