Response to the Insolvency Service (TIS) consultation on reforms to the regulation of Insolvency Practitioners

The Insolvency Practitioners Association (IPA) is a membership body recognised by the Secretary of State for Business, Innovation & Skills (BIS) for the purposes of authorising Insolvency Practitioners (IPs) under the Insolvency Act 1986, and has its own dedicated regulation team carrying out complaints handling and monitoring. The IPA has approximately 2,000 members, of whom more than 500 are currently licensed insolvency practitioners (IPs).

This total represents an increase of 30% on the 2008 IP figure following a number of new IP applications received and the decisions taken by some national firms to transfer the majority of their IP authorisations to the IPA. There has been a steady growth in the number of appointment-takers (ATs) in particular (up around 40% since 2008); we currently license nearly a third of UK ATs and actively monitor 34% of all ATs as a consequence of our contract to carry out inspection visits for the Law Society (Solicitors Regulation Authority), one of the other recognised professional bodies under the Insolvency Act.

This movement has been in part the product of IPs exercising their right to choose a regulator that has been innovative in its development of regulatory processes, not least its monitoring procedures (implementing the government's better regulation principles). The IPA aspires to be, and is rapidly becoming, the regulator of choice for UK IPs; in terms of the number of authorised IPs, it is currently the second largest of the recognised professional bodies.

Whilst maintaining a robust regulatory regime, and working within the terms of the delegation from BIS, the IPA has demonstrated that a degree of competition between bodies in areas such as the delivery of regulatory functions can work to the advantage of the profession and the public interest. Our monitoring programme is more focussed on substantive issues (i.e. those affecting creditors - quality, efficiency, value and outcomes), rather than pure technical compliance, and arguably as a consequence has become better able to protect creditor interests while at the same time genuinely adding value to IPs' practices. It has been recognised by IPs for its constructive approach, something achieved not least by the regulation team's annual engagement with IPs. This not only helps IPs to manage risk, but also improves the quality of outputs to the benefit of stakeholders in the insolvency cases administered.

As the only one of the recognised bodies solely involved in insolvency, for fifty years the IPA is proud to have been at the forefront of a number of significant developments in the insolvency profession, including the establishment of the Joint Insolvency Examination Board and the formation of what is now R3, the profession's trade body. 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.

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. Our regulatory activity is subject to oversight and inspection by BIS and the DETI Insolvency Service in Northern Ireland.

The IPA also carries out monitoring for a voluntary registration scheme for fixed-charge property receivers. This involves inspection visits to property receivers registered with either the IPA or the Royal Institution of Chartered Surveyors (RICS). The IPA also undertakes monitoring visit work for the Debt Resolution Forum which sets standards for those involved in providing non-statutory debt solutions to insolvency individuals. These programmes extend regulatory rigour into insolvency-related areas of activity not subject to any regular statutory monitoring – further evidence of the IPA's commitment to improving standards in all areas of insolvency work.

We set out below our responses to the consultation questions. The answers provided here are supplemented by the following accompanying documents:

i) paper on complaints handling issues arising from the OFT study and IS consultation;

ii) diagrams of complaints models incorporating IPA proposed model 5; and

iii) explanatory note on model 5.

We will of course be pleased to discuss any aspect of our submission with the Insolvency Service.

Q.1 Do you have any comments or evidence on the costs and benefits set out in the attached Impact Assessment (Annex B)?

Costs as shown regarding the four complaints models skew the comparisons in favour of model 1 and against model 3 by including re 3 the notional costs of investigation work met by the RPBs – currently and going forward under this model. The real marginal costs associated with model 1 would be considerably higher than any of the alternatives proposed.

Q2 Is the current Structure of IP regulation the right one? How could it be improved?

All would recognise the need for common standards, and there are some steps that the RPBs can take to make improvements in that area – see below. However, the present system has largely worked well in addressing unfit IPs, with practitioner input supplemented by government oversight, as the latest published regulation report from TIS confirms.

Removal of TIS as a direct authorising body will deal with some current conflict issues which complicate the existing structure.

Q.3 Would the creation of an independent complaints body be the best way to improve confidence in the handling of complaints and/or appeals?

Some interested parties will no doubt argue that the OFT has not made out a convincing case for significant change. It is noticeable for instance that, unlike TIS, the OFT did not see first hand the operation of the existing RPB complaints processes. Had it done so, it may have been a less ready to accept unsubstantiated anecdotal comments and include these in its report.

Notwithstanding the above, there is clearly a perception issue, at least, regarding the sufficiency of independence in the present system. That despite the fact that most RPBs have lay input to varying degrees in their disciplinary processes. Indeed, last year IPA Council approved an increase in the lay quota on its two main regulatory committees from a quarter to a third; it also removed all Council members from those committees to ensure that operational regulatory matters are independent of the IPA's governing board.

