



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

BY MICHELLE BUTLER

Overview

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

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

The difficulties in following through with these noble aspirations begin when one considers the proposals around changes to the IP fees regime. There seem to be some extraordinary expectations levelled at the regulators to monitor, assess, and even adjudicate on, IPs’ fees, but the Impact Assessments seriously underestimate the associated costs – costs that inevitably will be passed on to IPs, who will then be under pressure to seek to recoup them from the insolvent estates. Of course, it is appropriate that the regulators remain alert to identify and deal with IPs who abuse their positions of control over estates, but it is difficult to see how regulators might manage the costs of examining in detail the fairness of fees and whether those costs might be considered well-spent if, as is considered likely, few examinations will lead to identifying, and dealing with, any instances of abusive over-charging. The consultation notes that “the issues highlighted by the OFT and Professor Kempson do not apply to the same extent in Scotland, where the Court Reporter system is used as a check and balance”, which suggests that lessons may be drawn from the Scottish approach.

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



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

The consultation document touches on what I believe is the solution, but fails to grasp it. It states that a difficulty with the time costs basis is "the uncertainty that currently exists in requiring creditors to approve an hourly rate without any indication of how long a job will take or what work will be done for that time". Surely, there lies a potential solution: if the issue is that creditors, focussing on an excluding costs Statement of Affairs, become upset and disillusioned when they learn that all asset realisations have been "swallowed up" by fees and other costs, then perhaps IPs should provide more prospective information when seeking approval for fees. This does not have to mean that time costs cannot be sought, but rather that, in common with a fixed/percentage fee, creditors are provided with some indication as to how much the fees are likely to be and what work is expected to be done for that fee. Of course, it is difficult for IPs to be certain of these at the outset – and they would encounter the same difficulties in setting an appropriate fixed or percentage fee – but I would expect that IPs could communicate effectively and promptly with creditors when original estimates turn out to be unrealistic, or, if additional safeguards are considered necessary, legislation could provide a simple low-cost mechanism for revising a fees estimate. The advantages of this approach include that time costs *is* a fair basis for fees – it reduces the risk of cross-subsidy of costs between cases – and creditors will be able to envisage at the start the likely impact of fees and thus will have some idea of their prospects of a dividend. In receiving this information when they are asked to consider a resolution for fees, creditors may be encouraged to engage to a greater degree in the process.

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

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Consultation Questions

Q1 Are the proposed regulatory objectives and the requirements for RPBs to reflect them appropriate for the insolvency regulatory regime?
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The objectives proposed have departed quite considerably from the four objectives suggested by the OFT in its 2010 market study and it is pleasing to note that the concerns of some, as regards the OFT's suggestions that were not suited to the legislative boundaries within which insolvency office holders must operate, have been taken into account. However, I do not believe that all the proposed additions to the OFT's suggested objectives are advantageous or appropriate. For example, not all insolvency procedures are collective processes (e.g. Receivership) and thus it would not be appropriate to encourage members to "consider the interests of all creditors in any particular case".

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

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

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

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

the statutory regulatory objectives as their guide in acting as oversight regulator, although I would welcome such an attempt.

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

No

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

No

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

No

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

No

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

I have no comments.

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

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

regulated IPs unresolved, would any action by the Secretary of State directed at IPs appear appropriate.

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

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

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

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

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

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

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

No.

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

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

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

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

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

No.

The consultation document is confusing: it states that “we recognise that giving the RPBs a regulatory role in monitoring fees will increase their costs when dealing with complaints around the quantum of fees... The regulators will be expected to take a full role in assessing the fairness of an IP’s fees, including the way they are set, the manner in which they are drawn and that they represent value for money for the work done. This would be done via the usual monitoring visits and complaint handling processes”. However, the IA estimates the costs of dealing only with additional *complaints*; there is no additional cost in relation to *monitoring*.

The IP regulation IA seems to envisage that there will be no increase in monitoring costs, but that the RPBs’ monitoring activity will simply be focussed better on “areas where creditors are likely to suffer larger losses”. Therefore, presumably the Service envisages that a typical 3-day monitoring visit will involve examining the fees drawn on a sample of cases – presumably RPBs are not expected to examine all cases, notwithstanding the proposed regulatory objective of “ensuring that the fees charged by IPs represent value for money” – as regards fairness and value for money, rather than examining the IPs’ compliance standards with the vast majority of other



statutory, SIP, and Ethics Code requirements. Would the oversight regulator be satisfied, if the consequence were that, in the time allowed, monitoring visits could deal with no other matter but fees or would it conclude that the RPB were failing to meet the other regulatory objectives in taking such a narrow approach on monitoring visits? On the other hand, if RPBs are expected to continue to monitor statutory, SIP etc. compliance generally, as well as assessing fees, this will significantly lengthen monitoring visits. It would seem to me that the monitoring resource of RPBs would need to double in order even to get close to the “full role” that the consultation document describes and this cost, as well as that incurred by IPs in servicing longer monitoring visits, is entirely absent from the IA.

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

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

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

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

There is also the question of cost, as explained in my answer to Q11 above: it seems inequitable to me that the significant costs associated with these changes should be carried equally by each IP (by reason of increased licence fees and levies). However, the alternative – perhaps that the IPs that are the subject of fees complaints or increased monitoring activity bear the costs – seems little better: would an IP be expected to bear the cost of an investigation that resulted in no finding of

misconduct? If not, then who would bear this cost? A further inequity would arise if the recommendations of the OFT and Professor Kempson were taken forward: they suggested that assessment of IPs' fees for large insolvency cases might be left to the court process. This would seem grossly unfair to IPs in smaller practices: if the RPBs are to take a "full role" in assessing the fairness and value for money of IP fees, no case should be too great or complex for such attention.

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

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

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

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

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

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

I object to the removal of the option for fees to be based on time costs for any case. An office holder cannot draw fees unless he obtains creditors' approval. The fact that, in the vast majority of cases, fees are approved on a time cost basis

demonstrates, not only that this is preferred by IPs, but also that it attracts creditors' approval. The proposal to take away this option from creditors in certain circumstances is irrational and would be a wholly inappropriate step to take to remedy what is seen as a lack of engagement by unsecured creditors in the fee-approval process.

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

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

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

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

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

creditor, the draft Rules would allow the office holder's fees to be based on time costs.

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

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

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

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

If IPs were restricted to a fixed/percentage basis for fees, they would seek to propose them at a level that would result in a time cost equivalent. It is extremely difficult to assess that outcome at the commencement of an insolvency process, which is likely

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

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

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

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

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

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

- (a) The complexity of the case;
- (b) Any respects in which, in connection with the insolvent's affairs, there falls on the office holder any responsibility of an exceptional kind or degree;
- (c) The effectiveness with which the office holder appears to be carrying out, or to have carried out, his duties as such; and
- (d) The value and nature of the property with which he has to deal.

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

Although the imposition of a prescribed scale may overcome the difficulty of absent creditor engagement, few meetings are inquorate and it would seem that



disenfranchising creditors entirely from the process would do nothing to improve public confidence in the profession.

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

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

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

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

It has been suggested that the time cost basis does not encourage IPs to become efficient and perhaps even rewards inefficiency. The consultation document also identifies that "allowing time and rate... would not remove the uncertainty that currently exists in requiring creditors to approve an hourly rate, without any indication of how long a job will take or what work will be done for that time." If these are the fundamental concerns as regards the time cost basis, it would seem sensible to take steps to address these, rather than to eliminate the basis for some cases altogether.

Impact Assessment Questions

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

No.

1.5 hours of an IP's time is a staggering underestimate. The IA states that "this change is not complex to understand and would only need to be understood once before being applied". The draft Rules are by no means simple to understand, particularly as they do not implement the policy objective, as explained in my answer to Q15 above. An IP's systems would need to be substantially altered to

accommodate the change; standard reports and meeting templates would need to be changed to accommodate fixed/percentage fee resolutions; diaries would need to be devised to check frequently whether the case has reached the R17.19 threshold; IPs would need to devise a method of calculating a reasonable fixed/percentage fee for the circumstances of the case and calculating approved fees to be drawn throughout the life of the case; revisions of bases would be more likely, so systems, procedures, and templates would need to be created to provide for these; and finally all administration, cashiering, and compliance staff would need to be trained to operate these new processes.

Q22 As a secured creditor, how much time/cost do you anticipate these changes will require in order to familiarise yourself with the new fee structure?

Not applicable.

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

See my response to Q16.

Q24 Do you agree with the assessment that the requirement to seek approval of creditors for the percentage of assets against which remuneration will be taken, will not add any additional costs?

No.

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

Q25 Do you agree with these assumptions? Do you have any data to support how the changes to the fee structure will impact on the fees currently charged?

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

Q26 Do you agree or disagree in adding a weight in the relative costs and benefits to IPs and unsecured creditors? If you agree, what would the weight be?

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

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

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

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

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

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

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



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