The creation of an appropriately cost-effective independent body to deliver the decision making may help to address this perception. However, it should be borne in mind that the very nature of insolvency work and the complaints that arise from it are such that there will always be unsatisfied parties adversely affected by the outcomes of IP-led assignments, and consequently disappointed when a complaints body, however constructed, fails to produce the 'just' verdict some complainants desire.

Q.4 Should such a body have the power to review the fees and remuneration charged by IPs?

This is undoubtedly one of the most difficult issues, and the one most likely to be of concern to IPs and creditors. There is a strong feeling amongst many IPs that this is a matter for the courts.

There is within the profession a prevailing view, to which we subscribe, that the 2010 Insolvency Rules changes have yet to be seen to take full effect, and it would seem premature to contemplate further change at this stage. JIC has considered whether it might commission some research to explore further the real extent and nature of creditors' concerns before supporting a move to invest new powers in a complaints body.

One option here, to avoid duplication of the court's role and prevent the complaints body becoming mired in minute detailed analysis, is for it to take a high level view on fees complaints, considering in the round whether a case for excessive fees has been made out on the face of it and taking into account the extent of creditor involvement in the fee approval process. The complaints body could, if it were to believe the fees excessive, require the IP to go to court to seek approval; or alternatively it could invite the IP to repay part of the fee, failing which it could require the IP to go down the court route.

We include elsewhere in our submission ways in which this might be accommodated within a new structure, but we believe there are limits to which the desire to introduce adjudication on fees can be fairly addressed within any complaints system.

We also believe that there should be certain barriers to entry into the complaints process for those seeking to complain about fees, such as a minimum 10% debt level, perhaps also demonstration of a financial interest in the outcome, and a timing consideration so as not to conflict with or be seen to override the provisions in the 2010 Rules.

Q.5 Should all fee complaints be reviewed in this manner, or should some (such as more complex cases) be reserved to the court? Who would decide the criteria in individual cases?

The most complex, and the largest, cases should perhaps be dealt with by the courts, though the complaints body would be able to determine those which it could and could not deal with.

Q.6 How should the costs of a fee related complaint be paid where i) the IP is found to have overcharged and ii) where they are found not to have overcharged?

Where there is a case found against the IP on overcharging it is difficult to argue that anyone other than the IP should foot the bill, though it is best left to the complaints body to make a separate determination in each case about costs on the merits of the substantive decision. It would be odd (though perhaps not impossible) to contemplate some circumstances where, if an IP had complied with statutory and practice requirements (e.g. SIP9) and obtained approval for fees, a complaints body ruled on overcharging resulting in both a fee reduction and costs award (and conduct sanction?) as a result of a complaint made by say a minority creditor.

Where there is no finding of overcharging, it would clearly be inappropriate for the IP to foot the bill. It is equally difficult to justify the estate paying for the cost of the unjustified complaint; especially so where a minority creditor complains in a case where large creditors have approved fees through the proper process (e.g. a democratically elected committee of creditors) as set out in the Rules.

Q.7 What are your views on the single first tier independent complaints body model? Do you agree with the benefits and disadvantages that we have set out? What are your thoughts on the relative importance of the positives and negatives?

Our separate submission on complaints bodies addresses the questions 7-11. *

We consider model 1 to be undesirable, unnecessary, expensive, and an over-reaction to the perceived problem. It would create a disconnect between complaints handling and other aspects of the regulation system, to the detriment of effective regulation.

Q.8 What are your views on the independent appeals body model? Do you agree with the benefits and disadvantages that we have set out? What are your thoughts on the relative importance of the positives and negatives?

See above. *

Q.9 What are your views on the decision making body model? Do you agree with the benefits and disadvantages that we have set out? What are your thoughts on the relative importance of the positives and negatives?

See above. *

Q.10 What are your views on the decision making body overlaid with an investigative appeals function model? Do you agree with the benefits and disadvantages that we have set out? What are your thoughts on the relative importance of the positives and negatives?

See above. *

Q.11 Should the appeals or decision making body also act as the single point of entry for all complaints?

See above. *

Q.12 Do you think that settling fee complaints through arbitration would bring advantages over the other suggested complaint models? Do you think any other alternative dispute resolution regimes may work better, i.e. Conciliation?

If the complaints body were to believe some form of dispute resolution to be appropriate, then mediation would be a better alternative. It should be borne in mind that the complainant and IP would not be the only parties affected – any complaint about fees is effectively a class action.

Arbitration or mediation have been suggested by some as methods for resolving fees issues, but the complaining party would be unlikely to be acting on a mandate from creditors as a whole and this renders these options unworkable in our view.

Q.13 How many complaints (fee and non-fee related) do you expect to be made annually?

Doubtless more than at present, if only initially, particularly if complaints about fees form part of any new regime.

Q.14 What safeguards would be appropriate to protect against frivolous or vexatious complaints? Would requiring the support of 10% of the creditors (by value) be appropriate?

Yes, together with other barriers referred to above.

Q.15 What are your views on the location of the body tasked with carrying out the complaints function? Is the Insolvency Service or the Adjudicator's Office suitable to undertake the role of the appeals body? If you have chosen the creation of a new body please explain your reasons for rejecting the alternative options.

Neither TIS nor the Adjudicator's Office are ideally placed to deal with routine complaints against IPs. A new body of the type we describe in our submission could be established from new or it could be a 'new' joint disciplinary/appeal committee (JDC) (with powers and functions similar to those enshrined in the Disciplinary Committees of most of the existing RPBs).

In one sense, a JDC would not really need to be set up from scratch as a new body; it would simply require the RPBs to put in place a parallel DC to those dealing with complaints against their members for other purposes. The JDC would deal with complaints against IPs acting as such, i.e. in respect of matters relating to their conduct whilst carrying out their functions as office holders under the Insolvency Act.

Q.16 Which of the funding models (A – D) would be most appropriate for the complaint body? Can you suggest any alternative funding model? Do you agree with the suggestion to fund the establishment of the body by a levy on each RPB according to its number of IP members?

The costs of setting up a body of the decision-maker type outlined in model 3 would not require substantial funding, as we set out in our submission. In all but model 1, which we reject for the reasons stated above, the investigation costs remain with the RPBs as now. The model D funding option (RPBs paying cost of investigating through a levy) therefore becomes redundant,

Certain costs of the complaints body are likely to be fixed in nature (e.g. its secretariat, independent member participation etc) and these should be borne by each of the RPBs equally. To the extent that variable costs are incurred, these could be met in part by costs awards against IPs where the body makes adverse findings. Consideration could also be given to sums collected from fines ordered by the body being used to supplement the income needed to cover its running costs.

This leads us to conclude that the model A funding option (equal levy on each RPB) is the most appropriate. Using income from costs and fines ordered by the body as above should obviate the need for model C type funding (RPBs paying per proven complaints) as the IPs will be paying in proven cases. Model B (RPB paying per complaints made) appears inequitable given the potential propensity for complainants (some mischievous no doubt) to make greater use of the new (free) system and given also the nature of the IP's work and the likelihood of complaints arising whether based on evidence of misconduct or not.

Q.17 Do you agree that it would be helpful to set objectives for the regulatory regime? What objectives would you favour?

Yes, and the first two of those suggested are reasonable. The second two are inappropriate and create potential conflicts with an IP's statutory duties.

Q.18 Do you agree that TIS should no longer act as direct regulator, except as regulator of last resort if no RPB existed? Should any other changes be made to the number of regulatory bodies?

TIS should cease to act as a competent authority for the purpose of directly authorising IPs, because of the conflicts it creates and because of the unavailability of sanctions of the types used by the RPBs to regulate their IPs.

Whilst the number of RPBs is always likely to attract comment, given the size of the IP population, the proposed changes to the complaints system will go a long way to addressing any real or perceived inconsistencies. The OFT did not recommend reducing the number to one, though it did express an expectation that the number might reduce over time, as we believe it may well do.

An element of competition between regulators (e.g. on cost or quality of service) is not unhealthy. Indeed, competition has brought significant benefits in recent years, not least through initiatives taken by the IPA on monitoring – measures that others have since begun to follow.

Q.19 Do you agree the oversight regulator should be given increased powers to monitor and sanction? If so do you agree these should include the power to fine RPBs, the power to issue formal reprimand and the power to publicise enforcement action?

TIS already has the power to publicise its findings against RPBs through its annual report. New powers must be balanced by the establishment of better procedures for dealing with issues in its oversight role, i.e. proper, transparent, processes for engaging with RPBs, with reasoned findings and rights of appeal.

Q.20 Should the cost of oversight be recovered by a combination of fixed and variable charges to the RPBs?

Yes.

Q.21 Do you agree that the oversight regulator should be given greater powers to influence the setting of standards? If so are the suggested powers of veto and a positive power to direct standards, appropriate powers to give? If not what powers would be appropriate?

We believe that a revamped JIC with lay input could address weaknesses in its operational effectiveness, combined with more streamlined mechanisms for approving new standards. We believe that the development and introduction of standards such as SIPs are best dealt with by the RPBs, acting in accordance with TIS published objectives. TIS will have the ability to hold the RPBs to account if it considers that any new standards fall short of what TIS believes is required, and TIS has the power to legislate (and therefore to 'trump' any measures it deems inadequate).

Q.22 Is the oversight regulator best placed to ensure the regulatory objectives are being met?

Yes.

Q.23 Do you support the proposal to establish a new standard setting board to replace the JIC? What membership should it comprise?

See above. The RPBs will need a JIC or something similar to liaise on common concerns, whether related to monitoring or other matters, and so a new body would create an extra unnecessary layer of bureaucracy.

Q.24 Do you support the proposal to establish a new standard setting board to act as an advisory board to the oversight regulator? What membership should it comprise?

This seems to be an unnecessary duplication. It is important to retain IP input into the standards setting process.

Q.25 Do you agree with the recommendation to fold the Insolvency Practices Council?

The IPC as presently constructed appears to have runs its course. It has either failed to identify any substantial issues requiring its input (perhaps because there are no such issues or because it has been incapable of identifying them) or has been unwilling to take them on.

There might be a need for such a body, not least to provide some outside input and challenge TIS in its new enhanced role, but the IPC in its present format does not appear to us to be the best organisation to do that. A reformed IPC with a fresh mandate and newly appointed members might be able to provide the necessary input.

Q.26 Do you think that increasing the level of the prescribed part would help to constrain IP fees for unsecured creditors? If so how do you propose this should be achieved?

We are not convinced that this would have the desired effect.

Q.27 Would you welcome greater transparency in the remuneration of IPs? Should the provision of further details be mandatory or upon request?

We do subscribe to the principle of greater transparency. However, the present requirements of the 2010 Rules and SIP9 are not obviously inadequate, and the provision of greater information has to be balanced against the need (i.e. limiting information to those charged with a responsibility to approve fees) and cost (to the estate and therefore ultimately creditors).

Q.28 Do you favour hourly rates being agreed by creditors at the time of the resolution either specifically or subject to a maximum amount?

Yes, we do not envisage any difficulty with this in principle. However, one option is to quote rates and then revert to creditors if the IP wants to increase rates. Consideration needs to be given to the appropriate point at which approval should be sought, for example in cases where administration is followed by liquidation.

Q.29 Do you have any evidence that the administration process is being used where a CVL would be more appropriate?

There are undoubtedly cases where liquidation could have been used as an alternative, though whether the use of the administration process in such cases has caused any detriment to creditors is another matter.

Proposed changes to the rules regarding pre-packs in administration could lead to greater use of liquidation.

A single gateway in corporate insolvency might be an answer.

Q.30 Do you agree with the proposed approach of restricting paragraph 22 appointments and paragraph 14 appointments? If not do you have any alternative suggestions?

Encouraging greater use of liquidation procedures will only benefit creditors if they participate.

Q.31 Should creditors be given an opportunity to review the choice of an IP to act as liquidator, prior to the company converting from administration to CVL?

Yes, there is a case for this, and the proposal outlined in paragraph 5.38 of the consultation document seems sensible. However, if creditors wish to object to an appointment perhaps they should be prepared to put forward an alternative IP who is willing and able to act.

Q.32 Does Rule 2.106 need further clarification?

Yes. A separate resolution should be put to a creditor vote.

Q.33 Should IPs be required to provide an estimate of the duration and cost of the insolvency process at the outset? If Yes, should they publish the amount to which these estimates were exceeded?

This is a laudable objective and it is the case that IPs are often required to provide estimates of the duration and cost of an administration to a bank when appointed as administrator, but this is usually against a strictly prescribed set of assumptions. In practice, and when faced with the reality of the insolvency process, it is often the case that actual events and situations render the initial assumptions invalid and the estimates are altered. There is also the question of deciding when the estimate should be provided. If it is intended that this is the first day of an administration or liquidation, this would inevitably be before the IP has had an opportunity to investigate the affairs of the company, the results of which could significantly affect the basis of an initial estimate. There are also many situations where the IP has had minimal involvement with the company prior to appointment and any estimate would be subject to significant guesswork. In practice, therefore, one has to question the value of an estimate at the "outset" of an insolvency process in many cases, as it is likely that they will either be provided with many significant caveats, or potentially overstated for prudence. It may be more appropriate for more accurate estimates to be provided when an IP is likely to have more information to hand to provide an estimate.

Q.34 Should any discounted hourly rates negotiated in an administration be applied to a subsequent CVL? If so, should this be mandated, and if so, how?

No, the rate should not necessarily be the same. The liquidation rates should be subject to separate approval. The liquidation rates could be lower or higher depending on circumstances.

Q.35 If an IP is unsuccessful in defending a challenge to his fees, should the costs be borne by the IP?

Yes, in principle, but this should be a matter for the court's discretion (see Q6 above).

Q.36 Is there a need for clearer and more consistent information to be a) provided to creditors and b) filed at Companies House? How could this be achieved?

It is not clear that there is need for change here. The SIP9 template provides a basis for reporting, and amendments to SIP9 presently under consideration should be given time to take effect, as should the 2010 Rules, before further measures are contemplated. Creditors' willingness to engage in the process is perhaps a bigger issue.